

BUTTERWORTHS'  
**Ten Years' Digest**  
OF  
REPORTED CASES,  
1898—1907.





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OF  
REPORTED CASES,

1898 TO 1907.

DIGEST OF REPORTED CASES DECIDED IN THE SUPREME  
AND OTHER COURTS DURING THE YEARS 1898 TO 1907,

INCLUDING

*COPIOUS SELECTION OF REPORTED CASES DECIDED IN THE IRISH  
AND SCOTCH COURTS, WITH LISTS OF CASES DIGESTED,  
OVERRULED, CONSIDERED, ETC.*

ISSUED UNDER THE GENERAL EDITORSHIP OF

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VOL. I.

ACTION TO FRIENDLY SOCIETIES.

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## PUBLISHERS' NOTE.

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THE TEN YEARS' DIGEST is arranged on a system of classification which it is hoped will recommend itself to the legal profession. Hitherto, the lawyer has never been certain of the heading in a Digest or work of reference under which he would find any particular case or cases. If, for example, he wished to refer to the decisions on the abstraction of cream from milk, he has been undecided whether to search under "Adulteration," "Food and Drugs," "Health," "Milk," "Public Health," or "Sale of Food and Drugs Acts," or he might find he was referred from one heading to another in an aggravating manner. In the present work the Publishers have adopted a classification based on that of their popular publications, the *ENCYCLOPÆDIA OF FORMS AND PRECEDENTS* and Lord Halsbury's *LAWS OF ENGLAND*, with such modifications as the nature and wider scope of a Digest render necessary. This arrangement will be followed in future issues of their *YEARLY DIGEST OF REPORTED CASES*, and in the *QUARTERLY DIVISIONS* which will be issued in connection therewith. They hope in this way to set up a standard of classification which will avoid all unnecessary delay in finding any particular case.

The DIGEST includes practically every case reported during the years 1848—1907 as decided in the English Courts, together with a large number of cases from Scotland and Ireland. A feature of the work is the facility with which references may be made from one heading to another. The cases under each general heading

## PUBLISHERS' NOTE.

are numbered consecutively, and where the case-note contains a reference to a case followed, distinguished, discussed, overruled, or dissented from, such reference gives also the heading and number under which such case will be found. Whenever a case deals with more than one subject it has been digested and inserted under the several headings, and cases that have been judicially noticed are specially indicated. The work contains notes of over 9,300 cases, many of which, it is believed, do not appear in any other digest, and an alphabetical table of the names of all parties is contained in Vol. IV. All the more important headings have a separate table of contents prefixed, and no pains have been spared to render the work easy to use as well as accurate and comprehensive.

The Publishers desire to tender their grateful thanks to the Proprietors and Editors of the LAW TIMES, the TIMES LAW REPORTS, COMMERCIAL CASES, and the JUSTICE OF THE PEACE, for permission to make special use of their valuable reports, and their acknowledgments to Mr. Edward Beal, B.A., and Mr. G. R. Hill, M.A., the Editors of the YEARLY DIGEST. They also desire to thank the gentlemen named on the title-page and many others who have assisted them in the production of the TEN YEARS' DIGEST.

BUTTERWORTH & CO.

*June, 1908.*

BUTTERWORTHS'  
Ten Years' Digest  
OF  
REPORTED CASES,  
1898—1907.

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**ABATEMENT.**

*See* NUISANCE.

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**ABETTERS.**

*See* CRIMINAL LAW AND PROCEDURE.

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**ABSCONDING DEBTOR.**

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### I. ACTIO PERSONALIS, etc.

1. *Death of Party—Fraudulent Misrepresentation—Judgment against Defendant—Appeal by Defendant—Death of Appellant during Appeal*—“*Actio personalis moritur cum personâ.*”]—The plaintiff brought an action against several defendants, alleging that by their fraudulent misrepresentations he had been induced to take shares in a company promoted by them, which proved to be valueless, and claiming damages. The Master of the Rolls held that the plaintiff had been induced by the fraudulent misrepresentations of certain of the defendants to take the shares in question, and held the said defendants answerable for the plaintiff's loss: his judgment ordered the said defendants to pay to the plaintiff the

amount paid by him in respect of the shares with interest less by the value of the shares, and he directed an inquiry to ascertain the value of the shares. The said defendants appealed from this judgment, two of them joining in their appeal, the others appealing separately. After the appeals were opened, and before the arguments were concluded, one of the appellants who joined in their appeal died.

HELD—that the rule “*actio personalis moritur cum personâ*” applied, and that the proceedings could not be continued against the personal representatives of the deceased appellant.

DAVOREN v. WOOTTON, [1900] 1 I. R. 273—C. A.

2. *Unliquidated Damages—Misrepresentation by Testator*—“*Actio personalis moritur cum personâ.*”]—A claim was made for damages suffered by the claimant by reason of his being induced by the misrepresentations of a testator to buy certain shares belonging to the testator in a limited company. The claimant still retained the shares. There was nothing among the assets of the deceased that in law or equity belonged to the claimant.

HELD—that the claim was legally one for unliquidated damages, and not the less so because the claimant sought to establish that the true measure of those damages was the full amount of the contract price, and could not therefore be brought against the legal personal representatives of the testator; that the principle applied of “*actio personalis moritur cum personâ.*”

IN RE DUNCAN; TERRY v. SWEETING, [1899] 1 [Ch. 387; 68 L. J. Ch. 253; 47 W. R. 375; 80 L. T. 322; 15 T. L. R. 185—Romer, J.

### II. MAINTENANCE.

3 *Assignment of Debts to Trustee to Sue—Trustee to hold Proceeds for Creditors—Maintenance—Motive of Assignee—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.*]—The plaintiff obtained the execution of an assignment to himself of certain debts due from the defendant to other persons, the plaintiff covenanting to pay to the respective assignors any sums which he should be able to recover from the defendant after payment of the costs incurred. There was no pecuniary consideration for the deed of assignment, and the plaintiff took no beneficial interest in the debts. The object of the plaintiff in taking the assignment was to make the defendant bankrupt, and so to remove him from his position of director of a company of which the plaintiff was also a director.

HELD—that the assignment was not open to the objection of maintenance, and the plaintiff could sue the defendant upon it.

Comfort v. Betts, [1891] 1 Q. B. 737; 60 L. J. Q. B. 656; 39 W. R. 595; 64 L. J. 685—C. A., followed.

**Maintenance—Continued.**

FITZROY v. CAVE, [1905] 2 K. B. 364; 74 L. J. [K. B. 829; 54 W. R. 17; 93 L. T. 499; 21 T. L. R. 612—C. A.]

4. *Charity—Religious Views.*—The defendants, who were the committee of a religious society, agreed with a solicitor to employ him to act for certain persons who were resisting proceedings in Chancery taken by a religious institution to recover the custody of certain children who had been removed from the institution. The persons resisting the Chancery proceedings were certain relatives of the children, and they had removed the children from the institution because they did not approve of the religious instruction given there. They were not persons of means. In an action by the solicitor to recover his costs from the defendants,

HELD—that the contract with the solicitor was not void on the ground of maintenance, as it came within the exception of charity, though the inducement which prompted the act of charity was religious sympathy.

HOLDEN and ANOTHER v. THOMPSON and OTHERS, [1907] 2 K. B. 489; 76 L. J. K. B. 889 97 L. T. 138; 23 T. L. R. 529—Div. Ct.

5. *Trade Union—Instigating Member to bring Action for Libel—Reasonable and Probable Cause—Paying Cost of Action—Common Interest.*—The objects of a trade union, as stated in the rules, were the raising of funds for mutual benefit by the contributions of the members, which were to be applied (*inter alia*) to giving legal aid to members when necessity arose in their relation with employers; and in cases of a dispute arising between members and their employers, or unlawful treatment of members by their employers, the executive committee were, if they considered the merits of the case justified such a course, to provide legal aid for the members.

A member of the union was dismissed by his employer without a week's notice, and in answer to a letter written to him by the general secretary of the union the employer stated that the member was discharged for dishonesty. The union took proceedings on behalf of the member to recover a week's salary in lieu of notice, and the employer paid the amount. The executive committee of the union obtained the member's consent to bring an action for libel against the employer, founded upon his letter to the general secretary, and brought an action and employed their own solicitors, whose costs they paid. The action was dismissed with costs. The employer sued the union to recover his taxed costs of the action for libel.

HELD—that the union had instigated the plaintiff to bring the action, for which there was no reasonable or probable cause, that the union had wrongfully maintained the plaintiff in the action, having no com-

mon interest, and that, therefore, the union were liable.

*Semble*—There was nothing in the rules of the union to justify the action; but even if there was, the rules could not justify an act which would be wrongful if done by an individual.

GREIG v. THE NATIONAL AMALGAMATED UNION OF [SHOP ASSISTANTS, WAREHOUSEMEN AND CLERKS, (1906) 22 T. L. R. 274—Lord Alverstone, C.J.]

**III. GENERAL.**

6. *Action for Account—Periodical Payment—Foreign Currency—Rate of Exchange—Date of Conversion.*—An action for an account in equity is an action for the balance found due on taking the account, and not for several items to be included in it.

An action was brought in this country by a creditor to have an account taken of certain money payable by the defendant in foreign currency periodically under a contract made abroad, and the Court directed an account to be taken.

HELD—(Williams, L.J., dissenting), that the creditor was not entitled to have the sums so payable converted into English money at the rate of exchange at the date when each periodical payment became due, nor at any date prior to the balance due on the account being found.

Decision of Kekewich, J., affirmed.

MANNERS v. PEARSON and SON, [1898] 1 Ch. 581; [67 L. J. Ch. 304; 78 L. T. 432; 14 T. L. R. 312; 46 W. R. 498—C. A.]

7. *Damnum Sine Injuria—Error of Officer of Court—Liability of Plaintiff for Injury thereby Resulting to Defendant.*—Owing to a mistake on the part of a sheriff's officer in not serving a summons on a defendant, the plaintiff signed judgment by default, and such judgment was published in the trade journals.

HELD—that, unless the defendant could prove knowledge of the error or malice on the part of the plaintiff, the circumstances gave him no cause of action against the plaintiff.

M'GREGOR v. M'LAUGHLIN, (1906) 8 F. 70—[Ct. of Sess.]

8. *Judicial Separation—Permanent Alimony—Right to maintain Action for Arrears.*—An Order of the Divorce Court for permanent alimony is not a final and conclusive judgment upon which an action of debt can be maintained if the payments ordered are in arrear.

ROBINS v. ROBINS, [1907] 2 K. B. 13; 76 L. J. [K. B. 649; 96 L. T. 786; 23 T. L. R. 428—Joyce, J.]

9. *Sovereign State as Plaintiff—Counterclaim—Jurisdiction.*—A sovereign state, by

**General—Continued.**

bringing an action in an English Court, only submits to the jurisdiction to the extent of the subject-matter in the action. The Court has, therefore, no jurisdiction to entertain any counterclaim except in mitigation of the relief claimed or for discovery. The defendant company were the holders of a concession to make a railway in the territory of the South African Republic. In pursuance of contracts between the Republic and the company, large sums of money had been paid into an English bank in the names of two trustees, one nominated by each party, to be paid out according to the contracts and concession. The nominee of the Republic having died, the Republic commenced this action against the company for the appointment of a new trustee and the transfer of the funds to the trustees. The company counter-claimed for damages for alleged breaches of the contract by the Republic, and an injunction to stay proceedings in the Courts of the Republic for forfeiture of the concession.

**HELD**—that the counterclaim must be struck out on the ground that the Court had no jurisdiction to give any of the relief claimed.

**SOUTH AFRICAN REPUBLIC v. LA COMPAGNIE [FRANCO-BELGE DU CHEMIN DE FER DU NORD (No. 2), [1898] 1 Ch. 190; 67 L. J. Ch. 92; 77 L. T. 555; 46 W. R. 151—North, J.**

**ACTION IN PERSONAM.**

*See* ADMIRALTY.

**ACTION IN REM.**

*See* ADMIRALTY.

**ADEMPMENT OF LEGACY.**

*See* WILLS.

**ADEN.**

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**ADJOINING OWNERS.**

*See* BOUNDARIES AND FENCES; HIGHWAYS; METROPOLIS; MINES, MINERALS AND QUARRIES—WATERS AND WATERCOURSES.

**ADMINISTRATION OF ASSETS.**

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**ADMINISTRATION ORDER.**

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*See also* CONFLICT OF LAWS, 11; CONTEMPT OF COURT; FISHERIES, 24, SHIPPING AND NAVIGATION.

**1. HIGH COURT.**

(a) Actions in Personam.

1. *Default of Appearance—Right to sign Judgment—R. S. C., Ord. 13, r. 3.*—Order 13, r. 3, applies to all Divisions of the High Court. Therefore, where in an action in personam in the Admiralty Division the writ is indorsed with a claim for a liquidated sum, and the defendant fails to appear, the plaintiff is at liberty to sign judgment in the registry for the amount indorsed upon the writ.

**THE MADELAINE AND ANDRE THEODORE, (1904) 73 [L. J. P. 24; 89 L. T. 675; 20 T. L. R. 83; 9 Asp. M. C. 508—Barnes, J.**

2. *Foreign Plaintiffs—Counterclaim by English Defendants—Security for Damages—Admiralty Act, 1861 (24 & 25 Vict. c. 10), s. 34—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5) (7).*—A tug owned by foreigners was sunk by a collision with a British vessel.

The tug owners brought an Admiralty action in personam against the owners of the British vessel, who counterclaimed.

**HELD**—that neither under the Admiralty Act, 1861, nor at Common Law or in Equity was there power to stay the action until the plaintiffs gave security for damages under the counterclaim.

**THE JAMES WESTOLL, [1905] P. 47; 74 L. J. P. [9; 92 L. T. 150; 10 Asp. M. C. 29—C. A.**



**High Court—Continued.****(b) Actions in Rem**

3. *Action "Against any Person"—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.*—An action *in rem* does not fall within sect. 1 of the Public Authorities Protection Act, 1893, and therefore can be commenced after the expiration of six months next after the act, neglect, or default complained of.

*The Longford* ((1889) 14 P. D. 34, 58 L. J. P. 33; 60 L. T. 373; 37 W. R. 372, 6 Asp. M. C. 371—C. A.) followed.

Decision of Deane, J. (23 T. L. R. 258), affirmed.

*THE BURNS*, [1907] P. 137, 76 L. J. P. 41, 71 [J. P. 193, 96 L. T. 684, 23 T. L. R. 323; 5 L. G. R. 676—C. A.]

4. *Appearance—Arrest—Release on Bail—Judgment—Excess of Damages over Bail—Writ of fieri facias—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 15.*—Persons, whose ship has been arrested by the marshal of the Admiralty Court, who think fit to appear and fight out their liability before the Court, the forms of the proceedings in the Admiralty Court show that the persons so appearing become parties to the action, and thereby personally liable to pay whatever in the result may be decreed against them, and the action, though originally commenced *in rem*, becomes a personal action against the defendants upon appearance.

The plaintiffs, owners of a British vessel run into by a foreign vessel, commenced an action *in rem* and arrested the foreign vessel of the defendants, who were domiciled abroad. An appearance was entered and an undertaking to put in bail was given, and the vessel was released. The damages proved to be in excess of the amount of bail. The plaintiffs, therefore, having an unsatisfied decree of the Admiralty Court in their favour, sued out a writ of *feri facias* for the excess under which the foreign vessel was seized.

HELD—that the plaintiffs were in a position to issue execution against the property of the defendants to the extent of the property proceeded against, without first serving a monition upon the defendants.

*The Dictator* ([1892] P. 304; 61 L. J. P. 73; 67 L. T. 563, 8 Asp. M. C. 251—Jeune, P.) approved.

Decision of Bucknill, J., reversed.

*THE GEMMA*, [1899] P. 285; 68 L. J. P. 110; [81 L. T. 379, 15 T. L. R. 529, 8 Asp. M. C. 585—C. A.]

5. *Arrest of Ship—Agreement to Bail—Meaning of "Freight."*—A summons, which had been adjourned into Court, raised the question as to the amount of bail the owners of the "Gemma" ought to give in a collision action. After the collision, the defendants' solicitors wrote to the plaintiffs' solicitors, saying that if the "Gemma" was released from arrest they would give an undertaking to put in bail for a sum not exceeding the

value of the "Gemma" in her damaged condition and her freight.

HELD—that in construing this agreement the word "freight" must be construed in its ordinary sense, as meaning the whole freight due under the charterparty.

*THE GEMMA*, (1898) 14 T. L. R. 444—Jeune, P.

6. *Cargo Owners suing as such—Person suing in name of Firm—Writ—Irregularity—"Co-Partners"—Fresh Step—R. S. C. 1883, Ord. 48A, r. 1—Ord. 70, rr. 1, 2*—A writ of summons in an Admiralty action *in rem* was issued at the suit of "Louis Dreyfus and Co." against the owners and parties interested in the carrying ship, and the indorsement ran: "The plaintiffs, as owners of goods laden on board the steamship 'Assunta' on a voyage from the River Plate to England, claim compensation for damage done to the said goods during such voyage." The plaintiffs were really one person who carried on trade in the City of London.

HELD—that the old practice in the Admiralty Court enabled the owners of a ship or cargo in any Admiralty action to sue as such, because what the Admiralty Court was really dealing with was one ship against another, and so long as you had the names of the vessels you had really all that was material; the names of the owners could be ascertained from the register or otherwise, that Ord. 48A, r. 1, did not apply to abrogate the former practice of the Admiralty Court, because the owners of a ship do not as such constitute a firm; that the plaintiff suing in the name of the firm was no more than a mere irregularity, and Ord. 70, r. 1, applied; that Ord. 70, r. 2, applied also, for the defendants had taken a step, namely, asking for security for costs, after they knew the facts of the real composition of the firm of "Louis Dreyfus & Co." and of their ownership of the goods; and that the plaintiffs might have leave to amend.

*THE ASSUNTA*, [1902] P. 150, 71 L. J. P. 75; [50 W. R. 544; 86 L. T. 660; 18 T. L. R. 150; 9 Asp. 302—Jeune, P.]

7. *Property sold by Private Person—Action against Proceeds of Sale*—No action *in rem* will lie against the proceeds of a sale by private persons of property, although, if the property had been unsold, such an action might have been brought against it.

Alleged salvors landed stores from a wrecked vessel and handed them over to the owner's agent, under an agreement (as they stated) that they should look to the agent for a settlement of their claim for salvage. The agent, with their aid, sold the stores.

On motion for prohibition to a County Court.

HELD—that no action *in rem* by the

**High Court—Continued.**

salvors would lie against the proceeds of the sale in the agent's hands.

THE OPTIMA, (1905) 74 L. J. P. 94; 93 L. T. [638; 10 Asp. M. C. 147—Barnes, P.

8. *Sale of res—Proceeds in Hands of Private Person—Writ—Service—Ord. 9, rr. 12, 13, 14.*—A Norwegian vessel collided with a pier belonging to the plaintiffs and damaged it. The vessel became a total loss. The Norwegian Vice-Consul, acting as agent of the owner of the vessel, advertised the sale of the wreck and stores. Before the sale took place the Vice-Consul gave the plaintiffs an undertaking on behalf of the owners that he would hold the net proceeds of wreckage, &c., until the liability for damage caused to the pier was determined. The sale took place, and the plaintiffs brought an action *in rem* against the owners of the vessel and her tackle, apparel and furniture, or the proceeds of sale thereof, and served the writ upon the Vice-Consul.

HELD—that the service was bad, and the writ must be set aside.

THE FORNJOT, (1907) 24 T. L. R. 26—  
[Bucknill, J.

9. *Specially Indorsed Writ—Affidavit of Service dispensed with—Rules of Supreme Court, Ord. 3, r. 6, Ord. 13, r. 12.*—In July, 1904, the plaintiff supplied necessities to the "Berengere" by order of the master. The ship was sold in another action. In December, 1904, the plaintiff issued a specially indorsed writ under Ord. 3, r. 6, *in rem* against the vessel, or the proceeds of her sale. The writ was served on the registrar, who accepted service. On a motion for judgment, a clerk to the plaintiff's solicitor gave evidence as to the date when the writ was served.

HELD—that the plaintiff was entitled to judgment for the amount claimed, and that an affidavit of service of the writ might be dispensed with.

THE BERENGERE, [1905] W. N. 18—Barnes, J.

**(c) Limitation of Liability.**

10. *Names of Owners of Ship.*—In an action for limitation of liability, though strictly the names of all the plaintiffs who are seeking to limit their liability should be stated in the writ, it is sufficient in the writ to describe the plaintiffs as the owners of the vessel, provided that the affidavit made in support of the claim and the certified copy of the ship's register exhibited thereto show clearly who are the owners at the date of the collision.

THE BLANCHE, (1905) 21 T. L. R. 145—  
[Barnes, J.

11. *Proof of Ownership—Loss of life or Personal Injury—Proof of Ownership at Date of Collision.*—Where the owners of a vessel seek to limit their liability in respect

of a collision under the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 503, 504, and the evidence in support of their claim is given by affidavit, the affidavit as to whether loss of life or personal injury was occasioned by the collision should be made by some person having knowledge of the facts, and the certified copy of the register proving the ownership of the vessel should be a certified copy of the register at the date of the collision.

THE ROSSLIX, (1905) 92 L. T. 177; 10 Asp. [M. C. 24—Barnes, J

12. *Title of Suit—Description of Plaintiffs—Life Claims—Bail in lieu of Payment into Court.*—Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 503, 504, it is not proper to describe the plaintiffs in the writ as "the owners of the ship or vessel," for, the action being one of personal relief, the names of the owners of the vessel at the time of the collision should be set out on the face of the writ.

Where the owners of the vessel at fault institute a suit for the purpose of limiting their liability in respect of a collision which has caused loss of life, and in respect of which loss of life the claims made do not amount to the total limit of the owners' statutory liability, the Court may grant a decree on their giving bail for an amount to be fixed by the Court and an undertaking to give bail if required for the balance of their statutory liability instead of requiring them to pay into Court the total amount of their statutory liability in respect of the life claims.

THE INVENTOR, (1905) 93 L. T. 189; 10 Asp. [M. C. 99—Barnes, P.

**(d) Salvage Actions.**

*And see SHIPPING AND NAVIGATION.*

13. *Award reduced on Appeal—Costs of Appeal.*—As a general rule, when a salvage award is reduced on appeal, the Court gives no costs of the appeal (*see The Gipsy Queen*, [1895] P. 176).

But when an award is very considerably reduced, the successful appellant may be given the costs of the appeal (*see The Kilmaho*, (1900) 16 T. L. R. 155).

Where a County Court Judge had awarded £160, which the Divisional Court reduced to £70 on the grounds that the services rendered were short and easy, and that the total value of the property salvaged was only £216, the Court followed *The Kilmaho* (*supra*), and allowed costs.

THE PRINCE LLEWELLYN, [1904] P. 83; 73 L. J. [P. 22; 89 L. T. 489; 9 Asp. M. C. 505—  
Div. Ct.

14. Where on appeal in a salvage action the appellants get the award substantially reduced, *e.g.*, from £5,100 to £3,000, they are entitled to the costs of the appeal.

## High Court—Continued.

*The Gipsy Queen* ([1895] P. 176; 64 L. J. P. 86; 43 W. R. 359; 72 L. T. 454—C. A.) no longer governs the practice of the Court.

*The Kilmaho* (1900) 16 T. L. R. 155—C. A.) and *The Prince Llewellyn* ([1904] P. 83, 73 L. J. P. 22; 89 L. T. 489; 9 Asp. M. C. 505—Div. Ct.), *supra*, followed.

THE TOSCANA, [1905] P. 148; 74 L. J. P. 54; 53 [W. R. 405; 93 L. T. 392; 21 T. L. R. 329; 10 Asp. M. C. 108—C. A.]

15. *Counter-claim for Breach of Charter-party—Embarrassing fair trial of Action—Ord. 19, r. 27—Judicature Act, 1873* (36 & 37 Vict. c. 66), ss. 16, 24, sub-s. 3.]—The Admiralty Division has jurisdiction to entertain a claim *in personam* for damages for breach of a charter-party, and such a claim may be raised by way of counter-claim in an action *in rem* to recover remuneration for salvage services.

The owners, master and crew of a foreign vessel brought an action *in rem* for salvage service rendered to the defendants' vessel. The defendants counter-claimed *in personam* against the owners of the salving vessel, who were foreigners resident abroad, for damages for breach of a charter-party in detaining the defendants' vessel when loading, the latter vessel being at the time of the salvage services under charter to the owners of the salving vessel. The Judge having refused to strike out the counter-claim, the Court affirmed his decision.

THE CHEAPSIDE, [1904] P. 339; 73 L. J. P. 117; [91 L. T. 83; 20 T. L. R. 655; 53 W. R. 120; 9 Asp. M. C. 595—C. A.]

16. *Jurisdiction—Floating Beacon.*—The Admiralty jurisdiction in respect of salvage awards extends only to the salvage of ship and cargo, or that which has formed part of one of them, and does not extend to all property saved from peril at sea. A floating beacon, incapable of being navigated, is not so connected with navigation as to be the subject of salvage.

Judgment of the Court below affirmed.

WELLS v. GAS FLOAT WHITTON (No. 2), [1897] [A. C. 337; 8 Asp. M. L. C. 272; 66 L. J. P. 99; 76 L. T. 663; 13 T. L. R. 422—H. L. (E)]

17. *Payment into Court with Denial of Liability.*—By the Admiralty practice it is not admissible for defendants to make a payment into Court while denying liability in a salvage action.

THE CHILTONFORD (1901) 17 T. L. R. 293—[Jeune, P.]

## (e) In General.

18. *Appeal from Board of Trade Inquiry—Costs of Appeal—Master's Certificate Suspended—Successful Appeal by Master—Duty of Board of Trade—Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), ss. 470, 474, 475—*Shipping Casualties Rules, 1895*, rr. 11, 12, 13, 20.]—A Court of Inquiry, held by order

of the Board of Trade, investigated the circumstances attending the loss of a British ship and the resulting loss of life. The Board asked the opinion of the Court whether the loss was due to the master's wrongful act or default, but declined to say whether in the Board's opinion the master's certificate should be dealt with. The Court suspended the certificate of the master for one year. The Divisional Court, on appeal by the master, came to the conclusion that there was not sufficient evidence against the master, and allowed the appeal. The Board of Trade were represented at both hearings.

HELD—that the master should be allowed his costs of the appeal on the ground that the Board ought to have assisted the Court below by an expression of their opinion upon the evidence.

The duty of the Board in such cases considered.

THE CARLISLE, [1906] P. 301; 75 L. J. P. 97; [95 L. T. 552; 22 T. L. R. 709; 10 Asp. M. C. 287—Div. Ct.]

19. *Charging Order—Not Usually to be Made ex parte—Admiralty Matters—Solicitors Act, 1860* (23 & 24 Vict. c. 127), s. 28.]—In Admiralty, as in Chancery, charging orders will only be made *ex parte* under exceptional circumstances.

THE BIRNAM WOOD, [1907] P. 1; 76 L. J. P. 1; [96 L. T. 140; 23 T. L. R. 3; 10 Asp. M. C. 325—C. A.]

20. *Collision—Costs of Appeal.*—In the Admiralty Court the appellants' vessel was found to be solely responsible for a collision.

The appellants appealed on the sole ground that the other vessel was also in fault, and succeeded.

HELD—that the appellants were entitled to the costs of the appeal.

*The Ceto* ((1889) 14 App. Cas. 670—H. L.) followed as laying down the correct rule on this point.

THE LONDON, [1905] P. 152; 74 L. J. P. 71; 53 [W. R. 419; 93 L. T. 393; 21 T. L. R. 339; 10 Asp. M. C. 109—C. A.]

## II. COUNTY COURTS.

## (a) Actions in Personam.

21. *Collision—Service of Summons—Owner resident abroad—Agent—County Courts Admiralty Jurisdiction Act, 1868* (31 & 32 Vict. c. 71), s. 21.]—Where a Scotchman resident out of the jurisdiction was sued *in personam* on the Admiralty side of the County Court for a collision, and his agent in this country was served under the County Courts Admiralty Jurisdiction Act, 1868, s. 21, sub-s. 2, it was held that the Court had no jurisdiction because, at the time of the commencement of the proceedings, the defendant's vessel, to which the cause related, had been lost, and the agency in respect of such vessel had ceased.

The words "agent in England" in the

## County Courts—Continued.

County Courts Admiralty Jurisdiction Act, 1868, s. 21, sub-s. 2, mean a person acting for another in relation to the vessel or property proceeded against at the time the service of the process is effected.

THE CITY OF AGRA, [1898] P. 198; 67 L. J. P. [81; 79 L. T. 307; 8 Asp. M. C. 457—Barnes, J.

## (b) Actions in Rem.

22. *Mode of Trial—Right to Jury—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 101—County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2.*—In an action in rem brought to recover freight in the County Court under the County Courts Admiralty Jurisdiction Acts, 1868 and 1869, a defendant is not entitled to trial by a jury under the County Courts Acts, 1888, s. 101.

THE THEODORA, [1897] P. 279; 8 Asp. M. L. C. [259; 66 L. J. P. 50; 76 L. T. 627, 13 T. L. R. 350; 46 W. R. 157—Div. Ct

23. *Judgment—Execution—Sale of Ship by High Bailiff—Rights of Mortgagee—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), ss. 3, 12, 22, 23—County Court Rules, 1892, Order 39B, r. 42—County Court (Admiralty) Form No. 331.*—A decree on the Admiralty side of the County Court in a cause in rem can be enforced by sale by the high bailiff in the same manner as a judgment in rem of the High Court is enforced by the marshal; and hence, in a collision cause in rem in the County Court, the high bailiff can sell the defendant's ship in execution as against the mortgagee thereof, and give a good title to the purchaser.

THE RUBY (No. 1), [1898] P. 52; 67 L. J. P. 25; [78 L. T. 235; 14 T. L. R. 184; 46 W. R. 464; 8 Asp. M. C. 421—Jeune, P.

24. *Wages—Ship's Husband—Maritime Lien—Prohibition—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 10—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 2.*—A ship's husband, employed and acting as such, is not a seaman within sect. 10 of the Admiralty Court Act, 1861, which gave jurisdiction to the High Court of Admiralty over any claim by a seaman of any ship for wages earned by him on board the ship; and he has no maritime lien for wages even though he has performed some of his duties on board ship where such duties were not in fact required to be performed on board ship. A County Court has, consequently, no jurisdiction under sect. 3, sub-s. 2, of the County Courts Admiralty Jurisdiction Act, 1868, to entertain an action in rem by a ship's husband for wages.

THE RUBY (No. 2), [1898] P. 59; 67 L. J. P. 28; [78 L. T. 267; 14 T. L. R. 184, 46 W. R. 687—Jeune, P.

## (c) Appeal.

25. *Costs—Refusing Taxation—Payment into Court with Denial of Liability—Meaning of word "tender"—Final Order—County Courts Admiralty Jurisdiction Act, 1868, s. 26—County Court (Admiralty) Rules, 1892, Ord. 39B, rr. 48-50.*—The term "tender" in rules 48 and 50 of Order 39B refer to and include both a payment into Court without denial of liability and a payment into Court with a denial of liability.

An Order of the Judge of a County Court having Admiralty Jurisdiction refusing the taxation of his costs to a party entitled to the benefits given by the latter of these two last-mentioned rules is a final Order within section 26 of the County Courts Admiralty Jurisdiction Act, 1868, and is consequently appealable without the permission of the Judge of the Court appealed from.

THE VULCAN, [1898] P. 222; 67 L. J. P. 101, 47 [W. R. 123—Barnes, J.

26. *Damages under £50—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), ss. 26, 31.*—The plaintiffs, the owners of the "Pitho," instituted an action in the sum of £100 in the City of London Court, against the owners of the "Burma," to recover damages sustained by the former by reason of a collision between her and a vessel in tow of the "Burma." The learned judge gave judgment for the defendants. The plaintiffs appealed. It was admitted that the damages sustained by the plaintiffs did not exceed £50.

Held—that as the plaintiffs, if successful, could not have recovered more than £50, in the action, they were precluded from appealing by sects. 26 and 31 of the County Courts Admiralty Jurisdiction Act, 1868.

The Falcon (1878), 3 P. D. 100; 47 L. J. Adm. Div. 56; 26 W. R. 696; 38 L. T. 294—Sir R. Phillimore followed.

THE BURMA, (1899) 80 L. T. 839; 8 Asp. M. C. [549—Div. Ct.

## (d) Transfer of Action.

27. *Transfer of Action from County Court—Cross Actions—Conduct of Consolidated Actions.*—Two cross actions of damages were commenced on the same day in respect of the same collision, one at 3.15 p.m. in the Liverpool County Court, and the other at 8.50 p.m. in the High Court. A motion by the plaintiffs in the High Court for the transfer and consolidation of the County Court action was not opposed except on one point, namely, that the plaintiffs in the High Court asked as part of the order that their action should be treated as the principal cause.

Held—that the proceedings must be treated as if they had been taken simultaneously, and that the action which was already in the High Court at the time of making the order of transfer must be deemed the principal cause, and the plain-

**County Courts—Continued.**

tiffs in that suit should, therefore, have the conduct of the consolidated actions.

**THE MERSEY**, [1901] P. 369; 70 L. J. P. 100; [18 T. L. R. 14; 85 L. T. 584—Jeune, P.

28. *Transfer of Action from County Court—Summons—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 Vict. c. 71), s. 6.]—An application under sect. 6 of the County Courts Admiralty Jurisdiction Act, 1868, to transfer an action from the County Court to the High Court should be made by summons in chambers.

**THE INDRA**, (1905) 22 T. L. R. 12; 94 L. T. 110; [10 Asp. M. C. 196—Barnes, P.

**(e) In General.**

29. *Costs—Amount Recovered Not Exceeding £300—Discretion—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 Vict. c. 71, s. 3, sub-s. 3.)—In an action of collision in the Admiralty Division the defendants gave bail in the sum of £600, and after the pleadings had been closed they admitted liability. The plaintiffs then filed a claim in the registry for £330, and the action was eventually settled for £218. The Court, in its discretion, allowed the plaintiffs costs on the High Court scale, though the amount recovered did not exceed £300, as it considered that the case was rightly brought in the High Court.

**THE EMDEN**, (1907) 23 T. L. R. 546—[Bucknill, J.

30. *Jurisdiction—Damage to Pier by Ship—“Damage by Collision”—County Courts Admiralty Jurisdiction Acts*, 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 3, and 1869 (32 & 33 Vict. c. 51), s. 4.]—The County Court has no jurisdiction under sect. 3, sub-sect. 3 of the County Courts Admiralty Jurisdiction Act, 1868, and sect. 4 of the County Courts Admiralty Jurisdiction Act, 1869, to entertain a suit by a pier-owner to recover damage sustained through a ship running into the pier.

**THE NORMANDY**, [1904] P. 187; 73 L. J. P. 55; [52 W. R. 634; 90 L. T. 351; 20 T. L. R. 239; 9 Asp. M. C. 568—Div. Ct.

31. *Payment into Court and Plea of Tender—Withdrawal of Plea—Acceptance of Sum paid into Court—Sum less than £2—Taxation of Costs—County Court Rules*, 1892, Ord. 39B, rr. 50A, 80.]—Where a sum less than £2 was paid into Court in a County Court action with a plea of tender before action, and that plea was subsequently withdrawn, and the money paid in was accepted by the plaintiff and taken out of Court, the plaintiff was held entitled, under Ord. 39B, r. 50A, of the County Court Rules, to costs, and to have those taxed under Column B. under the provisions of r. 80 unless the Judge otherwise ordered.

**THE SKUDENAES**, (1901) 70 L. J. P. 64, 17 [T. L. R. 649—Div. Ct

**ADMISSIBILITY OF EVIDENCE.**

*See EVIDENCE.*

**ADMISSIONS.**

*See CRIMINAL LAW, EVIDENCE; PRACTICE.*

**ADOPTION.**

*See BASTARDY; INFANTS.*

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*See GAMING AND WAGERING; LIBEL AND SLANDER; PUBLIC HEALTH.*

**ADULTERATION.**

*See AGRICULTURE, 11, 12; FOOD AND DRUGS.*

**ADULTERY.**

*See HUSBAND AND WIFE.*

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*See EVIDENCE; PRACTICE.*

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**AGENCY.**

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*And see AUCTIONS AND AUCTIONEERS; HUSBAND AND WIFE, 44—46; INSURANCE, 4, 7, 9, 10, 11, 15, 42; MASTER AND SERVANT, 406; PUBLIC HEALTH, 30.*

## I. IN GENERAL.

And see LIMITATION OF ACTIONS, 59.

1. *Agency Contract—Interpretation—Vendor and Purchaser—Agency—"To You"—Commission—Surrounding Circumstances.*

—A suit was brought by the appellant to obtain a conveyance to him by the respondent of the property comprised in a contract, alleging that thereby the respondent had undertaken to sell it to him at his option for the consideration therein mentioned.

HELD—that looking at the agreement as a whole, it clearly was not a vendor and purchaser agreement, but an agency agreement; that the phrase "to you" in the agreement meant to the persons whom the appellant might find to buy the property, and had the same meaning as "to your parties, your friends, your syndicate, your purchasers," or the like; that the appellant never considered that he had come under any personal liability, present or future, to purchase; and that the key-note to the whole was the provision for 2½ per cent. commission being payable to the appellant after the completion of the sale, showing that the appellant was an agent for sale to be paid by commission, and not a purchaser; and that if there could be any doubt as to the construction of the agreement, standing alone, a reference to the surrounding circumstances made the matter still clearer.

LIVINGSTONE v. ROSS, [1901] A. C. 327; 70 [L. J. P. C. 58; 85 L. T. 382—P. C.]

2. *Agency Contract—Interpretation—Agency or Subordination and Service—Implied Undertaking to Continue Employment—Rangoon—Geographical Area.*—Where there is a contract to employ another as an agent merely, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission. But if the contract is one of service, then the commission is merely intended to be in the place of salary, and the contract cannot be determined without compensation to the servant.

The defendant, who carried on business in India, appointed the plaintiff to be his sole buying agent in Great Britain for ten years, the defendant to send all orders to the plaintiff, who was to receive 3½ per cent. on all goods bought by or for the defendant whatever their destination in India might happen to be, the commission to be paid quarterly. The plaintiff was to keep proper books of account of all incidental expenses, which were to be paid by the defendant together with the commission every quarter, and in case any firms should refuse to supply goods unless invoiced direct to the plaintiff, he was to be under no obligation to place such orders unless he was fully satisfied that the bank would hand him cash covering such purchases immediately these goods were ready for shipment.

HELD—that there was no implied contract that the defendant would continue to carry on business for the term of ten years so as to supply the plaintiff with orders; and that a place is for business purposes in that geographical area within which business men determine that it shall be; therefore for business purposes Rangoon is not in India.

Rhodes v. Forwood ((1876) 1 App. Cas. 256; 47 L. J. Ex. 396; 24 W. R. 1078; 34 L. T. 890; H. L. (E.); and Turner v. Goldsmith [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; 39 W. R. 547; 64 L. T. 301—C. A.) explained.

NORTHE v. TREVILLION, (1902) 18 T. L. R. 648; [7 Com. Cas. 201—Phillimore, J.]

3. *Duty of Agent—Events not provided for.*—It is the duty of an agent to exercise reasonable care in doing what he undertakes to do, but he is not bound to provide for events not contemplated by the contract but equally within the foresight of his principal as of himself.

COMMONWEALTH PORTLAND CEMENT CO. v. WEBER [LOHMANN & Co., (1905) A. C. 66; 74 L. J. P. C. 25; 53 W. R. 337; 91 L. T. 813; 21 T. L. R. 149, 10 Asp. M. C. 27—P. C.]

4. *Following Money—Money Collected for Principal Paid into Agent's General Banking Account—Disbursements Paid out of Account—Right of Principal to Follow Money in Bank.*—The B. company collected advance freights on account of the plaintiffs, and the course of business known and assented to by the latter was for the B. company to pay the freights when collected into their general account with the P. bank. They also paid into that account moneys of their own and freights collected for other shipowners. They paid disbursements on behalf of the plaintiffs by cheques drawn on the same account. Accounts were rendered periodically by the B. company to the plaintiffs showing the freights received and disbursements made and the balance owing to the plaintiffs, or, as sometimes happened, the balance owing by the plaintiffs to the B. company. The B. company having gone into liquidation, and there being a large sum due to the plaintiff for freights collected by the B. company, the plaintiffs claimed to be entitled to the amount standing to the credit of the B. company with the P. bank, alleging that it was the proceeds of freights collected on their account.

HELD—that the plaintiffs were not entitled to follow the money in the hands of the P. bank, as there was no fiduciary relationship between the B. company and the plaintiffs, but merely the relationship of debtor and creditor.

In re Hallett's Estate ((1880) 13 Ch. D. 696; 49 Ch. 415; 42 L. T. 421—C. A.) considered.

THE WILSONS AND FURNESS-LEYLAND LINE, LD. [v. THE BRITISH AND CONTINENTAL SHIPPING CO., LD. AND OTHERS, (1907) 23 T. L. R. 397—Walton, J.]

5. *Indemnity—Act done by Agent in course*

**In General—Continued.**

*of his Employment—Damages against Agent at suit of Third Party—Agent's Right to an Indemnity*].—Plaintiff, a Paris auctioneer, was instructed by the defendants to advertise for sale a thoroughbred mare, "Pentecost," whose pedigree appeared in the English Stud Book, as then (1898) imported into France for the first time. A French owner, claiming to own the true "Pentecost," imported in 1893, recovered damages against the plaintiff for disparagement of his mare, whose value he alleged to have been decreased by the advertisement. The plaintiff now claimed to be indemnified by the defendants.

It was found as a fact that a mistake had been made in 1893, and that "Pentecost" was not exported until 1898; and it was

**HELD**—that the plaintiff's loss arose, not from any act done by him in the course of his employment, but from a mistaken view of the facts taken by the French Court; the defendants had sent over the mare which they had ordered him to advertise, and could not be held liable.

**HALBRONN v. INTERNATIONAL HORSE AGENCY AND [EXCHANGE, LD., [1903] 1 K. B. 270; 72 L. J. K. B. 90, 51 W. R. 622; 88 L. T. 232; 19 T. L. R. 133—Bruce, J.**

**6. Joint Agency—Joint Agent of Debtor and Creditor—Embezzlement—Incidence of Loss as between innocent Debtor and Creditor.**—Where the joint agent of a debtor and creditor receives money from the debtor for payment to the creditor of the debt, and embezzles it; then, apart from negligence of the debtor or creditor, he is held to have defrauded the one or the other of his clients, according as, at the date of the embezzlement, he held the money as agent of the debtor or agent of the creditor.

For example, if the debt were payable on the 12th of October, and the agent received the money from the debtor on the 6th and embezzled it on the 7th, then the loss would fall on the debtor; but if he did not embezzle till the 13th, the loss would fall on the creditor.

**RICHARDSON v. MACGEOCH'S TRUSTEES, (1898) 1 [F. 145; 36 S. L. R. 111, 6 S. L. T. 290.**

**7. Mercantile Agent—Sale by Broker—Possession with Consent of Owner—Larceny by a Trick—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2.]—Semble, where a mercantile agent obtains possession of goods by means amounting to larceny by a trick he is not in possession of them "with the consent of the owner," and sect. 2 of the Factors Act, 1889, does not protect a person who honestly takes the goods in pledge from him, or buys them.**

The plaintiff, a diamond merchant, parted with the possession of diamonds to a broker who represented that he had a customer who would buy them. The broker did not offer the diamonds to the customer, but gave

them to one B. asking him to try to sell them. B. took them to the defendants, who were diamond merchants, explaining that he came from the broker, and the defendants purchased them on joint account with B. The defendants paid the full amount by cheque in favour of the broker, and debited B. in their books with half the purchase price, and credited him with half the profits when the diamonds were ultimately sold.

In an action for conversion of the diamonds, the jury found that the broker obtained them from the plaintiff by larceny by a trick, and that the defendants did, and B. did not, act in good faith.

**HELD**—(1) that as the diamonds had been obtained by larceny by a trick, sect. 2 of the Factors Act, 1889, probably would not in any case have protected the defendants; and that (2) apart from this point, as they were partners with B. in the transaction, they were affected by his want of good faith and could not claim to retain the diamonds.

**Decision of Channell, J., [1907] 1 K. B. 519; 76 L. J. K. B. 276; 23 T. L. R. 183; 12 Com. Cas. 147—varied.**

**OPPENHEIMER v. FRAZER AND OTHERS, [1907] 2 K. B. 51; 76 L. J. K. B. 806; 97 L. T. 3; 23 T. L. R. 410; 12 Com. Cas. 280—C. A.**

**8. Rights of Third Party—Conversion by Principal and Agent—Account against Agent.**—Where, in the case of a conversion by two joint tortfeasors, one of whom, as between themselves, has acted as principal and one as agent, the injured party elects to waive his remedy against the agent and to proceed against him by way of account, the injured party is entitled to demand from such agent an account of so much of the converted property, or its proceeds, as may still be actually remaining in the agent's hands at the time of taking the account. But he is not entitled to demand an account of so much of the converted property, or of its proceeds, as such agent has duly handed over, in the course of his agency, to his principal.

**IN RE ELY, EX PARTE THE TRUSTEE, (1900) 48 [W. R. 693; 82 L. T. 501—C. A.**

**9. Termination of Agency—Notice—Custom.**—The defendants, who were glove manufacturers, by an agreement in writing agreed to give to the plaintiff "2½ per cent. commission on all business you do for us in London, whether you send the buyers to buy, or orders come through the post, or you take them and send them direct. You let us know to whom you show our samples, and if business results from the transaction, we will forward your commission quarterly as you suggested. This refers to orders executed." The defendants having terminated the agreement without notice, the plaintiff brought an action for wrongful dismissal, alleging that he was employed by the defendants as their agent for the sale of gloves, and that there was a custom in the glove

**In General—Continued.**

trade for commission agents to give and receive six months' notice to terminate the agency.

**HELD**—that there was no agreement by the defendants to employ the plaintiff as their agent; that the agreement only came to this—that if the plaintiff obtained orders which were accepted by the defendants, they would pay him commission, and that it was inconsistent with that agreement to add a term to it requiring six months' notice of intention to terminate it.

JOYNSON v. HUNT & SON, (1905) 93 L. T. 470;  
[21 T. L. R. 692—C. A.]

And see ARBITRATION, 34

**II. AUTHORITY OF AGENT.**

And see AGRICULTURE, BILLS OF EXCHANGE, 5, 18.

10. *Agent Borrowing Money in Excess of Authority—Money partly Applied for Purposes of Principal—Equitable Right of Lender against Principal.*—The London agent of a country firm was entitled to draw on their London banking account, but not to borrow money. He borrowed money from the plaintiff, who believed that he was properly borrowing for the use of the firm.

**HELD**—that the plaintiff was in equity entitled to recover from the firm so much of the money borrowed as was in fact applied in paying debts legally due from them.

BANNATYNE v. D. & C. MACIVER, [1906] 1 K. B. 103; 75 L. J. K. B. 120; 54 W. R. 293; 94 L. T. 150—C. A.

11. *Contract in Name of Principal—Implied Authority to make Contract—Personal Liability of Agent—Knowledge of Want of Authority.*—A party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that, if it turns out that he has not this authority, he is liable in an action on such implied contract. There need be no wrong or omission of right, on the part of the agent, in order to make him personally liable in respect of a contract in the name of his principal.

The conclusion to the contrary in *Smout v. Ibery* ((1842) 10 M. & W. 1; 12 L. J. Ex. 357) is negatived by *Collen v. Wright* ((1857) 8 E. and B. 647; 27 L. J. Q. 215; 4 Jur. (n.s.) 357; 6 W. R. 123—Ex. Ch.) and *Beattie v. Lord Ebury* ((1872) L. R. 7 Ch. 777; 41 L. J. Ch. 804; 20 W. R. 994, 27 L. T. (n.s.) 398).

If the person who deals with the agent is fully aware in point of fact that the agent has no authority to bind his principal, the agent is not liable.

HALBOT v. LENS, [1901] 1 Ch. 344; 70 L. J. Ch. 125; 49 W. R. 214; 83 L. T. 702—Kekewich, J.

12. *Contract within Agent's Authority, but made only for his own Purposes—Principal held liable—Underwriter and his "Names."*

—Where an agent, purporting to act on behalf of his principal, makes a contract within the terms of his written authority, the principal is bound thereby although the agent was in fact acting only in his own interests, unless the other party has been guilty of *mala fides*, this is so even if the other party does not examine the written authority.

*Dictum* of Lord Brougham in *Bank of Bengal v. Fagan* ((1849) 7 Moo. P. C. 61) followed. *North River Bank v. Aymar* (U.S.A.) ((1842) 3 Hill 262) is no longer an authority to the contrary even in America.

B., an underwriter at Lloyd's, writing for four "names," was a director of a virtually insolvent company; and in 1899, in order to bolster up such company, he put his own signature and those of his "names" to a policy guaranteeing bills drawn by the company, on which bankers advanced money. The bills and policy were renewed from time to time until 1902; but B. received no premiums, and credited his "names" with none in his books, and they had no idea of the kind of business he was doing. In 1902 the company failed to meet its bills, and B. and his "names" were sued upon the current policy. The "names" contended that, though B. had authority to make such a contract "for their benefit and on their behalf," yet they were not liable inasmuch as he had in fact made the contract only for his own benefit.

**HELD**—that the "names" were liable.

Decision of Bigham, J. ([1903] 2 K. B. 399; 72 L. J. K. B. 662; 51 W. R. 652; 89 L. T. 180; 19 T. L. R. 584; 8 Com. Cas. 252), reversed.

HAMBRO & SON v. BURNAND AND OTHERS, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 52 W. R. 583; 90 L. T. 803; 20 T. L. R. 398; 9 Com. Cas. 251—C. A.

13. *Course of Business—Holding out Agent as having Authority—Evidence—Stockbroker's Clerk.*—The plaintiff gave two orders to a clerk in the service of a firm of stockbrokers for the purchase by the firm of certain shares upon the London Stock Exchange. The order was communicated by the clerk to the stockbrokers, and was duly carried out by them. Payment was made by the plaintiff by means of his cheque which he drew in favour of the stockbrokers, and handed to the clerk for transmission to them. A third transaction was carried out in like manner, except that the plaintiff made the necessary payment by a cheque drawn in favour of the clerk which he handed to the clerk, who transmitted it to his employers. In each case bought notes were made out by the stockbrokers, and given by them to the clerk, who gave the notes to the plaintiff. In no case did the plaintiff communicate in any way with the stockbrokers except through the clerk.



**Authority of Agent—Continued.**

Subsequently the plaintiff gave other orders to the clerk for the purchase of shares in the same way. The clerk never communicated any of these orders to his employers, nor were they carried out. By forging bought notes he obtained cheques in payment from the plaintiff, and appropriated the money. The clerk had no express authority from the firm of stockbrokers to enter into contracts on their behalf. In an action by the plaintiff against the stockbrokers in respect of the orders given by him to the clerk which were not carried out,

**HELD** (by Smith and Chitty, L.J.J., Collins, L.J., dissenting)—that there was no evidence that the stockbrokers had held out their clerk as possessing authority to enter into contracts on their behalf so as to bind them.

Judgment of Hawkins, J. (77 L. T. 685) affirmed

**SPOONER v. BROWNING**, [1898] 1 Q. B. 528; 67 [L. J. Q. B. 339; 78 L. T. 97; 14 T. L. R. 245; 46 W. R. 369—C. A.]

**14. Instructions to Procure Tenant—Authority to enter into Agreement for Lease.**—House agents have as such no authority to make contracts on behalf of their employers. Their business is to find offers and submit them for approval. Authority to make a contract must be proved in any particular case, and cannot be inferred from the relationship of the parties.

**THUMAN v. BEST**, (1907) 97 L. T. 239—Parker, J

**15. Instructions to Sell Land—Authority to Make and Sign Agreement.**—Instructions given by the owner of land to an agent to sell it for him, and an agreement to pay so much on the purchase price, are an authority to make a binding contract, including an authority to sign an agreement.

**ROSENBAUM v. BELSON**, [1900] 2 Ch. 267, 69 [L. J. Ch. 569; 48 W. R. 522, 82 L. T. 658—Buckley, J.]

**16. Mercantile Agent—Pledge—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 1.**—The plaintiff, a dealer in diamonds at Amsterdam, sent some diamonds to a diamond broker in London for sale. The broker, without the authority of the plaintiff, asked a friend to pledge the diamonds for him. The friend pledged them with the defendants, who were pawnbrokers. The defendants acted in good faith, and without notice that the diamonds were pledged without the authority of the owner. In an action to recover the diamonds,

**HELD**—that, though the broker was a mercantile agent within the meaning of the Factors Act, 1889, it was not the ordinary course of business of a mercantile agent to ask a friend to pledge goods entrusted to him, but to pledge them himself, and that therefore the defendants were not protected by sect. 2, sub-s. 1. of the Act.

**DE GORTER v. GEORGE ATTENBOROUGH & SON**, [1905] 21 T. L. R. 19—Channell, J.

**17. Mercantile Agent—Pledge by Broker—Authority to Pledge—Custom of Trade—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2.**—The expression “a mercantile agent” in sect. 2 of the Factors Act, 1889, means a mercantile agent quite independently of the kind of goods he deals in. Therefore, although it is not usual in a particular trade—e.g., the diamond trade—for a broker to have authority from his principal to pledge goods, nevertheless a pledge by such a broker, who is in possession of goods with the consent of the owner, is, when he is acting in the ordinary course of business of a mercantile agent, valid under sect. 2 of the Factors Act, 1889, provided the pledgee takes in good faith and without notice that the pledger had no authority to make the pledge.

**Quære**, whether a *bona-fide* pledgee of goods is protected by the section if his pledger, a mercantile agent, has obtained the goods from his employer by larceny by a trick (*See* No. 7, *supra*).

Decision of Channell, J. ([1907] 1 K. B. 510; 76 L. J. K. B. 177; 96 L. T. 501; 23 T. L. R. 182, 12 Com. Cas. 88), affirmed.

**OPPENHEIMER v. ATTENBOROUGH & SON**, (1907) [24 T. L. R. 115—C. A.]

**18. Mercantile Agent—Pledge of Documents of Title—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 3—Factors (Scotland) Act 1890 (53 & 54 Vict. c. 40).**—Sect. 3 of the Factors Act, 1889 (extended to Scotland by the Act of 1890), which enacts that “a pledge of the documents of title to goods shall be deemed to be a pledge of the goods,” is not of general application, but applies only to a pledge by a “mercantile agent” as defined in the statute.

Therefore, where the owner of goods in a bonded warehouse indorsed the delivery order to the appellant as security for a loan, without notice to the warehouse keeper,

**HELD** (affirming the judgment of the Court below)—that the appellant's title did not prevail against that of the respondents, the unpaid vendors, who had arrested the goods to found jurisdiction in Scotland.

**INGLIS v. ROBERTSON & BAXTER**, [1898] A. C. [616; 67 L. J. P. C. 108, 79 L. T. 224; 14 T. L. R. 517—H. L. (Sc.)]

**19 Money paid to Agent—Misappropriation by Agent—Liability of Principal.**—A company undertook as part of its business to effect investments for intending investors. A clerk in their employment, whom they held out as having authority to negotiate investments and to receive the money, received a sum of money from an intending investor for the purchase of certain shares. The clerk appropriated the money to his own use, intending to do so from the beginning.

**Authority of Agent—Continued.**

**HELD**—that the company were liable to refund the money.

**TROTT v. NATIONAL DISCOUNT Co., (1901) 17 [T. L. R. 37—Kennedy, J.]**

**20. Sale of Goods—Authority to receive Payment—Payment by Cheque.**—Where a shop assistant has authority to accept payment in cash, or by cheque drawn in favour of his master, such facts justify the inference that he has authority to accept payment by cheque drawn to himself provided he receives cash for that cheque.

**WALKER v. BARKER, (1900) 16 T. L. R. 393—[Div. Ct.]**

**III. COMMISSION.**

- (a) When Payable.
- (b) Secret Commissions, etc.

- (a) When Payable.

*And see AUCTIONS AND AUCTIONEERS, 16.*

**21. Advertisement Agent—Alleged Custom as to Payment after Termination of Engagement.**—The way to prove a custom is to show an established course of business, at first contested but ultimately acquiesced in.

The plaintiff had been the advertisement agent in London for the newspapers owned by the defendants, and had been paid a commission of 10 per cent. upon all advertisements obtained in London for the newspapers. In June, 1898, the defendants terminated the plaintiff's engagement, after notice. The defendants paid the plaintiff commission up to Christmas, 1898. The plaintiff insisted that by the custom of the business he was entitled to the payment of commission in two cases: first, where the advertisements were inserted "until countermanded"; secondly, where advertisements originally procured by him were renewed with less than a break of twelve months, even though the renewal might have been obtained by the plaintiff's successor.

**HELD**—that the custom had not been proved.

**BETTANY v. EASTERN MORNING AND HULL NEWS [Co., Ltd., (1900) 16 T. L. R. 401—Mathew, J.]**

**22. Advertisement Agent—Commission on Renewals of Advertisements—Termination of Employment—Right to Commission on Renewals after Termination.**—Apart from express agreement an agent, employed on commission to solicit fresh or renewed advertisements for newspapers, is not entitled to commission on any renewals (whether obtained through another canvasser or sent direct to the paper) received after the termination of his employment.

**GERAHTY v. BAINES & Co., Ltd., (1903) 19 [T. L. R. 554—Lord Alverstone, C.J.]**

**23. Agent Employed to Sell House—**

**Rescission of Employment—Subsequent Sale through Third Party.**—The plaintiffs were employed to find a purchaser for the defendant's business on the terms that they were to receive a commission if they succeeded, but that if no sale took place there was to be no charge. The plaintiffs advertised the business for sale, and in October, 1904, introduced to the defendant one N., who inspected the premises and stock, but made no offer. In February, 1905, the defendant, with the plaintiff's approval, decided not to sell. In May, 1905, the plaintiffs claimed and were subsequently paid a small sum for their out-of-pocket expenses in the matter. In June, 1905, the defendant consulted a friend C. as to the sale of his business. C. knew that N. was looking out for a business of the kind, but did not know of his introduction to the defendant by the plaintiffs. He suggested N. as a likely purchaser, and subsequently communicated with N., advising him to purchase. N. again inspected the premises and stock, and made an offer, and after some negotiations between the defendant, N., and a third party, a price was fixed at which N. bought the business. The plaintiffs having brought an action claiming commission, the jury found that the sale really and substantially proceeded from the plaintiff's acts, and found for the plaintiffs for the commission claimed.

**HELD**—that there was no evidence to support the verdict.

**BRANDON & Co. v. HANNA, [1907] 2 Ir. R. 212 [—C. A.]**

**24. Agent finding a Tenant—Tenant subsequently Purchasing—Right to Commission on Sale.**—The defendant in 1900 employed the plaintiffs to find a purchaser, or, failing a purchaser, a tenant for a certain property; and they thereupon introduced C. to the defendant, and tried unsuccessfully to get him to buy the property; eventually, however, he took it upon a seven years' lease, and the plaintiffs received their commission at 5 per cent. on the rent. After being in possession for about fifteen months C. bought the property, and the plaintiffs claimed a further commission on the sale.

The plaintiffs had pleaded an oral contract to pay commission on such a sale, but at the trial they called no evidence on this point, and asked leave to amend in order to rely on a certain correspondence as proving that their retainer was intended to continue after the letting. Lawrence, J., refused leave, and gave judgment for the defendant. On appeal,

**HELD**—that the Judge was right, and, *Semble*—even if there had been any evidence of a contract, the jury ought to have found a verdict for the defendant.

In commission cases it is not sufficient to show that the introduction was a *causa sine qua non* of the letting or sale; it must be shown to have been an efficient cause. And in the present case the plaintiffs had

**Commission—Continued.**

not proved that they had brought about the sale

MILLAR, SON & Co. v. RADFORD, (1903) 19 [T. L. R. 575—C. A.]

25. *Agreement to Pay Commission on Properties Purchased—Property Introduced to Principal—Promotion by Principal of Company to Purchase Property—Liability of Principal to Pay Commission.*—The defendant brewery desired to acquire some public-houses in a particular district, and agreed to pay the plaintiff commission on all licensed property they might purchase through his instruction. Subsequently the defendants abandoned that idea, and instead promoted a new company, which ultimately acquired certain licensed property originally brought to the notice of the defendants by the plaintiff.

HELD—that as the new company was merely ancillary to the old, the commission was payable by the defendants.

Decision of Channell, J. ((1901) 17 T. L. R. 563), affirmed.

GUNN v. SHOWELL'S BREWERY CO., LD., AND [CROSSWELL'S, LD., (1902) 50 W. R. 659; 18 T. L. R. 659—C. A.]

26. *Amount "One per cent. on the purchase money"—Meaning of.*—A public-house broker wrote saying "We beg to inform you that our regular commission to a vendor for licensed property is 1 per cent. upon the purchase money."

HELD—Per A. L. Smith, L.J., that these words meant 1 per cent. upon the money contracted to be paid, and not on the money actually paid.

Decision of Kennedy, J. ((1897) 14 T. L. R. 39), affirmed.

PASSINGHAM v. KING, (1898) 14 T. L. R. 392—[C. A.]

27. *Commission on "hire earned"—Time Charter-party—Cancellation.*—The plaintiff, acting as broker for the defendants, obtained a time charter-party for their ship upon terms of being paid a commission on all hire earned. During the currency of the charter-party litigation arose between the defendants and the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charter-party, there being no wilful act or default on the part of the defendants in bringing about this result.

HELD—that, upon the true construction of the contract, the intention of the parties was that the plaintiff should not be entitled to commission if the earning of hire was prevented by reason of causes such as had in fact put an end to the charter-party.

WHITE v. TURNBULL, MARTIN & Co., (1898) 3 [Com. Cas. 183; 78 L. T. 726; 14 T. L. R. 401; 8 Asp. M. C. 406—C. A.]

28. *Commission Payable on Purchase being Completed—When Purchase deemed to be Completed.*—The defendants, who were mortgagees of an estate, agreed to pay to the plaintiff a commission of 3 per cent. on the purchase-money of the estate, with an additional 2 per cent. in the event of the purchase being completed by a certain date. It was agreed that the purchase would be considered completed if a definite offer and acceptance were made. Before the specified date a memorandum of agreement between the intending purchaser and the defendants was signed, by which the former undertook to send professional persons to verify the particulars of the property, and, provided he received a satisfactory report, he undertook to enter into a formal contract for the purchase of the estate for a named sum. The contract for the purchase was not signed until some time after the specified date. In an action to recover the 2 per cent. commission,

HELD—that, as the memorandum of agreement contemplated a formal contract, the terms of which would require settlement, there was no definite offer and acceptance made, on or before the specified date, and the 2 per cent. commission was not payable.

HENRY v. GREGORY, (1905) 22 T. L. R. 52—[Walton, J.]

29. *Commission payable when and if the Purchase is Completed by Private Treaty—Contract Signed and Deposit paid—Purchaser unable to Complete—Vendor releasing Purchaser and retaining Deposit—Commission not payable.*—By the terms of a commission note the plaintiff was to receive a commission if he introduced a purchaser of the defendants hotel "when and if the purchase is completed by private treaty."

He found a person who signed a contract and paid a deposit; but subsequently the purchaser failed to complete and was released from the contract, the defendant retaining the deposit.

HELD—that the terms of the note meant that the purchase must be completed in the ordinary sense of the word by payment of the price, and that the plaintiff was not entitled to commission.

Decision of Div. Ct. (52 W. R. 478; 90 L. T. 159) reversed.

CHAPMAN v. WINSON, (1904) 53 W. R. 19; 91 [L. T. 17; 20 T. L. R. 663—C. A.]

30. *Dishonest Agent—Right to Commission in Transactions where Agent acted Honestly.*—The plaintiffs, who were manufacturers of matches in Norway, appointed the defendant their agent in the United Kingdom for the sale of their matches upon the terms that the defendant should not sell matches for any other firm. The defendant during his agency on several occasions, instead of forwarding the original invoices for the matches to the purchasers, kept them and

**Commission—Continued.**

sent invoices of his own at a higher price, and retained the difference between the two prices for himself, and he also sold to the plaintiffs' customers matches manufactured by other firms. The plaintiffs claimed on account of the secret profit so made by the defendant, and also contended that, as the defendant had acted dishonestly in some of the transactions, he was not entitled to be paid any commission at all.

**HELD**—that the defendant must account for the secret profit; but that, as the transactions were severable, he was entitled to commission upon those transactions in which he had acted honestly, but not upon those transactions in which he had made a secret profit.

**NITEDALS TAENDSTIKFABRIK v BRUSTER**, [1906] 2 [Ch. 671; 75 L. J. Ch. 798; 22 T. L. R. 724—Neville, J.]

**31. Introducing Purchaser—Purchaser accepted—Default of Purchaser—Liability of Principal.**—The plaintiff retained the services of the defendant to introduce a purchaser, giving him the following commission note: "26th April, 1899, 48 and 50, Howland Street, Tottenham Court Road I agree to accept a sum of £1,150 for the above property, and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of £1,150 without deduction, except of course apportionments of outgoings. Completion within a month, and a deposit of 10 per cent. to be paid over. Signed C. W. Beale. To Messrs. Henry Bond and Son." The defendant made a contract dated 9th July, on behalf of the plaintiff, with D. R. for the purchase of the houses for £1,250. He paid a deposit. D. R. did not complete the purchase, and owing to his default the sale went off. The plaintiff brought an action to recover the deposit. The defendant by his counter-claim claimed £100 as commission.

**HELD**—that the defendant was not entitled to the £100.

Decision of the Divisional Court ((1900) 16 T. L. R. 311) reversed.

**BEALE v. BOND**, (1901) 84 L. T. 313; 17 T. L. R. [280—C. A.]

**32. Introducing a Purchaser—Possession within reasonable Time.**—When a person employs a house agent to sell the lease of a house of which he is in occupation, and nothing is said about going out of possession, there is an implied promise to do so within a reasonable time.

Decision of Bruce, J. (15 T. L. R. 41; 79 L. T. 413), affirmed.

**NOSOTTI v. AUERBACH**, (1899) 15 T. L. R. 140—[C. A.]

**33. Land—"In the event of Business ensuing"—Introduction of Intending Purchaser.**—The plaintiffs wrote to the defendant saying

that they were seeking an unfurnished house in Sussex for Mr. G. and the particulars of what he wanted, and adding, "Can you send us particulars of anything suitable? We presume you will divide commission with us as usual." The defendant, in reply, sent particulars of a property, and added, "In the event of business ensuing, I shall be only too pleased to share with you my commission." Negotiations which ensued as to the property, of which particulars were sent by the defendant, fell through. Negotiations were afterwards entered into between Mr. G. and the defendant with respect to another property, belonging to Mr. T., which resulted in a contract for sale of that property to Mr. G. The sale, however, went off, and Mr. T. paid the defendant £144 and costs. The plaintiffs sought to recover one-half of the £144.

**HELD**—that as Mr. T. had paid commission to the defendant, it did not lie in the defendant's mouth to say that the commission was not paid in consequence of the introduction of Mr. G.

**BEAL & MYRTLE v. CARTER**, (1900) 16 T. L. R. [240—Phillimore, J.]

**34. Letting Farm—Commission on Value of Farm Stock—Stock Paid for at Recent Valuation.**—The defendant employed house and estate agents to find a tenant for a house and shooting with the option of a farm and the stock at valuation. The stock had been only recently valued. It was agreed that the person who eventually became tenant of the house, shooting and farm should take the farm stock and crops at the recent valuation. The house and estate agents claimed commission on the taking over of the farm stock without making any valuation.

**HELD**—that the inference was that the defendant would pay the usual terms, and that the charge was reasonable though not customary in the legal sense.

**TURNER v. REEVE**, (1901) 17 T. L. R. 592—[Channell, J.]

**35. Misstatement by Principal to Agent—Failure of Negotiations—Quantum meruit.**—Where an agent is employed to find a partner on commission, and his employer makes a statement to him which is to be the basis on which the agent is to go to work, if it turns out that that statement, though honestly made, is inaccurate, which inaccuracy causes a person to withdraw who otherwise would have been willing to enter into the partnership, then the agent is entitled to claim his commission.

The plaintiffs claimed commission on the introduction of a partner to the defendant.

**HELD**—that, on the facts, the defendant had not made a misstatement to the plaintiff, which caused the contract of partnership to go off, and that the plaintiff was not entitled to claim commission or a *quantum meruit*.

**SPIERS & BEVAN v. GLUCK**, (1901) 17 T. L. R. [236—Kennedy, J.]

*Commission—Continued.*

36. *Music-hall Artist—Future Engagements at named Hall—Hall pulled down and re-built.*—The defendant, a music-hall artist, agreed to pay the plaintiffs, who were variety agents, a commission on all future engagements at a named music-hall. The hall was pulled down and re-built, subsequently to which the defendant was engaged there.

**HELD**—that the defendant had expressly agreed that for the purposes of commission all future engagements at the named hall should be treated as referable to the original introduction.

**HELD**—also, that notwithstanding the pulling down and re-building, the hall was identifiable with the one named.

AUCKLAND v. COLLINS, (1898) 14 T. L. R. 348—  
[Div. Ct.]

*And see THEATRES, ETC.*

37. *Payable on all Business done with Customers introduced by Agent—Termination of Agency—Subsequent Business—Breach of Contract—Damages.*—The plaintiff was employed by the defendants as agent to introduce customers, upon the terms that he should be paid a commission on all business done by the defendants with the customers introduced by him. The plaintiff introduced customers, and business resulted from such introductions, upon which commission was paid. Subsequently the defendants terminated the employment of the plaintiff, but continued to do business with customers who had been introduced to them by the plaintiff during the period of his employment. The defendants contended that they were not liable to pay commission to the plaintiff on such business.

**HELD**—that there had been a breach of the contract under which the plaintiff had been employed, for which breach the defendants were liable to pay a lump sum as damages; that the damages were such a sum as the plaintiff might reasonably have expected to have earned if his relations with the defendants had continued; that in assessing the damages regard must be had to the chances of human life, the vicissitudes of trade, the probability of the customers continuing to deal with the defendants, and other similar circumstances.

FAULKNER v. COOPER & Co., LD., (1899) 4 Com.  
[Cas. 213—Mathew, J.]

38. *Transactions taken out of Agent's Hands—Right to Commission.*—A house agent is entitled to commission although the transaction has been taken out of his hands and been settled without his direct intervention in regard to the final contract, if he introduced the parties as buyer and seller, and was in fact the *causa causans* of the sale.

ROBERTSON v. BURRELL, (1899) 6 S. L. T. 449—  
[per Lord Kincairney, Ct. Sess.]

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39. *Traveller—Termination of Employment—Notice—Commission on Business done subsequent to Termination.*—In 1896, by an agreement in writing, the plaintiff was engaged by the defendants to represent them in the sale of their goods in certain specified towns, on the terms that the plaintiff was to receive a commission on all business done by the defendants through orders obtained by the plaintiff. The agreement contained no stipulation as to the length of time during which the plaintiff's engagement was to last, nor did it provide for the termination of the engagement by notice. The defendants wrote to the plaintiff in July, 1899, that after the 15th December, 1899, they should no longer require his services.

**HELD**—that the notice given was sufficient, and that the plaintiff was not entitled to be paid commission on business done by the defendants after the engagement had been terminated.

BARRETT v. GILMOUR, (1901) 17 T. L. R. 292;  
[6 Com. Cas. 72—Phillimore, J.]

40. *Dismissal—Right to Recover Commission on Orders obtained through introduction after Dismissal.*—Under an agreement the plaintiff was appointed agent for the defendant. He was to receive 2½ per cent. Commission on all orders from customers whom he introduced to the defendant, and it was provided that the agreement might be terminated by mutual consent, or six months' notice being given by either side. Having been dismissed by the defendant, the plaintiff brought an action claiming, not only commission up to the time of his dismissal, but also commission on orders obtained through his introduction after his dismissal.

**HELD**—that this he was not entitled to receive.

KELLY v. CROFT, (1898) 14 T. L. R. 348—Div. Ct.

(b) *Secret Commissions, etc.*

41. *Agreement by Vendor to pay Commission to Undisclosed Purchaser's Agent—Claim by Purchaser to set off Agent's Commission.*—The plaintiff was the owner of certain mineral rights in British Columbia, and he agreed with one Govan that Govan should have the option of finding a purchaser for the property, and that he would pay him, if successful, 10 per cent. of the price obtained from the purchaser. Govan succeeded in arranging a sale of the property to the defendant syndicate, of which, unknown to the plaintiff at the time, he was a director, and for whom he acted as agent in the transaction. Before the contract was entered into, however, and before the commission had become payable, the plaintiff learned Govan's position with regard to the defendants.

**HELD**—that the plaintiff having completed the contract without disclosing to the syndicate the agreement to pay commission to their agent, any part of the commission still in the plaintiff's hands could be recovered by the defendants.

**Commission—Continued.**

By a second agreement between the plaintiff and Govan, made before the commission became due, it was agreed, in consideration of an immediate payment, that Govan should accept a less commission than he was entitled to under the original agreement. The syndicate subsequently became aware of this second agreement, and they demanded and received from Govan, in satisfaction of all claims from him, the amount he had received from the plaintiff.

**HELD** (reversing the decision of Bigham, J.)—that the defendants had not lost their remedy by their conduct after they had discovered the real facts of the case. Neither were they bound by the terms of the second agreement between the plaintiff and Govan as to a reduction of the amount of the commission; and therefore, notwithstanding that second agreement and their demand and receipt from Govan of the reduced amount of the commission paid him, they were entitled to recover the balance from the plaintiff.

**GRANT v. GOLD EXPLORATION AND DEVELOPMENT [SYNDICATE, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150, 48 W. R. 280; 82 L. T. 5; 16 T. L. R. 86—C. A.]**

**42. Bribe by Seller to Agent of Buyer—Extent of Influence of Bribe on Agent immaterial—Conflict of interest and Duty—Rescission of Contract.**—Plaintiff was a horse-dealer. The defendant instructed a veterinary surgeon to look out for a pair of horses; the latter told him of a pair in the hands of the plaintiff, and the defendant employed him to examine the horses and give a certificate as to their soundness. The horses were certified as sound, and the defendant sent a cheque for their price. The horses were found to be unsound; they were sent back, and the cheque stopped. The veterinary surgeon had, in fact, accepted the offer of money from the plaintiff. An action was brought on the cheque.

**HELD**—that what occurred was conclusive evidence of a bribe, and was sufficient to vacate the certificate and the sale which depended on the certificate. In such a case it is an immaterial inquiry to what extent the bribe or the offer of it influenced the person to whom it was given or offered. "No man should be allowed to have an interest against his duty." *Thompson v. Havelock* (1808), 1 Camp. 527.

**SHIPWAY v. BROADWOOD, [1899] 1 Q. B. 369; 68 [L. J. Q. B. 360; 80 L. T. 11; 15 T. L. R. 145—C. A.]**

**43 Commission paid by Principal—Secret Commission paid by Other Party—Right of Principal to Recover both Commissions.**—A principal, who has employed an agent to sell property for him, and has paid a commission to the agent on the sale, on discovering that the agent has received a secret commission from the purchaser, is entitled to

recover from the agent such secret commission and also the commission which he himself has paid.

*Salomons v. Pender* ((1865) 3 H. & C. 639; 34 L. J. Ex. 95) followed.

**ANDREW v. RAMSAY & Co, [1903] 2 K. B. 635; [72 L. J. K. B. 865; 89 L. T. 450; 19 T. L. R. 620; 52 W. R. 126—Div. Ct.]**

**44. Confidential Relationship and Information—Agent using such Information to obtain a Concession for Himself—Trustee for Principal—Purchaser from Agent with Notice of his Position.**—The plaintiffs appointed M. as manager of their mining properties in Africa under an agreement, whereby he was to keep all the secrets of the company, and promote its interests to the best of his ability. Amongst other work he had to interview native chiefs, and collect evidence, for the purposes of a dispute between the company and T. as to the validity of the company's concessions. M. made use of the information so obtained, and of his association with the natives, to obtain for himself valuable concessions on the company's reef just outside their present boundaries.

**HELD**—that he was a trustee for the company of these concessions.

*Aas v. Benham* ([1891] 2 Ch. 244; 65 L. T. 25 (C. A.)) followed.

M. had agreed to sell the concessions to T.

**HELD**—that T., who knew M.'s position, and had paid nothing under his agreement, had no better title than M.

**TARKWA MAIN REEF, LD. v. MERTON AND [ANOTHER, (1903) 19 T. L. R. 367—Eady, J.]**

**45. Confirmation by Principal—Necessity for full knowledge of the Facts.**—A principal who discovers that a secret commission has been paid to his agent may repudiate the contract entirely, or he may elect to adopt it; but in order to prove such adoption, and hold him to the contract, the other party must show that the acts on which he relies for the purpose were done by the principal with a full knowledge and appreciation of the circumstances.

Decision of *Bruce, J.* (88 L. T. 286; 19 T. L. R. 293), reversed.

**BARTRAM & SON v. LLOYD, (1904) 90 L. T. 357; [20 T. L. R. 281—C. A.]**

**46. Discounts—Usage to take—Right of Agent to Remuneration.**—The rule laid down in *Andrew v. Ramsay & Co.* ([1903] 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 19 T. L. R. 620—Div. Ct. No. 43, *supra*) does not apply to an honest agent receiving improperly but innocently some commission in a matter collateral to the main object of his employment.

The plaintiff employed the defendants, who were auctioneers, to sell for him by auction certain pictures and other articles upon the

**Commission—Continued.**

terms that they were to be paid a commission of 5 per cent. on all lots sold, the *minimum* commission to be £20, and also all out-of-pocket expenses in addition, which included advertisements and printing catalogues and posters. The printers employed by the defendants to print the posters and catalogues allowed the defendants, as they were auctioneers, a trade discount of 10 per cent., which they would not have allowed to ordinary customers. The defendants also received a discount on the newspaper advertising account. The defendants charged the plaintiff the full amount of these two accounts without deducting the discounts. In an action to recover from the defendants the two sums allowed as discount and also the £20 *minimum* commission which had been paid, the defendants proved that there was a long-established usage or practice among auctioneers to receive these discounts, but it was admitted that no mention of the discounts was made to the plaintiff, and his evidence was that he did not know of any such usage or practice as to the printing discount, though he knew that there was such a practice with regard to advertisement accounts. The defendants, in taking the discounts, acted as the Court found honestly, and in reliance upon the usage or practice.

**HELD**—that, as under the contract the defendants were only entitled to charge out-of-pocket expenses for printing and advertising, they must account to the plaintiff for the discounts, but that the plaintiff was not entitled to recover the £20 paid as commission.

HIPPESLEY v. KNEE BROS., [1905] 1 K. B. 1; 74 [L. J. K. B. 68; 92 L. T. 20; 21 T. L. R. 5—Div. Ct.]

**47. Evidence of Motive — Presumption against Briber—True Price of Goods.**—If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal, and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law. The Court will not allow evidence to be gone into as to the motive.

The Court will presume in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable.

If the agent be a confidential buyer of goods for his principal from the briber, the Court will, it seems, assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it

The bribe when quantified can be recovered as money had and received.

HOVENDEN v. MILLHOFF, (1900) 83 L. T. 41; [16 T. L. R. 506—C. A.]

**48. Paid by Vendor to Purchaser's Agent—Conflict of Interest and Duty—Right to Rescind—Knowledge of Purchaser's Solicitors.**—The rule that a purchaser can rescind a contract of sale, entered into by his agent on his behalf, on the ground that the agent has received a secret commission from the vendor, only applies where the agent has by reason of the receipt of the commission an interest conflicting with his duty to his principal.

Therefore, where one of the purchasers of land, who acted as agent for all the purchasers in negotiating the purchase, received a commission on the amount of the purchase-money from the vendor, but his interest was to obtain the land as cheaply as possible:—

**HELD**—that the purchasers were not entitled to rescind. Knowledge of the solicitors, acting for the purchasers in the matter, of the commission, such knowledge having been acquired by them while acting in the matter, binds the purchasers.

ROWLAND v. CHAPMAN, (1901) 17 T. L. R. 669—[Buckley, J.]

**49. Secret profit—Forfeiture of Commission—Concealment of Material Facts—Damages**—A house agent employed to sell property concealed from the owner a material fact, viz., that the local authority desired to buy some of the property, and also made a secret profit.

**HELD**—that he had forfeited his commission and that the owners were entitled also to damages.

PRICE v. METROPOLITAN HOUSE INVESTMENT AND [AGENCY Co., (1907) 23 T. L. R. 630—C. A.]

**50. Sub-Agent recognised by Principal—Sub-Agent taking Secret Commission—Principal liable to Agent for agreed Commission**—A company employed the plaintiffs to negotiate a debenture issue in return for a commission: the plaintiffs employed a sub-agent, who was to receive a share of such commission, and who was recognised by the company as their agent in the subsequent negotiations. The sub-agent procured a guarantee society to place the debentures; but it was afterwards discovered that such society paid him a commission, and were liable to pay him further commission on any future premiums received by them from the company.

**HELD**—(1) that the company must pay to the plaintiffs the agreed commission.

(2) that, as the sub-agent was either the defendant's agent or in a fiduciary position towards them, the defendants were entitled to recover from him the commission already received by him, and were also entitled to a declaration of their right to any further commissions received by him.

**Commission—Continued.**

Decision of Kennedy, J. (20 T. L. R. 329; 9 Com. Cas. 186), affirmed.

POWELL AND THOMAS v. EVAN JONES & Co.,  
[1904] 21 T. L. R. 55; [1905] 1 K. B. 11;  
74 L. J. K. B. 115; 53 W. R. 277; 92 L. T.  
430; 10 Com. Cas. 36—C. A.

**IV. LIABILITY OF AGENT.**

51. *Broker wrongly informing Principal that Contract concluded—Liability of Broker—Measure of Damages.*—Where an agent makes an incorrect statement to his principals that he has concluded a contract on their behalf, the measure of damages is the loss actually sustained by them, and does not include profits which they might have made if the statement had been true.

*Cassaboglou v. Gibbs* (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538; 32 W. R. 138; 48 L. T. 850—C. A.) approved.

A broker negotiating a contract between A. and B. wrote to each of them that a contract had been concluded on their respective terms; he had, in fact, slightly varied A.'s terms, intending to himself take the risk of the difference.

B. at once repudiated the contract on the ground that he had made no firm offer. In an action by A. against the broker for misrepresenting to him that a binding contract had been concluded,

HELD—that the broker was liable only for A.'s outlay in telegrams, etc., and the costs of an action brought by him against B. and discontinued.

Decision of Ct. of Sess. ((1903) 6 F. 64) varied.

RIDERI AKTIEBOLAGET NORDSTJERNAN v. SALVE-  
[SEN. [1905] A. C. 302; 74 L. J. P. C. 96;  
92 L. T. 575—H. L. (E.)

52. *Contract on Behalf of a Company not in Existence—Liability of Agents.*—Parliamentary agents, who had given an order to a newspaper for the insertion of an advertisement of an intended application to Parliament for the incorporation of a company to construct a railway,

HELD—personally liable on the ground that they had contracted on behalf of a company not in existence.

WILSON & Co. v. BAKER, LEES & Co., (1901)  
[17 T. L. R. 473—Div. Ct

53. *Undisclosed Principal—Election.*—The defendant was an architect engaged by building owners for the rebuilding of two public-houses, and he invited the plaintiffs to give estimates for lamps, referring in his letters to his "clients," but not naming them. The plaintiffs sent him estimates in his own name, and in their letter referred to "your clients," and afterwards the defendant ordered the goods without stating that he did so as agent.

HELD—that the defendant by making the contract in his own name without naming his principals, and without expressly excluding his liability, had made himself personally liable, and that the plaintiffs, by endeavouring to get the money from the builders and the building owners to whom the defendants had referred them, had made no election exonerating him.

BEIGHTHEIL & YOUNG v. STEWART, (1900) 16  
[T. L. R. 177—Bigham, J.

54. *Liability to Account—Unexplained Deficiency in Stock.*—A., the manager of a branch shop, was supplied by his employer with goods marked and invoiced at selling prices. A. gave receipts for goods so delivered to him. At a periodical stocktaking at the branch shop an unexplained deficiency of goods worth £62 was discovered.

HELD—that, although there was no evidence of dishonesty or negligence on A.'s part, yet, the cause of deficiency being unexplained, A. was liable to his employer for the £62.

TYLER v. LOGAN, (1905) 7 F. 123—Ct. of Sess.

**V. LIABILITY OF PRINCIPAL.**

55. *Company—Receiver Appointed by Trustees for Debenture-holders—Winding-up Order—Goods ordered by Receiver after Winding-up Order—Liability of Trustees.*—A company conveyed all their property to trustees for debenture-holders, by a deed which gave the trustees power, in certain events, to appoint a receiver, who should carry on the business as agent for the company. The trustees appointed a receiver, stipulating that he should pay all moneys received to an account at their bank, and that all cheques drawn should be countersigned by the solicitor to the trustees, who was also chairman of the company.

An order to wind-up the company was made, and a liquidator was appointed, but he did not interfere in any way with the business, which was still carried on by the receiver.

HELD—that the principle of *Cox v. Hickman* (8 H. of L. Cas. 268) applied, and that the trustees were not liable, as principals of the receiver, for the price of goods ordered by him after the date of the winding-up order.

Judgment of the Court of Appeal reversed.

GOSLING v. GASKELL, [1897] A. C. 575; 66  
[L. J. Q. B. 848; 77 L. T. 314; 13 T. L. R.  
544; 46 W. R. 208—H. L. (E.)

56. *Election—Action and Judgment against Agent—Judgment set aside—Right to Proceed against Principal.*—Two persons were sued in the High Court for the price of goods supplied. Judgment was obtained by default against one, and the other had leave to defend, and the action was remitted to the County Court. At the trial the



**Liability of Principal—Continued.**

County Court Judge found as a fact that the debt was contracted by the former solely as agent for the latter, and that the plaintiff had given credit to the latter alone, and he adjourned the case to enable an application to be made to set aside the judgment against the agent. This was accordingly done, and the judgment was set aside and the action against both defendants was remitted to the County Court. At the second trial the County Court Judge entered judgment for the agent and against the principal.

**HELD**—that the plaintiff by signing judgment against the agent had conclusively elected to proceed against him; and there was no power to set aside that judgment so as to revive the right of the plaintiff to proceed against the principal.

CROSS & Co. v. MATTHEWS & WALLACE, (1904)  
[20 T. L. R. 603; 91 L. T. 500—Div. Ct.]

**57. Fraud of Agent—Two Innocent Parties—Sale by Person not Owner—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21.**—The plaintiffs were importers of timber, who carried on business at an office in the City, and they were accustomed to store timber imported by them at the Surrey Commercial Docks, the timber being delivered by the dock company upon their orders as required to their customers. By a document they authorised the dock company to accept all transfer or delivery orders which should be signed on their behalf by C., their confidential clerk; and this document was sent to the dock company in a letter, which stated that the plaintiffs had made arrangements whereby in future C. would sign delivery orders on behalf of and in addition to the other members of the firm. C., by means of orders signed by him, obtained possession of a number of small lots of timber belonging to his employers at the docks, and sold them to the defendants. It was admitted that the defendants purchased the timber in good faith, believing that their vendor was entitled to sell it to them. The plaintiffs sued the defendants on the ground that they for a period of four years over which the sales extended, had detained timber belonging to the plaintiffs.

**HELD**—that C. simply stole the plaintiffs' goods and sold them to the defendants, and the defendants' title was not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike; that the defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; that the plaintiffs were not, therefore, precluded from denying C's authority to sell; and that the plaintiffs were entitled to recover the value of the timber from the defendants.

Decision of C. A. ([1901] 2 K. B. 697; 70

L. J. K. B. 985; 49 W. R. 673, 85 L. T. 264; 17 T. L. R. 689) reversed.

FARQUHARSON BROTHERS & Co. v. KING & Co.,  
[1902] A. C. 325; 71 L. J. K. B. 667; 51 W. R. 94; 86 L. T. 819; 18 T. L. R. 665—  
H. L. (E.)

**58. Fraud of Agent—Scope of Employment—Benefit to Principal.**—A principal is liable for the fraud of his agent while acting within the scope of his employment, and also to the extent to which he may be *lucratus* [benefited] by the agent's fraudulent acts outside the scope of his employment.

HOCKEY v. CLYDESDALE BANK, (1898) 1 F. 119; 36 [S. L. R. 120, 6 S. L. T. 269.]

**59. Undisclosed Principal—Baptist Minister—Appointment of—Deacons of Church.**—The plaintiff was appointed the minister of a Baptist church by a document signed by the defendants, who were four deacons of the church. The document stated that the defendants, as deacons of the church, "do now invite you to the pastorate (authorised by a unanimous vote at our last church meeting, also at our finance committee meeting a unanimous vote was recorded and a good majority of the congregation) at a present salary of 25s. per week. We regret to state that our present income will not warrant anything higher now, but we hereby promise that if the dear Lord shall prosper us financially you shall be benefited thereby." The pastorate was determinable on three months' notice. The plaintiff acted as treasurer and paid himself his salary out of the funds in his hands. Upon notice being given to terminate the pastorate, the plaintiff sued the defendants to recover the last quarter's salary, upon the ground that they had contracted as agents for an undisclosed principal.

**HELD**—that the defendants were not personally liable, as the plaintiff took office on the understanding that he was to look only to the funds of the church.

MORLEY v. MAKIN & OTHERS, (1905) 22 T. L. R. 7; 54 W. R. 395—Div. Ct.

**VI. POWERS OF ATTORNEY.**

And see LUNATICS, 25.

**60. Attorney of an Attorney—Egyptian Law.**—Where a power is given by an heir-at-law to an attorney to appoint another attorney for the purpose of administration of the estate of a deceased foreigner, and such power is allowable by the law of the deceased's domicile, letters of administration will be granted to the attorney duly appointed by the first attorney. *Quebec and Richmond Railway v. Quinn* (12 Moo. P. C. C. 232) affirmed and followed.

*Semble*—where a power of attorney expressly authorises the appointment of an attorney by an attorney, the maxim *Delegatus non potest delegare* does not apply.

**Powers of Attorney—Continued.**

IN GOODS OF ABUL HAMID BEY, (1898) 67 L. J. [59; 78 L. T. 202—Jeune, P.

61. *Authority to Charge following Instructions—Charging without Waiting for further Instructions—Charge binding on Donor of Power.*—Plaintiff gave G. authority to buy, sell, charge and transfer in any form whatsoever any estate or stocks, "following his letters of instructions and private advices, which, if necessary, shall be considered as part of these presents." The plaintiff wrote with respect to the investment of money when received, and G. raised the money by mortgage instead of waiting till he received it.

HELD—that the general words authorised G. to bind the plaintiff by what he had done, though further instructions had not arrived; yet nothing could be more unwarrantable as between the plaintiff and G.

DAVY v. WALLER, (1899) 81 L. T. 107—North, J.

62. *Donor of Power unsound of Mind.*—A power of attorney for the transfer of shares executed by a person not at the time capable of understanding its effect is void, and any transfer executed in pursuance of it is a nullity a company acting upon such a transfer renders itself liable to the donor of the power.

A power of attorney executed by a person of unsound mind must be deemed invalid until proved to have been executed during a lucid interval.

DAILY TELEGRAPH NEWSPAPER CO., LD. v. [McLAUGHLIN, [1904] A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233; 20 T. L. R. 674—P. C.

63. *Interpretation—General Words—Matters ejusdem generis with Specific Matters—“Or in connection with my Business”—Power to Borrow—Money borrowed without Authority by Agent paid into Principal's Account—Claim by Lenders for money had and received—Knowledge of Principal—Estoppel.*—The plaintiff was the sole owner of a business carried on under a trading name of Jacobs, Hart & Co., in Melbourne, with an agency in London. The plaintiff's brother, Leslie Jacobs, became the London agent, and the plaintiff executed a power of attorney appointing his brother attorney (among other places) in London "for me in my name or in my said trading name, to purchase and to make and enter into, sign and execute, any contract or agreement with any persons, firm, company or companies, for the purchase of any goods or merchandise in connection with the business carried on by me as aforesaid," and "for me and on my behalf, and where necessary in connection with any purchases made on my behalf as aforesaid, or in connection with my business, to make, draw, sign, accept, or indorse any bill or bills of exchange." The plaintiff's brother, purporting to act on behalf of the firm, applied to the defendants

for a loan of £4,000, and produced the power of attorney. Upon the faith of his representations, and without looking at the power of attorney, the defendants granted the loan upon the security of bills of exchange accepted by the plaintiff's firm. They handed the plaintiff's brother two cheques for £2,000, each drawn to the order of the plaintiff's firm, and received from him four bills of exchange to that amount accepted by him as follows: "Per pro. Jacobs, Hart & Co. Leslie R. Jacobs." These cheques were paid into the banking account of the plaintiff's firm in London, and were subsequently drawn out by Leslie Jacobs and applied to his own purposes. The plaintiff brought an action to restrain the defendants from negotiating the bills for the £4,000, upon the ground that they were accepted without the plaintiff's authority. The defendants counterclaimed for the £4,000 as money had and received by the plaintiff.

HELD—that on the construction of the power of attorney it did not include a general power to borrow money; that the actual practice in the business seemed to negative rather than to affirm a general power to borrow for the purposes of the business; that the defendants could not recover the £4,000 as "money had and received" by Louis Jacobs, as they had constructive notice that Leslie Jacobs had no authority to borrow on behalf of Louis Jacobs; that the primary cause of the loss was the neglect of ordinary business precautions by the defendants; that the plaintiff did not know and had not the means of knowledge, while the money remained to the credit of the plaintiff's account, that it was the money of the defendants; and that the defendants' counterclaim failed.

Marsh v. Keating ((1834) 1 Bing. N. C. 198; 2 Ch. & F. 250; 1 Scott, 5; 37 R. R. 75) and Reid v. Rigby ([1894] 2 Q. B. 40; 63 L. J. Q. B. 451) followed.

Decision of Farwell, J. ([1901] 1 Ch. 261; 70 L. J. Ch. 183; 49 W. R. 365; 84 L. T. 112), affirmed.

JACOBS v. MORRIS, [1902] 1 Ch. 816; 71 [L. J. Ch. 363; 50 W. R. 371; 86 L. T. 275; 18 T. L. R. 384—C. A.

64. *Power Coupled with an Interest—Revocability.*—The appellant was by deed appointed the attorney of certain persons who were respectively tenants for life and tenants in remainder of an estate, authorising him to enter into possession and manage the estate, to receive the rents and profits thereof, and after providing for the expenses of management, to pay thereout the debts due by the owners of this estate. The appellant entered into possession, and, with the consent of the tenant for life, he gave to a person who advanced money on mortgage of the estate a personal guarantee to pay the mortgage debt on the day of redemption. The deed did not contain any reference to that guarantee, and did not

**Powers of Attorney—Continued.**

create any charge or lien in favour of the appellant, or any other creditor of the owners of the estate, or form part of the mortgagee's security. The owners served notice upon the defendant revoking his appointment as attorney before the mortgage debt was paid.

**HELD**—(1) that evidence as to the guarantee, since it did not contradict the power, was admissible; but (2) that even if the power was irrevocable, yet, since it was partly a contract for personal service, and could not therefore be ordered to be specifically performed, the defendant could not rely on it as an equitable defence to an action for ejectment, and further (3) that in fact the authority given to the appellant as attorney was not an authority coupled with an interest, and was therefore revocable.

**FRITH v. FRITH**, [1906] A. C. 254; 75 L. J. P. C. [50; 54 W. R. 618, 94 L. T. 383; 22 T. L. R. 388—P. C.

**65. Implied Warranty of Authority—Transfer of Stock—Forged Signature—Bank of England—Liability for Honest Misstatement of Stockbroker—Indemnity to Bank.**—Where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction, whether in the nature of a contract or not, which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

There was produced before the officials of the Bank of England by the appellant, a stockbroker, a power of attorney which purported to have been executed by two persons, F. W. O. and E. O. A sum of consols was standing in the names of those two, and the broker had been instructed by F. W. O., on behalf of himself and E. O., to sell these consols. Following the ordinary course, the broker had to apply for a proper form of power of attorney, and having applied for and obtained the form, the authority was then apparently executed by the two persons in whose names the consols were standing, and the broker in due course produced at the Bank of England this authority. The name of E. O. was forged by F. W. O. At the foot of each power were the words "I demand to act by this letter of attorney." The Bank of England, acting on that demand, did, in pursuance of this power of attorney, perform their statutory duty by allowing the transfer of the stock. The question arose whether there was raised, by implication of law, a warranty by the broker of the authority on which he "demanded" the Bank should act.

**HELD**—that by implication of law such a warranty did arise.

**Collen v. Wright** ((1857) 8 E. & B. 647; 27 L. J. Q. B. 215; 4 Jur. (N.S.) 357; 6 W. R. 123—Ex. Ch.) and **Firbank's Executors v. Humphreys**, (1886) 13 Q. B. D. 54; 56 L. J. Q. B. 57; 35 W. R. 42; 56 L. T. 36—C. A.) followed.

**Decisions of Kekewich, J.** ([1901] 1 Ch. 652; 70 L. J. Ch. 377; 65 J. P. 294; 49 W. R. 391; 84 L. T. 253; 17 T. L. R. 286), and **C. A.** ([1902] 1 Ch. 610; 71 L. J. Ch. 388; 50 W. R. 340; 86 L. T. 248; 18 T. L. R. 341; 7 Com. Cas. 89) (sub-nom. **Oliver v. Bank of England**) affirmed.

**STARKEY v. BANK OF ENGLAND**, [1903] A. C. 114; [72 L. J. Ch. 402; 51 W. R. 513; 88 L. T. 244; 19 T. L. R. 312; 8 Com. Cas. 142—H. L. (E.)

**66. Limits of—To sell Property belonging to Principal—Property held as Mortgagee—Statutory Powers of Sale—Power to give Discharge for Mortgage Money—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21 (4).**—A power of attorney "to sell any real or personal property then or thereafter belonging to the principal, and to receive and give a discharge for any moneys then or thereafter owing to the principal by virtue of any security" does not authorise the attorney to sell property held by the principal as mortgagee under the statutory powers of sale.

The words of sect. 21 (4) of the Conveyancing Act, 1881, "any person entitled for the time being to give a discharge for the mortgage money" refer to the mortgagees, executors, etc., not to an agent, and therefore do not authorise an agent to sell, though he could give a discharge for the debt.

**IN RE DOWSON AND JENKIN'S CONTRACT**, [1904] 2 [Ch. 219; 73 L. J. Ch. 684; 91 L. T. 121—C. A.

**VII. RATIFICATION.**

**67. Contract to Sell by Agent in Name of Principal fraudulently on his own Account—Repudiation by Buyers—Subsequent Ratification by Principal.**—The agent of a principal without authority and fraudulently contracted to sell wheat in the name of his principal, but on his own account. The buyers repudiated the contracts. The principal ratified the contracts. The principal had the means to carry out the contracts.

**HELD**—that, in the absence of fraud on his part, the principal could validly ratify and adopt the contracts notwithstanding the previous repudiation of those contracts by the buyers.

**Bolton Partners v. Lambert** ((1888) 41 Ch. D. 295; 58 L. J. Ch. 425; 37 W. R. 434; 60 L. T. 687) followed.

**IN RE TIEDEMANN & LEDERMANN FRERES**, [1899] 2 [Q. B. 66; 68 L. J. Q. B. 852; 81 L. T. 191—Div. Ct.

**68. Holding Out—Special Agent—Inference of General Agency—Multiplication of Acts as Special Agent.**—B. sold a racehorse to H., a

**Ratification—Continued.**

minor, upon the representation by H. that his mother would pay. On former occasions H. had, to B.'s knowledge, purchased horses for which his mother afterwards paid. His mother allowed H. to keep a pack of hounds at her residence, and paid for his equipment as master. She went frequently to races to see him ride, and was kept informed, when not present, of the results of races in which he engaged. B. sued the mother for the price of the horse. The case was tried twice, owing to a disagreement of the jury; and in the interval between the trials the mother entered into negotiations with B. for the return of the horse, B. making two alternative proposals which the mother agreed to consider; and this incident was relied upon by B. at the second trial as a ratification by the mother of the contract with her son.

HELD—that the facts proved did not amount to evidence of general agency in the son.

HELD ALSO—that no multiplication of acts as special agent can convert a special into a general agent so as to bind a principal in a transaction of this kind.

HELD ALSO—that the negotiations between the trials were not of such a character as to amount to ratification by the mother.

BARRETT v. IRVINE, [1907] 2 Ir. R. 562—C. A.

69. *Intention to act for Another—Undisclosed Principal—Unauthorised Agent.*—A contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, although the intending agent did not disclose at the time of making the contract that he was acting for someone else.

So HELD—by the Court of Appeal (Collins and Romer, L.JJ.; A. L. Smith, L.J., dissenting).

DURANT & Co. v. ROBERTS AND KEIGHLEY, MAXSTED & Co., [1900] 1 Q. B. 629; 69 L. J. Q. B. 382; 48 W. R. 476; 82 L. T. 217; 16 T. L. R. 244—C. A.

70. *Ratification by a person other than the original Principal—Marine Insurance—Custom of Lloyd's—"Taking up a risk."*—An insurance broker at Lloyd's, having an order from his principal to effect a reinsurance on goods for a voyage at a certain premium, obtained a slip from the defendant, an underwriter, at a premium in excess of that authorised. The defendant was not told who the principal was. The broker issued a provisional cover note, but the principal repudiated the insurance. The broker, without informing the defendant, issued a fresh cover note, containing the defendant's name as underwriter, to the plaintiff, who desired to reinsure an interest in the same goods. The defendant subsequently signed a policy in the ordinary Lloyd's form, bearing the same date as the slip.

HELD—that, as the plaintiff was not the principal of the broker at the time when the broker obtained the slip from the defendant, the plaintiff could not ratify the contract made by the broker, and therefore could not maintain an action against the defendant on the policy.

BYAS v. MILLER, (1898) 3 Com. Cas. 39 [—Mathew, J.]

71. *Undisclosed Principal—Unauthorised Agent—Undisclosed Intention of Agent to Act for a Third Party—Ratification by Third Party.*—A contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified by that third party, so as to render him able to sue, or liable to be sued, on the contract.

R. made a contract in his own name to purchase a large quantity of wheat from the respondent. R. bought on his own account and without any authority from the appellants to buy the wheat on joint account with them, but (it was assumed for the purpose of the present judgment) intending that the appellants should have the benefit of the contract on joint account with himself, if they chose to accept it, and hoping and expecting that they would do so. The appellants did afterwards agree with R. to take to the purchase on joint account with him. R. was unable to fulfil his contract, and thereupon the respondents sued the appellants as undisclosed principals.

HELD—that the appellants could not be made parties to nor sued upon the contract, as no ratification by them was possible.

Decision of the Court of Appeal ([1900] 1 Q. B. 629; 69 L. J. Q. B. 382; 48 W. R. 476; 82 L. T. 217; 16 T. L. R. 244) reversed.

KEIGHLEY, MAXSTED & Co. v. DURANT, [1901] [A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527—H. L. (E.).]

**AGREEMENT.**

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**AGRICULTURE.**

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And see MASTER AND SERVANT.

**I. AGRICULTURAL HOLDINGS.**

1. *Agreement to quit and as to Compensation prior to Expiration of Term—Un-*

**Agricultural Holdings—Continued.**

*exhausted Improvements—Agricultural Holdings (England) Act, 1883* (46 & 47 Vict. c. 61), s. 57.]—By a verbal agreement between the tenant of a farm and his landlord, it was agreed that the tenant should, before the expiration of the term quit the farm on a day named within the space of two months, and that, in consideration thereof, the landlord should pay him such sum as might be found by two valuers to be a reasonable compensation in respect of certain unexhausted improvements under four heads, one of them being a matter for compensation under the Agricultural Holdings Act, 1883, the other three being outside the Act.

**HELD**—that, notwithstanding anything contained in the Agricultural Holdings Act, such agreement was valid, and the tenant might maintain an action against the landlord to recover compensation thereunder.

**NEWBY v. ECKERSLEY**, [1899] 1 Q. B. 465; 68 [L. J. Q. B. 261; 47 W. R. 245; 80 L. T. 314; 15 T. L. R. 151—C. A.]

**2. Arbitration—Jurisdiction of County Court to enforce Award—Prohibition—Agricultural Holdings Act, 1900** (63 & 64 Vict. c. 50), s. 2, *Sch. II., Pt. II., cl. 7.*]—An agreement for a tenancy provided that any dispute arising between the parties over any matter or thing contained therein should be determined by arbitrators, each party choosing one, whose joint decision should be binding on both parties.

**HELD** by the C. A. (Barnes, Pres., dissenting)—that upon the terms of the agreement and upon the facts of the case, the arbitration was not under the Agricultural Holdings Acts, and that the Board of Agriculture had no jurisdiction to appoint an umpire under *Sch. II., Pt. II., cl. 7* of the Agricultural Holdings Act, 1900, and that therefore the County Court Judge had no power to make an order under sect. 24 of the Agricultural Holdings Act, 1883, for payment of the amount found due by the award of the umpire, and that prohibition would lie.

**IN RE CUNDALL and VAVASOUR**, (1906) 95 L. T. [483; 22 T. L. R. 802—C. A.]

**3. Arbitration—Statutory Arbitration—“Agreement in writing”—Provision for Arbitration in Lease—Notice of Intended Improvements—Verbal Dispensation with Notice—Agricultural Holdings Acts, 1883** (46 & 47 Vict. c. 61), s. 4; and 1900 (63 & 64 Vict. c. 50), s. 2, *Sch. II.*]—A clause in an agricultural lease provided that on its expiration the tenant's claim for compensation in respect of manure and feeding stuffs should be referred to two arbitrators.

**HELD**—that this was not such an “agreement in writing” as was contemplated by *Sch. II., Pt. II., ss. 1, 4*, of the Agricultural Holdings Act, 1900, and that the Board of Agriculture had no power under those sections to appoint an arbitrator to act with

one appointed by the other party to the lease.

**Semble**—The tenant's claim in respect of manure and feeding stuffs was by the express provision excluded from a general arbitration under the Act.

**Semble**—An agreement “dispensing with notice” of intended improvements within the meaning of the section corresponding to sect. 4 of the English Act of 1883 need not be in writing.

**OGILVY v. ELLIOT**, (1906) 7 F. 1115—Ct. of Sess.

**4. Compensation for Improvements—Agreement by Tenant to Consume on the Farm all Hay and Straw arising therefrom—Loss by Fire—Agricultural Holdings Act, 1900** (63 & 64 Vict. c. 50), s. 2.]—By an agreement for the tenancy of a farm the tenant agreed to manage and cultivate the whole of the land in a good and husbandlike manner, keeping the same in good heart and condition, and to stack upon the premises all the crops of hay and corn arising from the farm, and to consume on the farm all the hay, straw, chaff, and turnips, and other green crops arising therefrom, and to carry out and spread upon the farm in regular succession all the dung and manure arising therefrom. During the last year of the tenancy an accidental fire burnt down the stacks of hay and corn on the farm. The tenant having claimed compensation for unexhausted improvements under the Agricultural Holdings Acts, the landlord claimed compensation in respect of the loss of the manurial value of the hay and straw destroyed by the fire.

**HELD**—that the landlord's claim was not maintainable.

**IN RE HULL and LADY MEUX**, [1905] 1 K. B. 588; [74 L. J. K. B. 252; 53 W. R. 289; 92 L. T. 74; 21 T. L. R. 220—C. A.]

**5. Compensation for Improvements—Notice—Determination of Tenancy—Agricultural Holdings Act, 1883** (46 & 47 Vict. c. 61), ss. 1, 7, 9 (6), 54, 61.]—In order to entitle the tenant to claim compensation under the Agricultural Holdings Act, 1883, two months' notice must be given by him to the landlord before the determination of the tenancy. Where a holding consisted of buildings and land, which were to be given up at different times, the tenant gave a notice of his intention to claim, two months before the buildings were to be given up, but it was out of time with regard to the land.

**HELD**—that the buildings did not constitute a holding within the meaning of the Act, and that therefore the notice was bad.

**MORLEY v. CARTER**, [1898] 1 Q. B. 8; 66 [L. J. Q. B. 843; 77 L. T. 337; 14 T. L. R. 7; 46 W. R. 77—Div. Ct.]

**6. Compensation for unexhausted Improvements—Counterclaim by Lessor—Arbitration outside the Agricultural Holdings (England) Act, 1883** (46 & 47 Vict. c. 61)

**Agricultural Holdings—Continued.**

—*Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 12.]—A tenant made a claim for compensation for unexhausted improvements under the *Agricultural Holdings (England) Act, 1883*, and the lessor made a counterclaim in respect of breaches of covenant by the tenant. The tenant and lessor subsequently made further claims against one another, and the matter went to arbitration in the manner provided for by the Act. While the reference was pending, a question arose as to some of the respective claims not having been made within the time prescribed by the Act, and thereupon an agreement was entered into between the parties whereby all matters in dispute between them as stated in the claims and counterclaims were referred to the referees and umpire already appointed under the Act. The result of the arbitration was that the tenant made out her claim to a considerable amount, and the lessor made out her claim to a larger amount, so that the amount awarded to her exceeded that awarded to the tenant by £225 12s.

HELD—that, as there had been a submission to arbitration of matters in difference between the lessor and the tenant outside the Act, the lessor ought to be allowed to enforce the award in the same manner as a judgment or order to the same effect under sect. 12 of the *Arbitration Act, 1889*.

IN RE LLOYD AND TOOTH, (1899) 1 Q. B. 559; 68 [L. J. Q. B. 376; 80 L. T. 394—C. A.]

7. *Cultivation of Land—Agent's Authority to agree to alter—Market Garden Valuation—Claim by Tenant under Agreement—Agricultural Holdings (England) Act, 1883* (46 & 47 Vict. c. 61), s. 57.]—A tenant of a farm finding his farming operations were unsuccessful, in 1887 wrote to the landlord's agent, who was the manager of the estate of which the farm formed part, without any limitation as to his power as such manager, asking whether, if he were to cultivate the land in his occupation as a market gardener, he would be allowed a market garden valuation on quitting the farm. The agent, without express authority from his principal so to do, agreed to this. The tenant accordingly expended large sums of money in the planting of portions of the farm, and in its cultivation as a market garden.

HELD—that the agreement was within the authority of the agent to make, and binding on the landlord; and that sect 57 of the *Agricultural Holdings (England) Act, 1883*, did not deprive the tenant, who claimed nothing under the Act, of the rights he possessed under the agreement to have a market garden valuation made on his giving up his farm.

IN RE PEARSON AND L'ANSON, [1899] 2 Q. B. [618; 68 L. J. Q. B. 878; 63 J. P. 677; 48 W. R. 154; 81 L. T. 289—Div. Ct.]

**8. Notice to Quit—Service of by Registered**

*Letter—Agricultural Holdings Act, 1883* (46 & 47 Vict. c. 61), ss. 28, 33.]—Sect. 28 of the *Agricultural Holdings (England) Act, 1883*, by which a notice under the Act may be served by sending it through the post in a registered letter, applies to a notice to quit in the case of a tenancy from year to year, which by sect. 33 is required to be a year's instead of a half-year's notice.

VAN GRUTTEN v. TREVENEN, [1902] 2 K. B. 82; [71 L. J. K. B. 544; 50 W. R. 516, 87 L. T. 344; 18 T. L. R. 575—C. A.]

**9. Valuation—Provision for Valuation at "Away-going"—Forfeiture of Lease—Effect.**

—The tenant of a Scotch sheep farm stipulated that the landlord or incoming tenant should take over the stock at a valuation "at my away-going."

Before the expiration of the lease it was forfeited for non-payment of rent.

HELD—that the word "away-going" applied only to the legal expiration of the lease, and that the landlord was not bound to take over the stock.

Decision of Court of Session ([1903] 5 F. 359) reversed.

BREADALBANE (MARQUESS OF) v. STEWART, [1904] [A. C. 217—H. L. (Sc.)]

**II. CUSTOM OF THE COUNTRY.**

10. *Crops—Away-Going Crop—Valuation—Deductions.*—Tenants continued in possession of a farm on the terms of a lease dated 5th April, 1893, until the tenancy was duly determined in April, 1897. The lease provided that on the determination of the tenancy the tenants should, in the event of their having duly performed the several stipulations contained therein, be entitled to have an away-going crop of corn not exceeding one-third of the arable land, which away-going crop should be taken at a valuation, to be ascertained in the manner mentioned in the lease. Upon the determination of the tenancy the out-going tenants became entitled to an away-going crop of corn, and disputes arose as to what was meant by an away-going crop of corn, and as to what deduction should be made from its value, and it was agreed that all matters in difference should be referred to arbitration. The umpire raised certain questions for the Court's decision.

HELD—that the stipulations in the lease were wholly independent of the custom of the country. They were stipulations inserted for the benefit of the landlord, giving him in certain cases a right of lien upon the amount of the valuation of the away-going crop, in respect of his claim for damages against the tenants for breaches of covenant, or a right to make a deduction in respect of such claim from the amount of such valuation; and that the valuation was to be ascertained according to the custom of the country in the ordinary and

**Custom of the Country—Continued.**

customary way, and from it should be deducted the compensation in respect of breaches of covenant, if any.

RE AN ARBITRATION BETWEEN CONSTABLE AND [CRANSWICK, (1899) 80 L. T. 164—Div. Ct.

For CUSTOM AS TO AGISTMENT see  
BANKRUPTCY AND INSOLVENCY, 225.

**III. FERTILISERS AND FEEDING STUFFS.**

11. *Invoice—Failure to give—False Invoice—“Causing or Permitting to be False”—Guilty Knowledge—Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), ss. 2, 3 (1) (a), (b).—Mens rea is not a necessary element of an offence under sect. 3 (1) (b) of the Fertilisers and Feeding Stuffs Act, 1893.*

The respondents, being asked by a customer for samples of decorated cotton seed cake meal, submitted samples to their analyst, who certified that the samples contained over 60 per cent. of oil and albuminoids. Believing this to be true, the respondents sent the following letter to the customer: “In reply to your postcard of the 10th inst., we have pleasure in handing you samples of the following. Finest Galveston dec. C. S. cake meal at £6 7s. 6d. per ton. Guaranteed 58 per cent. oil and albuminoids . . . in bags, net cash terms, free rails at Liverpool; and we hope to receive your order.” The customer sent an order for 5 tons of the finest Galveston decorticated cotton seed cake meal, guaranteed 58 per cent. oil and albuminoids, by canal to Minshull Wharf, at £6 7s. 6d per ton, free on rails, and received from the respondents an invoice: “114 bags Galveston decd. cotton cake meal wg. cwt. 101, 1 qr., at £6 7s. 6d. a ton—£32 4s. 1d. S.W. Canal to Minshull Wharf.” The cake was subsequently analysed by the chief inspector of weights and measures, and found to contain only 51 per cent. of oil and albuminoids. The respondents were summoned on two informations—first, for causing and permitting an invoice or description of the stuff to be given to the purchaser which was false in a material particular to the prejudice of the purchaser; and, secondly, with failing to give without reasonable excuse on or before, or as soon as possible after, the delivery of the stuff an invoice stating the name of the article, and whether it was prepared from one substance or seed or from more than one substance or seed.

HELD—(1) that the respondents should be convicted of causing or permitting the invoice or description of the article sold to be false under sect. 3 (1) (b) of the Act; but (2) that the description in the invoice was sufficient.

LAIRD V. DOBELLS, [1906] 1 K. B. 131; 75 [L. J. K. B. 163; 70 J. P. 62, 54 W. R. 506; 93 L. T. 842; 4 L. G. R. 232; 21 Cox, C. C. 66—Div. Ct.

12. *Invoice—False in Material Particular—Manager of Company—Guilty Knowledge—Sample—Analysis—Condition Precedent to Prosecution—Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), ss. 1, 3 (1) (b) (5).—The appellant was the manager in London of a company trading in chemical fertilisers. The company entered into a contract with the Sheppy Glue and Chemical Works, Ltd., for the sale of Thomas’s phosphate powder, and an invoice was sent describing the goods as containing 38 to 45 per cent. of total phosphates. The appellant was prosecuted by the County Council for an offence under sect. 3 (1) (b) of the Act. There was no evidence that he saw the particular invoice sent out, or otherwise knew the contents to be false, it was proved, however, that in the ordinary course of business an invoice would not be sent out without his knowledge.*

HELD—that it is not a condition precedent to a prosecution by a county or borough council under the Act that the samples should be taken, and an analysis made, in accordance with sect. 5 of the Act and the regulations of the Board of Agriculture made thereunder; that the invoice describing the goods as containing 38 to 45 per cent. of phosphates, whereas they only contained 31 per cent., although subject “to conditions printed at the back hereof” as to allowance for variation in quality, was false in a material particular, and that the appellant was rightly convicted of causing or permitting it to be sent.

KORTEN V. WEST SUSSEX COUNTY COUNCIL, (1903) [72 L. J. K. B. 514; 67 J. P. 167; 88 L. T. 466; 19 T. L. R. 354; 20 Cox, C. C. 402—Div. Ct.

**IV. MARKET GARDENS.**

13. *Compensation for “Improvements”—Removable Fixtures—Glass-houses—Orchard—Fruit Trees—Retrospective Effect of Statute—Agricultural Holdings (England) Act, 1893 (46 & 47 Vict. c. 61), ss. 1, 3, 84, 54, 55, 60—Market Gardeners’ Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 4.—The owner of a farm—a purely agricultural holding—granted, in 1887, a lease containing the usual covenants applicable to a small farm and farm-house, and the lease provided by clause (13) that “in the last year of the tenancy . . . the tenant shall also leave gratis for the landlord or his incoming tenant all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering”; by clause (14) that “the tenant may at any time during the said term, at his own cost . . . convert into an orchard so much of the meadow land surrounding the said house as he may think proper”; and by clause (21) that “the Agricultural Holdings (England) Act, 1893, shall not apply to the contract of tenancy.”*

**Market Gardens—Continued.**

Shortly after the lease the defendant converted part of the meadow surrounding the house into an orchard. There were at the expiration of the lease in 1901 upwards of 1,200 trees in the orchard—apples, pears, plums, and cherries—in good bearing condition, which, though not capable of removal, were worth several hundred pounds to anyone taking the farm. The defendant also erected ten glass-houses, in which grapes, peaches, nectarines, tomatoes, and strawberries were grown.

The defendant carried on the trade of a market gardener on the premises with considerable success, and with full knowledge of his landlord. The defendant gave notice to quit at Michaelmas, 1901, and he claimed the right to remove the houses and to have compensation for the orchard trees.

**Held**—(1) that the defendant was entitled to remove the glass-houses by common law, and was not precluded by any covenant in the lease from so doing; and that the word “improvements” in clause (13) did not apply to the glass-houses, as that clause only applied to “similar matters” to tillages; (2) that sect. 4 of the Market Gardeners’ Compensation Act, 1895, gave compensation in respect of improvements made after the Act (*Smith v. Callander* [1901] A. C. 297; 70 L. J. P. C. 53; 84 L. T. 801—H. L. (S.)) [*infra*] followed, (3) that sect. 34 of the Agricultural Holdings (England) Act, 1883, was excluded by the lease; (4) that the landlord’s consent in writing to plant the orchard was given by the lease, and there was nothing in clause (13) which sufficed to deprive the defendant of his statutory right to compensation, and even if there was, then sect 55 of the Act of 1883 applied, and rendered void both in law and in equity the contract depriving him of his right to compensation.

**MEARS v. CALLENDER**, (1901) 2 Ch. 388; 70 L. J. [Ch. 621; 65 J. P. 615; 49 W. R. 584, 84 L. T. 618; 17 T. L. R. 518—Cozens-Hardy, J.

14. *Compensation for Improvements—Retrospective Effect of Statute—Agricultural Holdings (Scotland) Act, 1883* (46 & 47 Vict. c. 62)—*Market Gardeners’ Compensation (Scotland) Act, 1897* (60 & 61 Vict. c. 22), s. 4.]—The scheme of the Market Gardeners’ Compensation (Scotland) Act, 1897, is to amend the schedules as regards market gardens in the Agricultural Holdings (Scotland) Act, 1883, first, as to new market gardens, in cases in which there is an agreement in writing made after the commencement of the Act of 1897 to treat them as market gardens; and, secondly, as to all market gardens in respect of subsequent improvements, provided the landlord has not, after the passing of the Act of 1897, given a written notice that he will not be liable for improvements.

Decision of Second Division of the Court of Session ((1900) 2 F. 1140) affirmed.

**SMITH v. CALLANDER**, [1901] A. C. 297, 70 [L. J. P. C. 53; 84 L. T. 801—H. L. (S.).

15. *Fruit Trees—Agreement as to Compensation—Agricultural Holdings (England) Acts, 1883* (46 & 47 Vict. c. 61), ss. 1, 55, Sch. I.; and 1900 (63 & 64 Vict. c. 50), s. 1, sub-s. 5—*Market Gardeners’ Compensation Act, 1895* (58 & 59 Vict. c. 27), s. 3, sub-ss. 2, 3.]—A fixed sum was specified in a lease of market gardens as compensation for the exercise by the lessor of a power reserved to him by the lease of resuming possession of any part of the land on giving six calendar months’ notice to the lessee.

**Held** (by Stirling and Moulton, L.JJ., Vaughan Williams, L.J., doubting, but not dissenting)—that upon the terms of the particular lease compensation was not payable in respect of fruit trees permanently set out on the land subsequently to January 1st, 1896, when the Market Gardeners’ Compensation Act, 1895, came into operation.

**IN RE SMITH AND THE DUKE OF DEVONSHIRE**, [1906] 22 T. L. R. 619—C. A.

16. *Rates—Glass-houses—“Land”—“Buildings”—Agricultural Rates Act, 1896* (59 & 60 Vict. c. 16), ss. 1, 5, 6, 9.]—The terms “land” and “buildings” in the Agricultural Rates Act, 1896, are mutually exclusive of each other. A market gardener and nurseryman was the owner and occupier of a piece of land rather more than four acres in extent on which fifty-seven glass-houses or green-houses were erected. The area occupied by the fifty-seven houses was rather more than two acres. The rest of the four acres consisted of vine borders, paths and stokeholes.

**Held**—that the market gardener was not an “occupier of agricultural land” within the Agricultural Rates Act, 1896.

Decision of Court of Appeal ([1898] 1 Q. B. 683; 67 L. J. Q. B. 439; 62 J. P. 676; 46 W. R. 401; 78 L. T. 174; 14 T. L. R. 282) affirmed.

**SMITH v. RICHMOND**, [1899] A. C. 448; 68 L. J. [Q. B. 898, 63 J. P. 804; 48 W. R. 115; 81 L. T. 269; 15 T. L. R. 523—H. L. (E.).

**AIR.**

*See* EASEMENTS AND PROFITS A PRENDRE.

**ALE AND BEER.**

*See* INTOXICATING LIQUORS.

**ALIENATION, RESTRAINTS ON.**

*See* HUSBAND AND WIFE; PERPETUITIES; SETTLEMENTS; TRUSTS.



## ALIENS.

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## I. RIGHT TO SUE.

1. *Alien Enemy—Plaintiff adhering to the King's Enemies.*—A British subject adhering to the King's enemies either by voluntarily residing in or by trading in the enemy's country is in the same position as the enemy, and is not entitled to sue in the English courts.

Where the jury found that the plaintiffs at the date of the issue of the writ were adhering to the King's enemies, judgment was entered for the defendant.

NETHERLANDS SOUTH AFRICAN RY. CO., LTD. v. FISHER, (1902) 18 T. L. R. 116—Lawrance, J.

2. *Fatal Accident—Negligence of Steamship Company—Actions by Relations—Alien—Accident outside Three-mile Limit.*—A collision occurred outside the three-mile limit between the C. and the S.F., the ship of the defendants, through which the sons and husband respectively of the four plaintiffs were drowned. The negligence of the defendants was not disputed. None of the deceased or the plaintiffs were British subjects, and the present action was brought under Lord Campbell's Act to recover damages.

HELD—that an action would not lie at the suit of an alien under that statute.

ADAM v. BRITISH & FOREIGN SS. CO., LTD., [1898] 2 Q. B. 430; 67 L. J. Q. B. 844; 79 L. T. 31; 14 T. L. R. 540—Darling, J. (See Davidsson v. Hill, *infra*.)

3. *Fatal Accident—Alien Plaintiff—Negligence of British Subject—Collision between Foreign Ship and British Ship on High Seas—Jurisdiction—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93)—Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95).*—A foreigner, the widow of a foreign seaman killed on the high seas when navigating on board one of the ships of his own country by a collision between his ship and a British ship, can maintain an action in England against the English owners of the British ship for the negligence of their servants in causing the collision and death.

Parliament did intend to confer the benefit of the Fatal Accidents Acts, 1846 and 1864, upon foreigners as well as upon subjects, and certainly, as against an English wrongdoer, the foreigner has a right to maintain his action under those statutes.

ADAM v. BRITISH AND FOREIGN STEAMSHIP CO. ([1898] 2 Q. B. 430, 67 L. J. Q. B. 844; 79 L. T. 31; 14 T. L. R. 540—Darling, J. *supra*) dissented from.

DAVIDSSON v. HILL, [1901] 2 K. B. 606; 70 L. J. [K. B. 788; 49 W. R. 630; 85 L. T. 118; 17 T. L. R. 614; 9 Asp. M. C. 223—Div. Ct.

## II. EXPULSION ORDER.

4. *Expenses of Expulsion—Ship in which the Alien "has been brought to the United Kingdom"—Stowaway—Liability of Master—Aliens Act, 1905 (5 Edw. 7, c. 13), s. 4, sub-s. 2.*—An alien came to England from a foreign port on board an English ship without the knowledge of the master, and upon arrival was convicted under sect. 237 of the Merchant Shipping Act, 1895, and sentenced to imprisonment. An expulsion order was made under the Aliens Act, 1905, by the Secretary of State, who paid the expenses incidental to the alien's departure, and brought an action against the master of the ship in which the alien came to England to recover the amount of the expenses so paid by him.

HELD—that the defendant was liable, as he was the master of the ship in which the alien had been brought to the United Kingdom within the meaning of sect. 4, sub-s. 2, of the Aliens Act, 1905, although he had been so brought without anyone's knowledge.

ATTORNEY-GENERAL v. SUTCLIFFE, [1907] 2 K. B. [997; 76 L. J. K. B. 991; 97 L. T. 373; 23 T. L. R. 711—Bray J.

## III. IN GENERAL.

And see LUNATICS, 37—43.

5. *High Treason—Alien Resident—Allegiance—War with Alien's Country—Territory where Alien Resident Temporarily Evacuated by British Forces—Duty Not to assist Enemy.*—An alien, who is resident in British territory, owes allegiance to the Crown, and his allegiance does not cease if the country of which he is a subject is at war with this country, and temporarily occupies that part of British territory in which the alien resides, and the British forces temporarily retire therefrom; and if, during the temporary evacuation of that portion of territory by the British forces, the alien aids and assists the enemy, he is guilty of high treason.

DE JAGER v. ATTORNEY-GENERAL OF NATAL, [1907] A. C. 326; 76 L. J. P. C. 62; 96 L. T. 857; 23 T. L. R. 516—P. C.

6. *Right of Alien to Question Administrative Acts of Sovereign—Right of to Enter Territories of Another Country.*—An alien is not entitled to question in the Courts of this country an administrative act of the Sovereign, even assuming that that act is a violation of international law and of the municipal law of Scotland. An alien has no right enforceable by action to enter the territories of another country.

POLL v. LORD ADVOCATE, (1897) 35 Sc. L. R. [637—Court of Sess.

**ALIMONY.**

See ACTION, 8 ; HUSBAND AND WIFE.

**ALLEGIANCE.**

See ALIENS, 5.

**ALLUVION.**

See WATERS AND WATERCOURSES.

**ALTERATION OF DOCUMENTS.**

See BANKERS AND BANKING ; BILLS OF EXCHANGE, DEEDS AND OTHER DOCUMENTS ; WILLS.

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**ANIMALS.**

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And see GAME ; INSURANCE ; NEGLIGENCE.

**I. CRUELTY TO ANIMALS**

1. *Cat — Shooting — Failure to Destroy Suffering Animal—Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 2.*—The respondent was charged with unlawfully and cruelly ill-treating a cat contrary to sect. 2 of the Cruelty to Animals Act, 1849. It was proved that the respondent shot at it with a saloon rifle with intent to kill it. The bullet struck it, wounding it severely, and it crawled away out of respondent's view. About thirty minutes later, on the owner of the cat pointing out to the respondent that it was still

alive and in great pain, the respondent destroyed it. The respondent did not call the owner's attention to the injured state of the cat, although he knew to whom it belonged, and although he knew that the animal was severely injured he took no steps to have it attended to or its sufferings alleviated.

HELD—that the respondent had committed no offence against the section, as the use of a saloon rifle for the purpose of shooting at the cat was not cruelty in itself, and that, as the justices did not find that the respondent after shooting the cat failed, with knowledge of what he had done, to do his best to put the animal out of its pain, they were justified in dismissing the summons.

*Powell v. Knight* (1878) 42 J. P. 597 ; 38 L. T. 607 ; 26 W. R. 721 followed.

*Hooker v. Gray*, (1907) 71 J. P. 337 ; 96 L. T. 706 ; 23 T. L. R. 472—Div. Ct.

2. "*Cause*" act of cruelty—*Knowingly advise and counsel—Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 2—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5*—The owner of a horse which was lame consulted a veterinary surgeon as to whether the horse was in a fit condition to work. The veterinary surgeon advised that it was, and that the work would not cause it additional suffering. The owner worked the horse. The veterinary surgeon was summoned under sect. 2 of the Cruelty to Animals Act, 1849, for cruelly ill-treating the horse "by causing it to be worked while in an unfit state." The magistrate found that the defendant knew, when he advised the working of the horse, that to work it in its then state would be an act of cruelty, and, if the defendant had been proceeded against for counselling the act of cruelty, the magistrate would have convicted him, but, as he did not "cause" the act of cruelty, the summons was dismissed. On appeal.

HELD—that the learned magistrate should have convicted, since, by sect. 5 of the Summary Jurisdiction Act, 1848, anyone who counsels the commission of an offence punishable summarily may be proceeded against as a principal.

*BENFORD v. SIMS*, [1898] 2 Q. B. 641 ; 67 L. J. [Q. B. 655 ; 78 L. T. 718 ; 14 T. L. R. 424 ; 47 W. R. 46—Div. Ct.

3. *Cock Fighting—Prevention of Cruelty to Animals Acts, 1849 (12 & 13 Vict. c. 92), ss. 2, 29 ; and 1854 (17 & 18 Vict. c. 60), s. 3.*—A cock is an "animal" within sect. 2 of the Prevention of Cruelty to Animals Act, 1849, and to cause cocks to fight is therefore an offence under the section.

*ALLEN v. SMALL*, (1904) 2 Ir. R. 705—K. B. D.

4. *Conviction — Overstocking five Cows with Milk — One Conviction — Separate Offence with regard to each Cow—Validity—Cruelty to Animals Act, 1849 (12 & 13 Vict.*

**Cruelty to Animals—Continued.**

c. 92), ss. 2, 29]—The appellant was convicted in one conviction for cruelly ill-treating, abusing and torturing five cows by causing the same to be overstocked with milk contrary to sect. 2 of the Cruelty to Animals Act, 1849.

HELD—that an act of cruelty affecting several animals may constitute one offence, and that it was not necessary to have a separate summons and a separate conviction in respect of each cow.

R. v. CABLE, [1906] 1 K. B. 719; 75 L. J. K. B. [381; 70 J. P. 246; 54 W. R. 626; 94 L. T. 772; 22 T. L. R. 438; 21 Cox C. C. 186—Div. Ct.

5. *Dog—Ill-treatment—Intentional Cruelty—The Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), s. 2.]—In order to constitute an offence under sect. 2 of the Cruelty to Animals Act, 1849, the question for the magistrates is not whether there was intentional cruelty, but whether there was cruelty in fact.

DUNCAN v. POPE, (1899) 63 J. P. 217; 80 L. T. [120; 15 T. L. R. 195; 19 Cox C. C. 241—Div. Ct.

6. *Dog—Shooting at—Intention—Intent merely to Frighten—Question of Fact—Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), s. 2.]—A gamekeeper fired at a range of fifty yards at a dog which was frightening pheasants in a field by galloping about, but was not chasing them. The dog was hurt; but the justices dismissed the charge on the ground that the respondent had not been guilty of cruelty within the meaning of the Act, although they found that he did intend to injure it if necessary for the purpose of frightening it away.

HELD—that it was a question of fact whether shooting at such a range and with small shot was “cruelly ill-treating,” and that there was evidence to support the justices’ finding.

Daniel v. James ((1877) 2 C. P. D. 351—Div. Ct.) and Smith v. Williams ((1892) 56 J. P. 840; 9 T. L. R. 9—Div. Ct.) may sometime require reconsideration.

ARMSTRONG v. MITCHELL, (1903) 67 J. P. 329; 88 [L. T. 870; 19 T. L. R. 525; 20 Cox C. C. 497—Div. Ct.

7. *Domestic Animal brought into Proximity to tamed wild Animal—Suspicious Conduct of Wild Animal—Cruelly causing an Animal to be Ill-treated—Evidence of mens rea—Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), s. 2.]—The appellant was convicted by justices under sect. 2 of the Cruelty to Animals Act, 1849, for cruelly causing to be ill-treated an animal, to wit, a pony. It appeared that the appellant was a lion tamer, and part of his performance consisted of driving a roundabout of lions. The roundabout was in a cage, and consisted

of several boats, in each of which was a lion. A pony was introduced into the cage to draw the roundabout, and it appeared that for twelve years the pony had taken part in such a performance on more than three thousand occasions. During one of these performances a lion jumped out of its boat, and, raising itself upon the hind-quarters of the pony, sniffed at it. The appellant drove the lion to its boat, and continued the performance, but as soon as his attention was diverted the lion attacked the pony, causing injuries from which, two days later, it died. Formerly three or four men with iron bars were in readiness on the stage, but now one only was in attendance with a fire hose.

HELD—that there was evidence of mens rea in support of the justices’ decision.

Per Lord Alverstone, C.J., it cannot be laid down as a general proposition of law that the mere bringing of such an animal into the proximity of wild animals that have been tamed amounts to cruelly causing it to be ill-treated within the meaning of the section.

THIELBAR v. CRAIGEN, (1905) 69 J. P. 421; 21 [T. L. R. 745; 93 L. T. 600, 21 Cox C. C. 44—Div. Ct.

8. *Horse—Working in an Unfit State—Guilty Knowledge—Evidence—Prevention of Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), s. 2.]—The appellant was convicted by the justices of causing two horses to be worked in an unfit state under the following circumstances. The horses were under the care of a manager at a farm where the appellant resided, but the appellant himself was much away, and only saw the horses about once a fortnight. There was some evidence that the appellant knew the horses to be out of condition, but there was no evidence to show when that was or how long before they were worked. There was no evidence to prove that he had ever interfered in the way the horses were managed by his manager, or that on the day of the alleged offence he knew of their condition or that they were being worked in an unfit state.

HELD—that the conviction must be quashed on the ground that there was no evidence of any guilty knowledge on the part of the appellant.

GREENWOOD v. BACKHOUSE, (1902) 66 J. P. 519; [86 L. T. 566; 20 Cox C. C. 196—Div. Ct.

9. *Horse Slaughtering—Horse Sold for the Purpose of Slaughtering—Delay in Killing—Not Cutting Hair from Neck—Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), s. 8.]—The respondent, a licensed horse slaughterer, bought a horse for 10s., took it to his horse-slaughtering premises, and entered it in his register as bought to kill. He failed to cut the hair from its neck or to kill it within the prescribed time.

### Cruelty to Animals—Continued.

**HELD**—that the respondent must be convicted, as the horse was sold to him for the very purpose of having it slaughtered, and he knew perfectly well the object with which the horse was sold to him.

**EDGAR v. SPAIN**, (1901) 65 J. P. 502; 84 L. T. [631; 19 Cox C. C. 719—Div. Ct.

10. *Sheep—Branding Nose with Hot Iron—Necessity for Identification—Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), s. 2.]—The respondent, who was a farmer in a mountain district in Wales, used to brand his sheep by marking their noses with a red-hot iron so as to burn the hair away and destroy the hair cells, thus leaving a permanent mark. Upon an information under sect. 2 of the Cruelty to Animals Act, 1849, charging the respondent with having cruelly ill-treated and tortured the sheep, the justices found that branding the sheep with a hot iron as above described caused substantial pain and suffering, that there had been no unnecessary abuse of the sheep; that the practice of branding sheep on the unenclosed mountain lands in certain counties in Wales had existed for a great number of years; and that it was reasonably necessary for the purpose of identifying sheep grazing in large numbers on unenclosed mountain lands, which could not be effectually obtained by earmarking and pitch-marking. They accordingly dismissed the information.

**HELD**—that there was evidence upon which the justices could come to the conclusion that the branding was necessary, and the Court could not interfere.

**BOWYER v. MORGAN**, (1906) 70 J. P. 253; 95 [L. T. 27; 22 T. L. R. 426; 21 Cox C. C. 203—Div. Ct.

## II. DISEASES OF ANIMALS.

11. *Sheep Dipping—Offence—Sheep Dipping (North of England) Order of 1906*.]—The appellant duly obtained an exemption from the provisions of Article 3 of the Sheep Dipping (North of England) Order of 1906, subject to the condition that his sheep should be dipped between September 15th and 30th, 1906. The appellant on September 26th, 1906, dipped his sheep in a sheep dip, but such sheep dip was not a sheep dip approved by the Board of Agriculture and Fisheries, and except by the aforesaid dipping the sheep were not dipped at all between September 15th and 30th, 1906. The appellant was thereupon convicted for that he, on September 26th, 1906, did not dip the sheep in a sheep dip approved by the Board of Agriculture and Fisheries.

**HELD**—that the offence really committed was the non-dipping of the sheep between September 15th and 30th, 1906, in a sheep dip approved by the Board of Agriculture and Fisheries, that the conviction was bad and must be quashed.

**BINGLEY v. QUEST**, (1907) 71 J. P. 443; 97 L. T. [394; 5 L. G. R. 938—Div. Ct.

12. *Sheep-scab—Negligence of Inspector—Liability of Local Authority—Sheep-scab Order, 1898, Arts. 2, 14—Diseases of Animals Act, 1894* (57 & 58 Vict. c. 57), ss. 2, 22, 35 (xiii.).]—A veterinary inspector was appointed by a local authority under the Diseases of Animals Act, 1894, for the purpose of carrying out the provisions of that Act and the orders of the Board of Agriculture made thereunder. The inspector, purporting to act under the Sheep-Scab Order, 1898, made by the Board of Agriculture under the Act, detained a ram belonging to the plaintiff under the mistaken suspicion that it was suffering from sheep-scab. In doing so the inspector was guilty of negligence.

**HELD**—that the inspector was not the servant or agent of the local authority appointed by them to perform duties imposed upon them by the Act, but was appointed to perform duties imposed upon him by the Act, and that the local authority were therefore not liable for his negligence in the performance of those duties.

**STANBURY v. EXETER CORPORATION**, [1905] 2 [K. B. 838; 22 T. L. R. 3; 75 L. J. K. B. 28; 70 J. P. 11; 54 W. R. 247; 93 L. T. 795; 4 L. G. R. 57—Div. Ct.

13. *Swine Fever—Sale of—Taking round Swine in Cart and Offering for Sale—Diseases of Animals Act, 1894* (57 & 58 Vict. c. 57), s. 22, sub-s. xix.—*Markets and Fairs (Swine Fever) Order, 1896*.]—By an order of the Board of Agriculture, dated 11th December, 1896, made in pursuance of sect. 22, subsect. xix., of the Diseases of Animals Act, 1894, "no market, fair, sale, or exhibition of swine shall be held in a district to which this order applies except as expressly authorised by this order," and "a sale of swine (not being in a swine fever infected area) may be held with the licence of the local authority."

The respondent Monk was in charge of a horse and float passing along a highway containing pigs, two of which had been previously ordered, and, whilst so travelling, asked other people if they wanted to buy pigs, and subsequently sold them all to various people. This was not a swine fever infected area, and there had been no licence obtained from the local authority. The magistrates held that there had been no contravention of the order of 1896, and dismissed the information.

**HELD**—(dismissing the appeal)—that the magistrates were right, for, although there was a selling, there was no holding a sale.

**MCLEAN v. MONK**, (1898) 18 Cox, C. C. 686; 62 [J. P. 180; 77 L. T. 663—Div. Ct.

## III. DOGS.

14. *Dangerous Dog—Danger to other Animals—Dogs Act, 1871* (34 & 35 Vict. c. 56),

**Dogs—Continued.**

s. 2.]—The word “dangerous” in sect. 2 of the Dogs Act, 1871, is not to be confined to meaning danger to mankind, and on the hearing of a complaint that a dog is dangerous and not kept under proper control within the meaning of that section, the justices must admit evidence that the dog has attacked and worried sheep.

WILLIAMS v. RICHARDS, [1907] 2 K. B. 88; 76 [L. J. K. B. 589; 71 J. P. 222; 96 L. T. 644; 23 T. L. R. 423—Div. Ct.

15. *Dangerous Dog—Order for Destruction—Form of Order—Conviction for Disobedience—Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2.*—The appellants obtained rules *nisi* for *certiorari* to quash two orders that had been made by justices for the destruction of two valuable dogs, on the ground (1) that the justices could, under sect. 2 of the Dogs Act, 1871, only make an alternative order either for the owner to destroy the animal or to keep the animal under proper control; (2) that the first order was bad in form, since there was no adjudication that the dogs were not under proper control; (3) that the second order was bad, as it wrongly cited the first order.

HELD—discharging both rules—that an order for the destruction of a dangerous dog need not contain an adjudication by the justices that the dog was not under proper control, nor by sect. 2 of the Dogs Act, 1871, need the justices give the owner of the dog the option of keeping the animal under proper control before ordering its destruction; and that the third point was one wholly without merit.

Pickering v. Marsh (1874) 43 L. J. M. C. 143; 22 W. R. 798) followed.

REX v. DYMOCK AND ANOTHER; REX v. MOGER [AND ANOTHER, (1901) 49 W. R. 618, 17 T. L. R. 593—Div. Ct.

16. *Dangerous Dog—Powers of Justices—Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2.*—*Quere* whether justices are entitled to specify the mode of control for a dangerous dog, e.g., to order that it be led by a leash by day, and chained up at night.

REX v. OWEN AND OTHERS, (1907) 52 Sol. Jo. [132—Div. Ct.

17. *Ferocious Character—Tendency to Bite—Scienter.*—In order to render the owner of a dog liable for injuries caused to a person by the bite of a dog it is not necessary to show that the dog has to the knowledge of its owner bitten or attempted to bite someone. It is sufficient to show that, to the knowledge of the owner, the dog is a ferocious dog as regards human beings. The dog need not be ferocious at all times; it is sufficient if the dog is ferocious on certain occasions, as, for instance, when a bitch has pups.

BARNES v. LUCILE, LD., (1907) 96 L. T. 680; 23 [T. L. R. 389—Div. Ct.

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18. *Injury to Cattle or Sheep—Sheep Trespassing—Injury to Sheep while Trespassing—Liability of Owner of Dog—Dogs Act, 1865 (28 & 29 Vict. c. 60), s. 1.*—The plaintiff's sheep were trespassing on the defendant's field, which adjoined the plaintiff's land, and while the sheep were being driven by their owner back to his own field, the defendant's dog, which was in the field where the sheep were so trespassing, worried and killed one of the sheep. The defendant had several times warned the plaintiff to prevent his sheep from trespassing on his land.

HELD—that, under sect. 1 of the Dogs Act, 1865, the owner of the dog was liable for the injury done by his dog to the sheep, although such sheep was trespassing on his land at the time when the injury was inflicted.

GRANGE v. SILCOCK, (1897) 18 Cox C. C. 644; [61 J. P. 709; 77 L. T. 340; 13 T. L. R. 565; 46 W. R. 221—Div. Ct.

19. *“Injury” to Horse Frightened by Dog—Previous Mischievous Propensity in Dog—Scienter—Knowledge of Owner's Son aged Eleven Years—Dogs Act, 1865 (28 & 29 Vict. c. 60), s. 1.*—A horse was frightened by the defendant's dog, thereby causing it to bolt, whereby it sustained damage. The dog before the accident was mischievous to the knowledge of the defendant's son, a boy aged eleven years.

HELD—that the damage done to the horse was an “injury” within sect. 1 of the Dogs Act, 1865, and that the defendant was liable in damages.

ELLIOTT v. LONGDEN, (1901) 17 T. L. R. 648— [Phillimore, J.

**IV. LIABILITY FOR INJURY BY.**

*And see title NEGLIGENCE.*

20. *Bees—Negligence in the Management of Bee-hives—Danger to Persons in the Immediate Neighbourhood—Remoteness of Damage.*—The plaintiff's horse, being stung by the defendant's bees, dragged and severely injured the plaintiff. A jury found that the bees were kept on the defendant's land negligently, in unreasonable numbers, at an unreasonable place, and with appreciable danger to his neighbours, and that at the time of the accident the defendant was removing honey from their hives without exercising due precautions; and they awarded damages.

HELD—that upon the findings of fact the verdict must stand.

O'GORMAN v. O'GORMAN, [1903] 2 Ir. R. 573— [K. B. D.

21. *Feræ Naturæ—Duty to keep secure—Accident caused by action of Person injured.*—A man who keeps a dangerous animal must do so at his peril, and if any damage results, he is, apart from any question of negligence, liable for such damage,

**Liability for Injury by—Continued.**

but if the person who complains of damage has brought the injury on himself he is not entitled to damages. Where the plaintiff goes to see an exhibition of wild animals, finding the door of a stable open, goes in and strokes a zebra, and is pressed by the zebra through a partition and falls into the next stall, where another zebra bites his hand, which has to be amputated,

**HELD**—that even if the fact of the door being open was an invitation to go into the stable, it was not an invitation to stroke the animals, and that there was no evidence to go to the jury.

MARLOR v. BALL, (1900) 16 T. L. R. 239—C. A.

**22. Feræ Naturæ — Rabbits — Deer — Sic utere tuo ut alienum non lædas—Trespass.]**

—In the year 1898 W. came into possession of a demesne where there were rabbits and deer, which trespassed upon adjoining lands in the occupation of B., doing considerable damage to his crops. W.'s predecessor had, on two occasions, let loose foreign rabbits, with a view to the improvement of the breed, and W. had, since he entered into possession, trapped the rabbits for profit, and exported them to England, but had done nothing to improve them or increase their numbers. Rabbits bred in considerable numbers on B.'s lands as well. The deer, which at one time had been confined within a walled deer-park in the demesne, broke loose in the year 1893, through a temporary breach in the wall, and only a portion were recaptured. The remainder had since been wandering about the demesne, breeding there, and trespassing continually on B.'s lands, but always returning to the demesne. W., with his friends, occasionally shot the deer for sport; and, in response to B.'s complaints, told him that he might shoot them; and, in fact, gave it out generally in the neighbourhood that he desired that anyone who could shoot them might do so. At the same time he kept a wood-ranger, whose duty it was to look after the deer, and his predecessor had occasionally fed the deer in winter time with hay, laurels, and oats.

**HELD**—that W. was not liable in respect of the damage done by trespass of the rabbits.

**HELD** (Boyd, J., dissenting)—that there was evidence to support the finding of the jury that the deer were W.'s deer, that they were tame and "kept" by W., and under his control; and that W. was liable upon that finding for any damage done by the deer to B.'s land and crops.

BRADY v. WARREN, [1900] 2 Ir. R. 632.

**23. Fowls Straying on Highway—Fowls Frightened by Dog—Damage to Bicycle.]**—Fowls belonging to the defendant, who lived alongside a public road, strayed on to the road, and, being frightened by a dog belong-

ing to another person, one of them flew against a bicycle which the plaintiff was riding on the road and damaged it. The defendant knew that the fowls were sometimes in the habit of straying on to the road, and there was no negligence on the part of the plaintiff. In an action to recover the damage to the bicycle, no evidence was given that it was the general habit of fowls to behave as this one had done, or that it was the disposition of the particular fowls to behave in that way to the knowledge of the defendant.

**HELD**—that the defendant was not liable upon the ground that, assuming that the fowls were improperly on the highway, the injury was not the natural consequence of their presence there. *Quære* whether the defendant was not entitled to let his fowls stray on the adjoining highway.

HADWELL v. RIGHTON, [1907] 2 K. B. 345; 76 [L. J. K. B. 891; 71 J. P. 499; 97 L. T. 133; 23 T. L. R. 548; 5 L. G. R. 881—Div. Ct.

**24. Horse—Horse Liable to Stop Suddenly.]**—It is not negligent to use in the streets a horse which is apt to stop suddenly.

WATSON v. WORDIE & Co., (1906) 8 F. 876—[Ct. of Sess.

**25. Horse Dealer—Accident due to Vicious Horse—Horse Let on Hire—Liability of Owner.]**—*Semble*, a horse dealer who lets out for hire a notoriously vicious horse may be liable to a member of the public who is injured by it whilst under the control of a hirer.

WILSON v. WORDIE & Co., (1906) 7 F. 927—[Ct. of Sess.

**26. Runaway Horse—Res ipsa loquitur.]**—A presumption (though a rebuttable one) of negligence arises if a runaway horse and carriage knock down a person in a public street.

SNEE v. DURKIE, (1904) 6 F. 42—Ct. of Sess.

**V. WILD BIRDS PROTECTION.**

**27. Exposing for Sale—"Recently taken"—Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 3—Wild Birds Protection Act, 1881 (44 & 45 Vict. c. 51.)**—The respondent, a dealer, was summoned for exposing for sale three ravens, being wild birds recently taken. The summons was taken out on June 26th, 1901. The birds had come into the possession of the respondent on May 4th, having been sent from Holland, and being then about three weeks old.

**HELD**—that the respondent could be convicted of exposing for sale wild birds recently taken, but that the *onus* lies on the prosecution to show that the birds are wild birds recently taken.

GREEN v. CARSTANG, (1902) 66 J. P. 102; 85 L. T. [615; 20 Cox C. C. 92—Div. Ct.

**Wild Birds Protection—Continued.**

28. *Order of Secretary of State—Variation of Time—Public Notice—Condition Precedent to Prosecution—Wild Birds Protection Act, 1894 (57 & 58 Vict. c. 24), s. 4 (1).—*The public notice, prescribed by sect. 4 of the Wild Birds Protection Act, 1894, of an Order made by a Secretary of State under the Wild Birds Protection Acts, 1880 to 1902, and prohibiting the killing and taking of wild birds during that period of the year to which the protection afforded by the Wild Birds Protection Act, 1880, does not extend, is not a condition precedent to a prosecution for having in one's control or possession wild birds recently taken, contrary to sect. 3 of the Wild Birds Protection Act, 1880, as varied by the Order.

DUNCAN v. KNILL, (1907) 71 J. P. 287; 96 L. T. [911; 5 L. G. R. 620—Div. Ct.

*For Carriage of Animals see CARRIERS, 12, 13.*

**ANNUITY.**

*See* DEATH DUTIES; INCOME - TAX; REVENUE; SETTLEMENTS; TRUSTS; WILLS, 370—377.

**ANTICIPATION, RESTRAINT ON.**

*See* HUSBAND AND WIFE; PERPETUITIES; PERSONAL PROPERTY; REAL PROPERTY AND TRUSTS.

**APOLOGY.**

*See* LIBEL AND SLANDER.

**APOTHECARIES.**

*See* MEDICINE AND PHARMACY.

**APPEAL.**

*See* BANKRUPTCY; CHARITIES; DEPENDENCIES AND COLONIES, COUNTY COURTS, COURTS; CRIMINAL LAW AND PROCEDURE; MAGISTRATES; PRACTICE AND PROCEDURE; RAILWAYS; STREET TRAFFIC, ETC.

**APPEALS AS TO LICENSING.**

*See* INTOXICATING LIQUORS.

**APPEALS AS TO RATING.**

*See* RATES AND RATING.

**APPOINTMENT, POWERS OF.**

*See* POWERS.

**APPORTIONMENT.**

*See* ANNUITIES, ECCLESIASTICAL LAW; LANDLORD AND TENANT; TRUSTS; REAL PROPERTY AND CHATELLENS REAL.

**APPRAISERS.**

*See* VALUERS AND APPRAISERS.

**APPRENTICES.**

*See* INFANTS; MASTER AND SERVANT.

**APPROPRIATION OF PAYMENT.**

*See* BANKERS AND BANKING, 1—4; CONTRACT; MONEY AND MONEY-LENDING; MORTGAGE.

**ARBITRATION.**

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*See also* AGRICULTURE; BUILDERS, 6, 11, 13, 16; COMPULSORY PURCHASE; DEPENDENCIES AND COLONIES; FRIENDLY SOCIETIES, 2, 4; HIGHWAYS, 65, INSURANCE; LIMITATION OF ACTION, 25; MASTER AND SERVANT; PRACTICE AND PROCEDURE; RAILWAYS, 213—218; SHIPPING, 108, 110, 172, 361.

**I. ARBITRATORS AND UMPIRES.**

1 *Appointment of Umpire in Arbitration—Arbitration Act, 1889 (52 & 53 Vict c. 49),*

**Arbitrators and Umpires—Continued.**

*First Schedule (c).*—The appointment of an umpire by arbitrators constitutes an act in the arbitration within the meaning of clause (c) in the First Schedule to the Arbitration Act, 1889.

Decision of Stirling, J. ([1898] 2 Ch. 683; 67 L. J. Ch. 622; 47 W. R. 23; 79 L. T. 185), reversed.

IN RE AN ARBITRATION BETWEEN F. BARING—[GOULD AND THE SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE, (1899) 2 Ch 80; 68 L. J. Ch. 429; 47 W. R. 564, 80 L. T. 739—C. A.

**2. Disqualification of Interest—Member of Town Council.**—A town council and a firm, who had undertaken to build a public building, agreed upon B. as their arbiter in case of disputes. B. was subsequently elected dean of guild, and thereby became *ex officio* a town councillor.

**HELD**—that (1) he thereby became disqualified for acting as arbiter, (2) his disqualification was not removed on the termination of his tenure of office; (3) the town council were entitled to plead his disqualification.

EDINBURGH MAGISTRATES v. LOWNIE, (1903) 5 F. [711—Ct. of Sess.

**3. Powers of—Matters Referred—Action—Amendment of Points of Defence and Counterclaim at Close of Arbitration.**—An arbitrator to whom an action is referred may, in his discretion, hear evidence on and deal with points not covered by the pleadings or statements of the parties in the action, and may allow the necessary amendments to be made at the conclusion of the arbitration.

TAVERNER v. CUFF, (1907) 51 Sol. Jo. 248—[Kekewich, J.

**4. Powers of—Points of Claim and Defence—Amendment by Arbitrator—Interpretation of Letter.**—The claimants and the defendants agreed to refer all points in dispute in reference to a contract for sale. The claimants delivered their points of claim. The defendants delivered their points of defence and counterclaim and afterwards further particulars of such points of defence and counterclaim. The claimants then delivered their amended points of claim. The defendants subsequently delivered their amended points of defence and counterclaim. The claimants then delivered a reply and the defendants subsequently thereto delivered particulars of their points of defence and counterclaim.

**HELD**—that the documents referred to were in the nature of pleadings or particulars which were capable of amendment by the arbitrator, and if any points in dispute arose between the parties in reference to the contract which were not disclosed by such documents it was in the discretion of the arbitrator to allow amendments on such

terms as he might think fit in order to allow the parties to raise such points; and that it was for the arbitrator to construe a letter forming part of the contract and to determine the meaning of a word as used in the letter, but that parol evidence was not admissible to show the meaning attached to the word by the parties when entering into the contract.

EDWARD LLOYD, LD., v. STURGEON FALLS PULP [Co., LD., (1901) 85 L. T. 162—Div. Ct.

**5. Removal of — Arbitrator Exceeding Jurisdiction—Misconduct.**—R. S. C. Ord. 36, r 55 B.; Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 11.]—Where an arbitrator makes an error as to the limit of his jurisdiction, the Court will not remove him on that ground, it not being misconduct.

SCHOFIELD v. ALLEN, (1904) 48 Sol. J. 176; 116 [L. T. Jo. 239—C. A.

**6. Removal of Interested Arbitrator—Named in Contract—Staying Proceedings.**—Under an agreement matters in dispute were to be referred to the sole arbitration of X., whose decision was to be final and binding. On the 13th of June a motion was made raising the question whether an action brought by one of the parties to the arbitration should be allowed to proceed, and the motion was dealt with on the assumption that the arbitration should go on. After one or two appointments before X. an application was made to remove X. from being arbitrator, on the ground that he was a gentleman at the Bar, who had constantly been employed by solicitors, whose conduct would have to be considered by the arbitrator. At the time of the motion of the 13th of June, all the circumstances were known to the plaintiff. No charges whatever were made against X. When X. was originally named as arbitrator, it was known to the plaintiff's solicitors that X. was habitually employed by the solicitors whose conduct might come before the arbitrator, but they were told, as was the fact, that he had not been consulted in this particular matter. For the plaintiff it was said that the arbitrator ought to be a perfectly unbiassed person. For the defendant it was said that this rule does not apply to the case of an arbitrator named in the contract.

**HELD**—that the motion must be dismissed with costs.

BRIGHT v. RIVER PLATE CONSTRUCTION CO., LD., [1900] 2 Ch. 835; 64 J. P. 694; 49 W. R. 132; 82 L. T. 793; 704 J. Ch. 59 —Cozens-Hardy, J.

**7. Remuneration — At Common Law — Under Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 32.**—An arbitrator, apart from special agreement, has no claim for remuneration (1) at common law, or (2) under sect. 32 of the Lands Clauses Act, 1845.

MURRAY v. NORTH BRITISH RAILWAY CO., [1899] 7 S. L. T. 129—Ct. of Sess.



**Arbitrators and Umpires—Continued.**

8. *Remuneration—Fees of Arbitrators and Umpire—Payment of, to Take up Award—Part of Fees Disallowed on Taxation between Parties to Arbitration—Right to recover back Amount Taxed off—Certificate of Taxing Master—Whether Evidence of Unreasonableness of Fees in Action to recover Excess.*—The plaintiffs, who were parties to an arbitration, paid the sum of £476 12s. to the arbitrators and umpire for their fees, in order to take up the award. Upon taxation of the costs of the arbitration the taxing master disallowed £119 5s. of that sum. In an action brought by the plaintiffs to recover back from the arbitrators and umpire the amount so disallowed,

HELD—that in order to succeed the plaintiffs must show that the fees charged were unreasonable and extortionate, and, further, that the certificate of the taxing master was not evidence that the amounts disallowed by him were unreasonably charged.

Decision of Ridley, J. (67 J. P. 439; 19 T. L. R. 402), reversed.

LLANDRINDOD WELLS WATER CO. v. HAWKESLEY  
[AND OTHERS, (1904) 68 J. P. 242; 20 T. L. R. 241—C. A.]

9. *Remuneration—Jurisdiction of Court to Determine Remuneration—Fairness of Charges—Evidence all one Way—Discretion of Taxing Officer—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15, sub-s. 3*—A taxing officer, when determining the remuneration to be paid to a professional arbitrator under sect. 15, sub-s. 3, of the Arbitration Act, 1889, is not entitled, if the evidence all goes to show that in the opinion of persons in the same profession the charges made by the arbitrator are, for a person in his position, fair, to disregard that evidence and to reduce the remuneration to such an amount as is in his opinion fair.

MASON, LD. v. LOVATT, (1907) 23 T. L. R. 486—C. A.]

10. *Remuneration—Scale of Umpire's Charges—Taxation—Review of Taxation.*—The value of certain land taken by a rural district council was determined by two arbitrations. The umpire charged a fee for the award which varied with the amount awarded, being 2½ per cent. on £1,000, 1½ cent. above that amount. The council were willing to pay these fees, but on taxation a taxing master refused to allow a scale fee, holding that five guineas was enough in each case.

HELD—on review of taxation, that a scale fee not being in accordance with the practice of the office could not be allowed.

IN RE JAMES & SONS, [1903] W. N. 99—  
[Kekewich, J.]

**II. AWARD.****11. Condition Precedent to Action—**

*Validity of Arbitration Clause—Invalid Award—Estoppel.*—The plaintiffs bought from the defendants some timber "warranted to be of fair average quality, etc." The contract contained an arbitration clause as follows "Should any difference arise under this contract, the buyers shall not reject the goods . . . nor refuse payment . . . but such dispute shall be referred to . . . who shall decide whether any, or what, allowance shall be made, the decision shall be final and binding . . . and may be made a rule of Court."

HELD—(1) that a valid award was a condition precedent to the enforcement of a claim under the warranty, and

(2) that, under the circumstances of the particular case, the defendants were not estopped from alleging that an award relied on by the plaintiffs was an invalid one.

GREGG v. FRASER, [1906] 2 Ir. R. 545—C. A.]

12. *Enforcement—Summons—Service out of Jurisdiction*—A summons to enforce an award under sect. 12 of the Arbitration Act, 1889, cannot be served on a foreigner residing out of the jurisdiction.

RASCH & CO. v. WULFERT, [1904] 1 K. B. 118;  
[73 L. J. K. B. 20; 89 L. T. 493; 52 W. R. 145—C. A.]

13. *Enforcement—Order giving leave to Enforce—Right to nevertheless bring Action—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 12.*—A person who has obtained an Order giving leave to enforce an award under sect. 12 of the Arbitration Act, 1889, is not thereby precluded from bringing an action on the award.

CHINA STEAM NAVIGATION CO., LD. v. VAN  
[LAUN, (1905) 22 T. L. R. 26—Bigham, J.]

And see BANKRUPTCY AND INSOLVENCY, 41.

14. *Extension of Time for Making—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 9, 24—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, sub-s. (9).*—By the Public Health Act, 1875, s. 180, sub-s. (9), "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him."

By the Arbitration Act, 1889, s. 9, "The time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not."

HELD—that the Court has power, under sect. 9 of the Arbitration Act, 1889, to enlarge the time for making an award, under the Public Health Act, 1875, at any time, and that sect. 9 of the Arbitration Act, 1889, is not inconsistent with sect. 180, sub-s. (9), of the Public Health Act, 1875.

**Award—Continued.**

*In re Mackenzie and Ascot Gas Co.*, ([1886] 17 Q. B. D. 114; 55 L. J. Q. B. 309; 34 W. R. 487—Div. Ct.) overruled.

*Warburton v. Haslingden Local Board* ((1879) 48 L. J. Q. B. 451) approved.

**KNOWLES & SONS, LTD. v. BOLTON CORPORATION**, [1900] 2 Q. B. 253; 69 L. J. Q. B. 481; 48 W. R. 433; 82 L. T. 229; 16 T. L. R. 283—C. A.

15. *Form—Award of lump Sum—Matters not within Arbitrator's Jurisdiction—Evidence—Form of Award.*—If a lump sum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum matters were taken into account which the arbitrator had no jurisdiction to consider, the award is bad.

An award is not bad because the possibility that matters not within the jurisdiction of an arbitrator may have been taken into account is not in terms excluded on the face of the award.

In inferior Courts the maxim "*omnia presumuntur rite esse acta*" does not apply to give jurisdiction. That rule is applicable to the award of an arbitrator where no jurisdiction is shown to make the award, but where there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction, it has no application. In such a case the award can only be impeached by showing that the arbitrator did in fact exceed his jurisdiction.

It may be necessary for an arbitrator to take evidence in order to ascertain whether a matter is within his jurisdiction or not, and where the claims referred are so mixed up together as it is impossible to say that such evidence may not be received.

If the Court is satisfied that the award is one which the arbitrators can properly make, they should give effect to it, notwithstanding any defects in form.

**FALKINGHAM v. VICTORIAN RAILWAYS COMMISSIONERS**, [1900] A. C. 453; 69 L. J. P. C. 89; 82 L. T. 506—P. C.

16. *Form—Fees of Arbitrators and Umpire—Ought each to be Stated Separately in Award—Arbitration Act, 1889* (52 & 53 Vict. c. 49), ss. 2, Sched. I.]—In making his award, an umpire ought to specify separately the sum which he himself charges for his services, the sums similarly charged by the arbitrators, and the costs of the actual award.

*IN RE GILBERT & WRIGHT*, (1904) 68 J. P. 143; [20 T. L. R. 164—Div. Ct.]

17. *Mistake—Remitting—Mistake of Arbitrator—Omission of Award as to Costs—Arbitration Act, 1889* (52 & 53 Vict. c. 49), ss. 2, 10 (1), and Sched. I. (i)—*Light Railways Act, 1896* (59 & 60 Vict. c. 48), ss. 12, 13.]—A railway company, acting under an Order made under the Light Railways Act, 1896, and incorpo-

rating the Lands Clauses Acts, gave to the claimants notice to treat for certain land. The question of compensation was referred to a single arbitrator under the Light Railways Act, 1896, sect. 13 of which provides that the provisions of the Arbitration Act, 1889, are to apply to arbitrations under that section in lieu of the provisions of the Lands Clauses Acts. Under the Arbitration Act, 1889, the costs of a reference and award are in the discretion of the arbitrator. The arbitrator awarded compensation to the claimants, but his award was silent as to costs. The claimants applied to the Court to remit the award to the arbitrator on the ground that by mistake he had omitted to deal with the costs. In support of the application the arbitrator swore an affidavit, in which he stated that the reason why he had made no award as to the costs was because he was under the impression that the arbitration was under the Lands Clauses Consolidation Act, 1845, under which the costs would follow the event, and that but for his having been under that impression he would have awarded the claimants their costs.

**HELD**—that as the mistake was merely one of omission, and as the arbitrator did not seek to impeach his award upon any matter upon which he had adjudicated, the award ought to be remitted to the arbitrator for him to deal with the question of costs.

*Greenwood & Co. v. Brownhill & Co.* ((1881) 44 L. T. 47) and *Allen v. Greenslade* ((1873) 33 L. T. 567) discussed.

*IN RE BAXTERS & MIDLAND RY. CO.*, (1906) 70 [J. P. 445, 95 L. T. 20; 22 T. L. R. 616—C. A.]

18. *Taking Up—Arbitrator Appointed under Protest—Duty to take up Award—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 35.]—Although a railway company joined in an arbitration under protest, they may be compelled by mandamus to take up the award.

Decision of the Court of Appeal ([1899] 1 Q. B. 921; 68 L. J. Q. B. 685) affirmed.

**LONDON & NORTH-WESTERN RAILWAY v. WALKER**, [1900] A. C. 109; 69 L. J. Q. B. 367; 64 J. P. 483; 48 W. R. 384; 82 L. T. 93; 16 T. L. R. 194—H. L. (E.)

19. *Validity—Award regular on the Face of it—Presumption.*—By an agreement a dispute was to be submitted to arbitration "on the basis of the Riga usance." In an action upon the award the arbitrator admitted that he had not the agreement before him, had never heard of the "Riga usance," and consequently paid no regard to it.

**HELD**—that the award, being upon the face of it regular, must be presumed to have been properly made.

*BLAND v. RUSSIAN BANK*, (1906) 11 Com. Cas. [71—Bigham, J.]

20. *Validity—Excess of Jurisdiction—Matter included in Award not submitted to*

**Award—Continued.**

*Arbitrator—Action on Award.*—To make an arbitrator's decision binding the arbitrator is bound to exercise the jurisdiction given to him by the agreement to refer, and that only. If he exceeds his jurisdiction and awards something in respect of a matter which was not referred to him, the award is bad, unless the bad part is separable.

Where an award gave the plaintiff half the value of racing stakes and that was a matter clearly not submitted to the decision of the arbitrator,

**HELD**—that there was no award, there being an excess of jurisdiction.

*PEDLER v. HARDY*, (1902) 18 T. L. R. 591—  
[Channell, J.]

21. *Validity—Setting Aside—Error of Law—Error Apparent on Face of Award.*—Where an arbitrator has gone wrong in a point of law, and his error in law appears on the face of the award, it is good ground for setting it aside.

*LANDAUER v. ASSER*, (1905) 53 W. R. 534—  
[Div. Ct.]

22. *Validity—Umpire functus officio—Remitting Matters Referred—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 10.*—Where it was not suggested that an umpire was not impartial, or that he was not properly chosen, but the only suggestion was that by carelessness or by not having the actual submission before him, he made out a document as and for his award which could be of no good to the parties,

**HELD**—that the umpire was *functus officio* and could not of his own authority remedy any mistake, and that the Court would wisely exercise its discretion in remitting the case to the umpire under sect. 10 of the Arbitration Act, 1889.

*IN RE STRINGER & RILEY BROTHERS*, [1901] 1 Q. B. 105; 70 L. J. Q. B. 19; 49 W. R. 111—Div. Ct.

And see PRACTICE AND PROCEDURE.

**III. COSTS.**

23. *Costs in Discretion of Arbitrator—Award not Providing for Costs—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4, 14, 15 (2).*—Where an action is stayed and an arbitration directed by the Court at the request of the parties, if the arbitrator does not provide for costs left to his discretion, the award must be referred back for him to deal with them. It is only when a matter is referred by the Court under sect. 14 of the Arbitration Act, 1889, that such costs follow the event under sect. 15 (2).

*WARBURG & Co. v. M'KERROW & Co.*, (1904) 90 [L. T. 644—Walton, J.]

24. *Costs of Reference in Discretion of Arbitrator—Award for Less than £50—High*

*Court Scale—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 14, 15; Ord. 65, r. 12.*—Where an action of contract is referred to arbitration, whether compulsorily or by consent, upon the terms that the costs of the action shall abide the event of the award, and the costs of the reference and award shall be in the discretion of the arbitrator, if the arbitrator awards the plaintiff a sum less than £50, and orders that the defendant shall pay the plaintiff's costs of the reference and award, such costs may be taxed on the High Court scale, although by virtue of Ord. 65, r. 12, the plaintiff's costs of the action can only be taxed on the County Court scale.

*Moore v. Watson* ((1867), L. R. 2 C. P. 314; 36 L. J. C. P. 122; 15 W. R. 429; 15 L. T. (N.S.) 662) overruled.

*STREET v. STREET*, [1900] 2 Q. B. 57; 69 L. J. [Q. B. 574; 48 W. R. 450; 82 L. T. 648; 16 [T. L. R. 307—C. A.]

25. *Costs of Award—Payment by Party not Chargeable of Costs of Umpire's Solicitor in Order to Take up Award—Application to Tax Bill of Costs of Umpire's Solicitor—"Special Circumstances"—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 38, 41.*—There was an arbitration between a company and an owner of land taken compulsorily under the Lands Clauses Act. The arbitrators differed and the umpire made his award, which directed that the company should pay to the landowner his costs of the reference, and that the company should pay the costs of the award. In order to take the award up the company had to pay the fee demanded by the umpire, including the costs of the umpire's solicitor. Having made this payment, the company made application for the taxation of the bill of costs of the umpire's solicitor under sect. 38 of the Solicitors Act, 1843.

**HELD**—(1) that it was a proper application as the company, though not chargeable with the bill, had paid it; (2) that there were special circumstances to justify the order for taxation, as the company made the payment to the umpire at the time when it was not known what the provisions of the award would be, and (3) that the taxation should take place in the Chancery Division.

*IN RE COLLYER-BRISTOW & Co.*, [1901] 2 K. B. [839; 70 L. J. K. B. 941; 50 W. R. 4; 85 L. T. 208, 17 T. L. R. 741—C. A.]

26. *No Award as to Costs by Arbitrator—Costs follow Event.*—Where an arbitrator makes no order as to costs, the costs will follow the event.

*CARR BROTHERS v. DOUGHERTY* (1898) 67 [L. J. Q. B. 371; 14 T. L. R. 237—Phillimore, J.]

27. *Taxation—Jurisdiction to Review—Agreement to Purchase Gas Works—Purchasers to "Pay all the Costs, Charges, and Expenses . . . to be taxed"—Solicitor and*

**Costs—Continued.**

*Client Costs.*—By an agreement a gas company agreed to sell their undertaking to an urban district council at a price to be fixed by arbitration. This agreement was set out in the schedule to a private Act of Parliament, and was thereby confirmed. By clause 7 of the agreement it was provided that "the council shall pay all the costs, charges, and expenses of the company preliminary and incidental to the negotiation for the sale, and the preparation and execution of this agreement and the said arbitration, the same to be taxed in case the parties differ." The agreement was to be deemed a submission to two arbitrators within the meaning of the Arbitration Act, 1889.

**HELD**—that the gas company was to come out of the business scatheless, except so far as it had indulged in luxuries of costs, and that the nearest way to arrive at that result was to have a taxation as between solicitor and client.

**HELD ALSO**—that the Court had jurisdiction to review the taxation of the master, who had given not costs as between party and party, but something less than solicitor and client costs.

**MALVERN URBAN DISTRICT COUNCIL v. MALVERN**  
[LINK GAS CO., (1901) 83 L. T. 326—  
C. A.]

**IV. SPECIAL CASE.**

**28. Discretion of Court to Order—Contract to Construct Railway—Arbitration Clause—Point of Law—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19.**—A contractor agreed to construct a railway for a lump sum. The contract contained a submission to arbitration which was in the widest possible terms, and provided that all questions and disputes arising as to the meaning of the specifications or drawings, or as to the interpretation, meaning, or effect of the contract, or as to any matter or thing whatever connected with or arising out of the contract, or incidental thereto, or not thereby provided for, should be referred to the consulting engineer, whose decision should be conclusive. By a clause of the specification it was provided that the contractor should "satisfy himself of the nature of the soil, of the general form of the ground, and of the quantity of materials to be excavated," etc.

While constructing the railway, the contractor came across rock, which caused a large additional expense, and the question arose whether that additional expense ought to fall upon the contractor.

**HELD**—that this was one of the very cases in respect of which sect. 19 of the Arbitration Act, 1889, was passed, in order to enable the parties to bring the question before the Court. If the Court is satisfied that there is a real point of law, and that the arbitrator is not specially qualified to decide that point, the Court will order the

arbitrator to state a special case under sect. 19.

**RE AN ARBITRATION BETWEEN NUTTALL AND THE**  
[LYNTON & BARNSTABLE RAILWAY CO., (1900)  
82 L. T. 17—C. A.]

**29. Power of Arbitrator to State Case—Decision "to be Final"—Bristol Corporation Act, 1904 (4 Edw. 7, c. cxxxiii.).**—By the Bristol Corporation Act, 1904, sect. 53 (12), it was provided that "any dispute or difference arising between the Corporation and any person or persons who are or may be interested in the provisions of this section as to the proper construction of such provisions or as to the carrying out of the matters dealt with in this section or in anywise in connection therewith shall be referred to the decision of A. M., one of His Majesty's Counsel, or such other fit person as shall be mutually agreed upon, whose decision shall be final."

**HELD**—that the section constituted a reference to arbitration, and that therefore the arbitrator had power under sects. 7 (b) and 24 of the Arbitration Act, 1889, to state a special case for the opinion of the High Court, and that the words "whose decision shall be final" did not deprive the arbitrator of that power.

**IN RE CARPENTER & BRISTOL CORPORATION,**  
[(1907) 76 L. J. K. B. 1145; 71 J. P. 417; 97  
L. T. 461, 23 T. L. R. 654—C. A.]

**30. Statement of Special Case—Application after Award—Remitting for Reconsideration—Mistake of Law—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 10 and 19.**—An arbitrator cannot be directed by the Court or a Judge to state a special case for the opinion of the Court, under sect. 10 of the Arbitration Act, 1889, when no request or application to state a case has been made before the award has been made and the arbitration concluded.

An award will not be remitted for the consideration of an arbitrator upon the sole ground that the arbitrator has made a mistake in law.

*Quære*, whether an agreement, that the parties to an arbitration will not ask that a special case shall be stated for the opinion of the Court, is valid.

**RE MONTGOMERY, JONES, & CO., AND LIEBEN-**  
[THAL & CO., [1898] 1 Q. B. 487; 67 L. J. Q. B.  
313, 78 L. T. 211, 14 T. L. R. 201; 46 W. R.  
292—C. A.]

**V. SUBMISSION TO ARBITRATION.****(a) Effect of.**

**31. Condition Precedent—Difference before Action.**—A condition precedent to the invocation of the arbitrator, on whatever grounds, is that a difference between the parties should have arisen.

Decision of the Court of Appeal ([1898] 2 Q. B. 7; 67 L. J. Q. B. 681; 78 L. T. 575; 14 T. L. R. 362) reversed.

**LONDON & NORTH WESTERN RAILWAY AND**

**Submission to Arbitration—Continued.**

[GREAT WESTERN JOINT RAILWAY COS. v. BILLINGTON, [1899] A. C. 79; 68 L. J. Q. B. 162; 79 L. T. 503; 15 T. L. R. 97—H. L. (E.)

32. *Jurisdiction of Court to stay Action—Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 4.—Shipowners brought an action against charterers on a charter-party, which contained a clause that disputes should be referred to three arbitrators, one to be appointed by the shipowner and one by the charterers, and the arbitrators so appointed were to appoint the third.

HELD—that the case came within sect. 4 of the Arbitration Act, and that the action should be stayed, the applicants being ready and willing to appoint an arbitrator.

MANCHESTER SHIP CANAL CO. v. S. PEARSON & [SON, LD., [1900] 2 Q. B. 606; 69 L. J. Q. B. 852; 48 W. R. 689; 83 L. T. 45—C. A.

33. *Limitation Act, 1623* (21 Jas. 1, c. 16), s. 3.—Parties to a submission are not precluded from raising the defence of the Statute of Limitations unless an express provision to that effect is drawn up and embodied in the submission, or there is concealed fraud.

IN RE AN ARBITRATION BETWEEN THE ASTLEY & [TYLDESLEY COAL CO. AND THE TYLDESLEY COAL CO., (1899) 68 L. J. Q. B. 252; 80 L. T. 116; 15 T. L. R. 154—Div. Ct.

34. *Contract for Service — Arbitration Clause—Action for Wrongful Dismissal—Stay of Proceedings—Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 4.—The defendants and the plaintiff entered into a contract by which the plaintiff was to act as their agent for the sale of maize and other things, except barley, and he agreed to act as such agent, and they agreed to employ him for seven years at a certain remuneration. Disputes arose, and those disputes were referred to arbitration. His employers were not satisfied with his conduct, and the result of the dispute was an award adverse to him. By the contract there was a clause referring any dispute to arbitration, in accordance with the arbitration clauses and the rules and byelaws of the Liverpool Corn Trade Association, Ltd. By clause 17 of those byelaws "All disputes arising out of the transactions connected with the trade, except such as arise out of business of the Clearing House, shall be referred to two arbitrators." The plaintiff brought an action for wrongful dismissal against the defendants.

HELD—that the action for wrongful dismissal was a "dispute," and involved a dispute arising in connection with the contract for service, and came within its arbitration clause, and that the action must be stayed under sect. 4 of the Arbitration Act, 1889.

*Benshaw v. Queen Anne Mansions Co.*

([1897] 1 Q. B. 662; 66 L. J. Q. B. 496; 45 W. R. 487; 76 L. T. 611—C. A.) followed.

*Davis v. Starr* ((1889) 41 Ch. D. 242; 58 L. J. Ch. 808; 37 W. R. 481; 60 L. T. 797—C. A.) explained.

PARRY v. LIVERPOOL MALT CO., [1900] 1 Q. B. [339, 69 L. J. Q. B. 161; 81 L. T. 621—C. A.

35. *Scope of Reference — Partnership Agreement—Disputes "in any way relating thereto"—Proposed Addition to Business.*—A. and his sons agreed to carry on "a joint business as watchmakers and jewelers." The contract provided *inter alia* that A. should have "entire and uncontrolled oversight of the business and all its concerns," that none of the partners should engage in any other business, &c., without the consent of the others, and that any disputes "in any way relating hereto" should be referred to arbitration. The sons desired to add to the business that of opticians and sight-testers.

HELD—that there must be a reference as to whether the proposed new business fell within the business contemplated by the contract, and as to whether A. was entitled to veto it.

MUIR v. MUIR, (1906) 8 F. 365—Ct. of Sess.

36. *Staying Proceedings—Effect of Condition to "Submit all disputes" to a Foreign Court.*—The Budapest office of an English insurance company issued a policy on the life of a Hungarian, the premiums and insurance money being payable at Budapest. There was a condition (in French) "expressly agreeing to submit disputes to the Courts of Budapest." An action having been brought upon the policy in England,

HELD—that it must be stayed, for both parties had by the condition placed the foreign Court in the position of an arbitrator to settle their disputes.

AUSTRIAN-LLOYD STEAMSHIP CO. v. GRESHAM [LIFE ASSURANCE SOCIETY, LD., [1903] 1 K. B. 249; 72 L. J. K. B. 211; 51 W. R. 402; 88 L. T. 6; 19 T. L. R. 155—C. A.

37. *Staying Proceedings — Submission to Arbitration—Railway Passengers' Assurance Company's Acts, 1864 and 1892* (27 & 28 Vict. c. cxxv.) and (55 & 56 Vict. c. viii.)—*Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 4.—H. was the holder of an accident policy issued under the Railway Passengers' Assurance Company's Act, 1864, ss. 3, 16, and 33 of which provided for disputes being referred to arbitration, and also empowered a judge to stay proceedings if an action was commenced against the Company in respect of matters thus required to be referred. The policy itself contained a condition that any questions arising under it should, if either party desired, be referred to arbitration in the manner specified in the Act.

A consolidating Act of 1892 repealed the earlier Act, but all contracts in force at the date were to remain valid and effectual.

**Submission to Arbitration—Continued.**

H. was killed in an accident, and his widow named an arbitrator. On the Company objecting to the person named, she commenced an action.

HELD—that there was a subsisting submission to arbitration to which sect. 4 of the Arbitration Act, 1889, applied; and that on the Company's application there was jurisdiction under that section to make an order staying the action.

HODSON v. RAILWAY PASSENGERS' ASSURANCE CO.,  
[1904] 2 K. B. 833; 73 L. J. K. B. 1001—  
C. A.

**(b) Pleading as Defence to Action**

**38. Arbitration Clause—Contract for the Execution of Works containing Arbitration Clause—Motion to stay the Action on the ground that the Matters in Dispute came within the Arbitration Clause—Grounds on which Court will not stay the Action.**—On a motion to stay an action, on the ground that the matters in dispute came within a clause in a contract for the execution of works agreeing to refer matters in dispute, arising in the settlement of the accounts, to arbitration, the construction of the clause is for the Court. The Court will not stay the action where it is of opinion:—(1) That the plaintiff is suing upon substantial and *bona fide* causes of action which do not come within the clause; or (2) That there are serious and difficult questions of law involved in the action, not proper to be submitted to the determination of an arbitrator; or (3) That a cause of action based upon fraud, actual or constructive, is *bona fide* sued upon; or (4) That, in the exercise of its judicial discretion, it ought not to refer the matters in dispute to arbitration.

Vaudrey v. Simpson ([1896] 1 Ch. 166; 65 L. J. Ch. 369; 44 W. R. 123) followed.

WORKMAN v. BELFAST HARBOUR COMMISSIONERS,  
[1899] 2 Ir. R. 243—Q. B.

**39. Ouster of Jurisdiction of Court—Private Act and Scheduled Agreement—Waiver—Differences between Canal Company and Traders.**—An arbitration clause contained in or confirmed by a private Act of Parliament may completely oust the jurisdiction of the ordinary Courts either by express language or by necessary implication where the provision is intended for the benefit of the public at large and not merely for that of the parties to the agreement; in such a case, should an action be commenced, no waiver in pleading can give the Court jurisdiction.

Private Acts of the Manchester Ship Canal Company imposed a duty on the company, for the protection of the corporation and traders of Warrington, to keep their canal dredged; a section provided that any difference between the company and the corporation should be determined by an arbitrator; a later section contained a general arbitration clause as between the company and any person.

The corporation and certain traders sued the company in respect of a failure to dredge.

HELD—(1) that upon a true construction of the Acts the jurisdiction of the Court was ousted by the first-mentioned section so far as the corporation was concerned; but (2) that the traders could maintain their action.

Decision of C. A. ([1904] 2 Ch. 123; 73 L. J. Ch. 345; 52 W. R. 635; 90 L. T. 557; 20 T. L. R. 371) reversed in part upon the reasoning of Cozens-Hardy, L.J., in the C. A.

CROSSFIELD & SONS, LD., v. MANCHESTER SHIP  
CANAL CO., [1905] A. C. 421; 74 L. J. Ch.  
637; 69 J. P. 441; 93 L. T. 141; 21 T. L. R.  
689; 54 W. R. 172—H. L. (E.).

**40. Statutory Provision ousting Jurisdiction of Court—Omission to Plead—Effect of.**—Where there is a statutory provision for arbitration which ousts the jurisdiction of the Courts, objection to the jurisdiction may be taken on appeal, even though it was not pleaded or raised in the Court below.

NORWICH CORPORATION v. NORWICH ELECTRIC  
TRAMWAYS CO., LD., [1906] 2 K. B. 119; 75  
L. J. K. B. 636; 70 J. P. 401; 54 W. R. 572;  
95 L. T. 12; 22 T. L. R. 553; 4 L. G. R.  
1114—C. A.

**41. "Step in Proceedings"—Agreement to Arbitrate—Writ Issued—Joinder in Request for Delivery of Pleadings—Arbitration Act, 1889 (52 & 53 Vict. c. 49) s. 4.**—The defendant in a partnership action appeared on a summons for directions, and joined in a request for the delivery of pleadings, without suggesting that the matter ought to be settled by arbitration. The partnership deed contained an arbitration clause.

HELD—that he had "taken a step in the proceedings" within sect. 4 of the Arbitration Act, 1889, and had lost his right to a stay.

STEVEN v. BUNCLE, [1902] W. N. 44—  
[Eady, J.]

**42. "Step in Proceedings"—Agreement to Arbitrate—Writ Issued—Defendant attending Summons for Directions—Application for a Stay—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.**—If a defendant attends on the plaintiff's summons for directions, and acquiesces in an order for directions being made without asking for an adjournment, he takes a step in the proceedings within the meaning of sect. 4 of the Arbitration Act, 1889; and he thereby precludes himself from subsequently applying for a stay of the proceedings on the ground that there exists an agreement to refer differences to arbitration.

County Theatres and Hotels, Ltd. v. Knowles ([1902] 1 K. B. 480; 86 L. T. 132—C. A., No. 44, *infra*) followed.

RICHARDSON v. LE MAÎTRE, [1903] 2 Ch. 222;  
[72 L. J. Ch. 799; 88 L. T. 626—  
[Eady, J.]

**Submission to Arbitration—Continued.**

43. "*Step in the Proceedings.*"—*Partnership—Dissolution—Motion for Receiver—Cross-motion to Refer*—"Taking other Steps in the Proceedings"—*Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 4.]—In an action for dissolution of a partnership the plaintiff gave notice of motion for a receiver and filed affidavits in support of such motion. These were answered by the defendant, and when such affidavits in answer had been filed, defendant gave cross-notice of motion to refer to arbitration.

On the hearing it was objected by the plaintiff that the motion to refer was too late.

HELD—that the filing of evidence by the defendant was not taking a step in the proceedings within the meaning of sect. 4 of the Arbitration Act, and that the defendant consequently was entitled to move to refer to arbitration.

*Ives v. Willans* (70 L. T. 674) followed.

*Brighton Marine Palace v. Woodhouse* (68 L. T. 669) distinguished.

*ZALINOFF v. HAMMOND*, [1898] 2 Ch. 92; 67 [L. J. Ch. 370; 78 L. T. 456—Stirling, J.

44. "*Step in the Proceedings.*"—*Submission—Application to stay Legal Proceedings in Court—Order on Summonses for Directions—Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 4.—*R.S.C., Ord. 30 rr. 1, 2.*]—An action was brought for a breach of a written contract, in which there was an agreement to refer all matters in dispute between the parties. The plaintiff took out, under Order 30, a summons for directions, which was served upon the defendant, who attended by his solicitors in chambers at the hearing. An order was made as to several matters. Subsequently, and before delivery of defence, the defendant took out a summons under sect. 4 of the Arbitration Act, 1899, to stay proceedings, on the ground that the action was in respect of a matter agreed to be referred by the contract between the parties.

HELD—that the defendant might have objected to the making of the order on the ground of the agreement to refer differences; but as he did not do so he was not in a position to ask for a stay under sect. 4 of the Arbitration Act, 1899, for his acquiescence was a step in the proceedings just as if the order had been made on his application.

*COUNTY THEATRES AND HOTELS, LD v. KNOWLES*, [1902] 1 K. B. 480; 71 L. J. K. B. 351; 86 L. T. 132—C. A.

**(c) Revocation**

45. *Building Contract—Submission of Disputes and Differences to Architect—Charges of Fraud against Architect—Application to Revoke Submission.*]—All disputes and differences arising on a building contract were referred to the decision of the architect appointed by the building owners. The

builders issued a writ against the architect for damages for fraud and misrepresentation. A summons was taken out by the builders to revoke the submission to arbitration. The architect declined to admit the charges made against him.

HELD—that an application to revoke a submission is one to be granted with great caution, and that the submission ought not to be revoked.

*BELCHER v. ROEDEAN SCHOOL SITE AND BUILDINGS, LD.*, (1901) 85 L. T. 469—C. A.

**ARCHITECT.**

See BUILDERS, ENGINEERS AND ARCHITECTS; WORK AND LABOUR.

**ARMORIAL BEARINGS.**

See WILLS, 267, 270.

**ARMY.**

See ROYAL FORCES.

**ARRANGEMENT WITH CREDITORS.**

See BANKRUPTCY AND INSOLVENCY, 64—70.

**ARTICLED CLERK.**

See SOLICITOR.

**ARTICLES OF ASSOCIATION.**

See COMPANIES.

**ARTICLES OF PARTNERSHIP.**

See PARTNERSHIP.

**ARTIZANS' DWELLINGS.**

See PUBLIC HEALTH.

**ASSESSMENT.**

See RATES AND RATING.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY, 8, 63—70, 110, 111.

## ASSOCIATIONS.

See BUILDING SOCIETIES; CLUBS; COMPANIES; FRIENDLY SOCIETIES; INDUSTRIAL SOCIETIES; TRADE.

## ASYLUMS.

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## ATTACHMENT OF DEBT.

See BANKRUPTCY AND INSOLVENCY; COUNTY COURTS; EXECUTION; PRACTICE AND PROCEDURE.

## ATTACHMENT OF PERSON.

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## AUCTIONS AND AUCTIONEERS.

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### I. AUCTIONS.

1. *Auction after a Selling Race—Horse knocked down to one Bidder—Disputed Bid—Power of Stewards to Order a Re-sale—Rules of Racing.*—At an auction after a selling race the winner was knocked down to the plaintiff; another bidder protested that he had bid the same amount, and this was proved to be in fact the case. The auctioneer thereupon reported the matter to the stewards of the meeting, who ordered a re-sale, and at such re-sale the horse was sold to a third person at a much higher figure. The plaintiff brought an action for

damages, alleging that the horse became his property at the time of the first sale. It was admitted that the parties were bound by the "Rules of Racing," of which No. 10 gives the stewards power to "regulate and control the conduct of all officials," and No. 12 gives them power to "determine all questions arising in connection with racing at the meeting."

HELD—that the plaintiff could not recover, for Rule 12 covered the case, and empowered the stewards to act as they did; and (*semble*) Rule 10 also justified them in ordering a re-sale.

CLARK v. RANDALL & OTHERS, (1903) 19 T. L. R. [497—C. A.]

2. *Deposit—Cash—Offer of Cheque for—Custom as to Payment—Statute of Frauds* (29 Chas. 2, c. 3), s. 4.]—A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated, and who, being the highest bidder, is not allowed to sign the written contract; and it is no defence to an action to enforce such a liability that there is no contract in writing signed by the vendors.

Warlow v. Harrison, ((1858) 1 E. & E. 295; 8 W. R. 95; 29 L. J. Q. B. 14; 6 Jur. (n.s.) 66; 1 L. T. (n.s.) 211).

Carlill v. Carbolic Smoke Ball Co., ([1893] 1 Q. B. 256; 62 L. J. Q. B. 257; 57 J. P. 325; 41 W. R. 210; 67 L. T. 837—C. A.) relied on.

Under the usual conditions of sale that the purchaser shall, immediately after the sale, pay the auctioneer a deposit of 10 per cent. and sign the subjoined agreement, cash must be paid.

There is no custom that a vendor is bound to accept the cheque of a person of good credit, much less that of a pauper.

JOHNSTON v. BOYES, [1899] 2 Ch. 73; 68 [L. J. Ch. 425; 47 W. R. 517; 80 L. T. 488—Cozens-Hardy, J.]

3. *Material Representation—Horse entered as Property of a specified Person—In fact Owners changed before Auction—Horse Sold in name of original Owner—Liability of Owner to Refund price paid for the Horse.*—A horse was entered in a sale catalogue as the property of D. Before the sale it was sold privately to A.; but A. and D. told the auctioneer to "let him go through the sale." In D.'s presence the auctioneer described the horse by the description appearing in the catalogue and it was sold. Upon the purchaser discovering these facts he claimed to rescind the contract.

HELD—that the auctioneer had given a material misdescription of the horse, and that under the circumstances D. could not escape the consequences of it, and must refund the price paid for the horse.

WHURE v. DEVENISH, (1904) 20 T. L. R. 385—[Lord Alverstone, C.J.]



**Auctions—Continued.**

4. *Misdescription in Particulars—Correction by Auctioneer at Time of Sale—Compensation with or without Compensation—Specific Performance.*—When a statement correcting a material misdescription in the particulars has been made and distinctly by the auctioneer at the time of sale, but the purchaser is not shown to have heard that statement, the circumstances are such as to render it inequitable to grant the purchaser specific performance with compensation for the misdescription. If the purchaser does not wish to complete without compensation the contract will be rescinded and the return of the deposit with interest ordered and the cost of investigating the title down to the time he was furnished with the written statement of the auctioneer given to the purchaser.

*Manser v. Back* ((1848) 6 Hare, 443) followed.

IN RE HARE & O'MORE'S CONTRACT, [1901] 1 Ch. 93; 70 L. J. Ch. 45; 49 W. R. 202; 83 L. T. 672; 17 T. L. R. 46—Joyce, J.

5. *Purchase of Wrong Lot—Consensus ad idem—Wrong Date in Contract—Statute of Frauds* (29 Car. 2, c. 3).—The defendant, who was a builder, frequently purchased freehold properties by auction with a view to develop them. He attended a sale and bought by mistake the "Hampstead Property" instead of the "Ashstead Property." When the auctioneer, who had not induced the blunder, sent his clerk to the defendant to obtain his name and address for the purpose of filling up the necessary contract, the defendant objected that he had not purchased the Hampstead property, and refused to sign the contract; thereupon the auctioneer purported to sign it as his agent. The sale had been postponed from 17th October to 18th November, and the auctioneer omitted to alter the date in the printed form of contract which he filled up, and signed in the defendant's name; the original date for completion—21st November—was also left unaltered. In an action against the defendant for specific performance,

HELD—that the error of date was a substantial error, and prevented the document from being a sufficient memorandum in writing; and therefore the contract (if any) was unenforceable. *Quære*, also, whether there was ever any *consensus ad idem*.

Decision of Kekewich, J. ([1902] 2 Ch. 266; 71 L. J. Ch. 598; 87 L. T. 42; 18 T. L. R. 593) reversed.

VAN PRAAGH v. EVERIDGE, [1903] 1 Ch. 434; 72 [L. J. Ch. 260; 51 W. R. 357; 88 L. T. 249; 19 T. L. R. 220—C. A.

6. *Right of Seller to Withdraw Goods before Hammer Falls.*—As a bidder at an auction is entitled to withdraw his bid at any time before the hammer falls, there is a corresponding right in the seller to withdraw the goods from sale.

Per Lord Kyllachy, an auctioneer who acts in due accordance with instructions from a disclosed vendor incurs no personal liability to a person claiming to be a purchaser for implement and damages.

FENWICK v. MACDONALD, FRASER & Co., 6 F. [850—Ct. of Sess.

7. *Sale of Goods—Memorandum in Writing—Signature—Auctioneer writing Purchaser's Name against One Lot—"Ditto" against a Second—Held a Good Signature—Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 4].—Two successive lots were knocked down to one purchaser for more than £10 each; opposite the first lot the auctioneer wrote the purchaser's name; opposite the second he wrote "do."

HELD—a sufficient signature to satisfy the requirements of the statute.

REYNOLDS v. HOOPER, (1903) 19 T. L. R. 33—[Darling, J.

**II. AUCTIONEERS.****(a) Liability.**

And see AGENCY, 48.

8. *Conversion—Mercantile Agent—"Sale, Pledge, or Other Disposition" of Property—"Ordinary Course of Business"—Factors Act, 1889* (52 & 53 Vict., c. 45) s. 2].—The plaintiffs consigned goods to H., a mercantile agent, for sale by him on their behalf for cash or on the hire system. H. sent the goods to the defendants, who were auctioneers, to be sold by them, and they made to him an advance upon the goods in contemplation of the sale.

In an action for conversion against the defendants who had insisted upon selling the goods after notice not to do so,

HELD—that the transaction between H. and the defendants was not "a sale, pledge, or other disposition of the goods made by a mercantile agent when acting in the ordinary course of business of a mercantile agent" within the meaning of those words in sect. 2 of the Factors Act, 1889, and that the defendants were not protected by that statute.

WADDINGTON & SONS v. NEALE & SONS, (1907) 96 [L. T. 786; 23 T. L. R. 464—Div. Ct.

9. *Distress—Sale under—Warranty of Title—Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 12].—The defendant, an auctioneer, sold by auction to the plaintiff a piano which had been seized under a distress warrant for rent in arrear. The warrant was invalid, and the piano was claimed from the plaintiff by the true owner, and was delivered up to him. An action was brought by the plaintiff against the defendant on an implied warranty of title.

HELD—that there was no implied warranty of title on the part of the defendant.

PAYNE v. ELSDEN, 17 T. L. R. 161—Ridley, J.

10. *Misrepresentation—Material Fact.*—An auctioneer employed by a solicitor to sell

**Auctioneers—Continued.**

a house on behalf of one of the solicitor's clients advertised it as "held under lease for a term of years at £25: a rent of £18 yearly has been accepted for several years by the landlord in lieu of the said rent of £25."

Before the sale the landlord told the auctioneer that he should in future insist upon receiving the full rent. Relying on the solicitor's advice that the landlord was estopped from demanding more than £18, the auctioneer sold the house without qualifying the language of his advertisement, which he read over to bidders.

The purchaser was compelled by the landlord to pay £25, and thereupon sued the auctioneer.

**HELD**—that the latter was liable in damages, for his advertisement implied a representation that he had no reason to suppose that the lower rent would not be accepted in future.

*DELANEY v. KEOGH*, [1905] 1 Ir. R. 267—C. A.

**11. Mistake—Owner fixing Reserve Price—Auctioneer by Mistake Selling without Reserve—Resale—Personal Liability of Auctioneer to First Purchaser.**—An owner instructed an auctioneer to sell a pony by auction with a reserve of £25. The auctioneer by mistake sold it without reserve for fifteen guineas. He at once discovered his error, and without making a note or memorandum of the sale, put the pony up again and bought it in for seventeen guineas.

The purchaser brought an action against the auctioneer claiming (1) delivery of the pony, or damages for its detention, or (2) damages for breach of warranty of authority.

**HELD**—as to (1) that as an auctioneer has implied authority to sell without reserve, the buyer is not affected by a limitation imposed upon such authority by the owner and not made known to him; and that therefore there was a valid contract for sale: such a contract may in some cases be enforced by action against the auctioneer personally, even if he has disclosed the owner's name (*Woolfe v. Horne*, (1877) 2 Q. B. D. 355; 46 L. J. Q. B. 534; 25 W. R. 728, 36 L. T. 705); but in the present case the absence of a written memorandum prevented the plaintiff from succeeding.

As to (2) that the auctioneer, having made a valid contract, had committed no breach of warranty.

Possibly, however, the plaintiff might have had a cause of action against him for failing to make a memorandum of the sale.

*RAINBOW v. HOWKINS*, [1904] 2 K. B. 332, 73 [L. J. K. B. 641; 53 W. R. 46; 91 L. T. 149; 20 T. L. R. 508—Div. Ct.

**12. Mistake—Selling Property in Error.**—An auctioneer sold a horse in error. The same day he discovered his mistake and informed the purchaser.

**HELD**—(*diss.* Lord Young) that an auctioneer warrants his authority to sell, and that he was liable to the purchaser in respect of the loss of his bargain, although the mistake was *bonâ fide* a slip.

*ANDERSON v. CROALL*, (1904) 6 F. 153— [Ct. of Sess.

**13. Notice of Assignment of Property—Disregard—Assignment of Future Crops—Appointment of Auctioneer to Let and Manage Lands—Lands Sold by another Auctioneer—Notice—Right to Proceeds.**—A landowner by an irrevocable agreement for good consideration assigned to the plaintiff "authority to let and manage her farm for grazing, meadow, and other purposes, and out of the proceeds of such letting" to retain money in satisfaction of a debt due to him. Subsequently she instructed another auctioneer to sell her farm. Notice of the agreement was given to such second auctioneer; but he insisted on handing over the whole purchase price to the owner instead of first satisfying the plaintiff's claim.

**HELD**—that he was liable to the plaintiff.

*COONAN v. O'CONNOR*, [1903] 1 Ir. R. 449—C. A.

**14. Sale subject to a Reserve Price—Sum Bid Less than Reserve Price—Lot Knocked Down in Error—Refusal of Auctioneer to Complete—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58, sub-s. 2.**—Goods were put up for sale by auction under conditions of sale which provided that each lot would be offered subject to a reserve price, the highest bidder to be the purchaser. One lot above the value of £10 was knocked down by the auctioneer to the plaintiff, who bid less than the reserve price. The auctioneer after the hammer had fallen discovered that the reserve price had not been reached, and he refused to sign a memorandum of the contract of sale and to complete the contract. In an action against the auctioneer to recover damages,

**HELD**—that, where goods are offered by auction subject to a reserve price, each bid is a conditional affair subject to the price offered reaching the reserve price, and the fall of the hammer is an acceptance of that conditional offer; and that, therefore, no action lay against the auctioneer for damages either for breach of duty in not completing the contract, or for breach of warranty of authority.

*RAINBOW v. HOWKINS* ([1904] 2 K. B. 322; 73 L. J. K. B. 641; 53 W. R. 46; 91 L. T. 149; 20 T. L. R. 508—Div. Ct., No. 11, *supra*) discussed.

*McMANUS v. FORTESCUE AND BRANSON*, [1907] [2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292—C. A.

**(b) Generally.**

**15. Commission—Sale by Court—No Sale Effected—Subsequent Sale.**—An auctioneer was appointed by the Court to effect a sale of

**Auctioneers—Continued.**

real estate in an administration. He gave the usual recognizance. No sale took place at the auction; but the property was subsequently sold otherwise than through the agency of the auctioneer. On an application by the auctioneer for his commission, evidence was called to show that commission was usually allowed in such a case.

**HELD**—following the practice adopted by Master Burney (whose opinion the parties agreed to follow) that no commission was payable.

**RE MAITLAND; PICKTHALL v. DAWSON**, [1903] [W. N. 143; 115 L. T. Jo. 323—Kekewich, J.

**16. Innocent Misrepresentation by Auctioneer—Purchaser Stopping Cheque—Auctioneer's Right to Sue On.]**—The owner of pictures erroneously, but not fraudulently, told an auctioneer that they were painted by certain well-known artists. The auctioneer so described them in his sale catalogue. The auctioneer sold the pictures, and settled accounts with the owner. At a later date the purchaser returned the pictures, and stopped his cheque.

**HELD**—the auctioneer was entitled to sue on the cheque given by the purchaser, as the catalogue had been prepared on the instructions of the vendor, and the misrepresentations made by the auctioneer were made in good faith by him, and as the return of the pictures and the stopping of the cheque by the purchaser did not put the parties in the same position as they were in before.

**HINDLE v. BROWN**, (1907) 52 Sol. Jo. 133—[Pickford, J.

**17. Licence—"Same Town or Place"—Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56 s. 14.)**—Eastcheap and Sydenham are not the same town or place within sect. 14 of the Revenue (No. 2) Act, 1864, although the buildings are continuous.

**CASEY v. ROSE**, 64 J. P. 313; 82 L. T. 616—[Div. Ct.

**18. Bill of Exchange—Authority of Partner—Trading Firm.]**—Auctioneers do not carry on a "trade" so as to make one partner liable upon a bill of exchange accepted in the firm name by his co-partner without the knowledge or authority of the former.

**WHEATLEY v. SMITHERS**, [1906] 2 K. B. 321; 75 [L. J. K. B. 627; 54 W. R. 537; 95 L. T. 96; 22 T. L. R. 591—Div. Ct.

But **HELD**—by C. A. that (whether above decision was a correct statement of law or not) under the particular partnership deed one partner could bind the firm by accepting bills.

[1907] 2 K. B. 684; 76 L. J. K. B. 900; 97 [L. T. 418; 23 T. L. R. 585—C. A.

**AUDITORS.**

*See COMPANIES.*

**AUSTRALIA.**

*See DEPENDENCIES AND COLONIES.*

**AVERAGE.**

*See SHIPPING AND NAVIGATION.*

**BAIL.**

*See ADMIRALTY, 5; CRIMINAL LAW AND PROCEDURE.*

**BAILEE, LARCENY BY.**

*See CRIMINAL LAW.*

**BAILIFF.**

*See SHERIFFS AND BAILIFFS; COUNTY COURTS; EXECUTION; INTERPLEADER.*

**BAILMENT.**

- I. HIRE PURCHASE AGREEMENTS . . . 94
- II. LIABILITY OF BAILEE . . . 93
- III. LIABILITY OF BAILOR . . . 93

*See also BANKRUPTCY (ACT OF BANKRUPTCY); CARRIERS; INTERPLEADER.*

**I. HIRE PURCHASE AGREEMENTS.**

*And see BANKRUPTCY, 11, 187; BILL OF SALE, 6; MORTGAGE, 62.*

**1. "Agreed to Buy Goods"—Furniture—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9.]**—The plaintiff was the grantee, in good faith, of a bill of sale granted by A. W., who had obtained the furniture comprised in the bill of sale from the defendant under an agreement to hire the same and pay the defendant "the sum of one pound upon signing the agreement, and the balance in instalments of £1 per month until the full amount of the aforesaid value be paid, at which time and on completion of such sums of one pound per month" the defendant agreed to give up all claims to the said goods, and

**Hire Purchase Agreements—Continued.**

that the said goods should then become the property of A. W., "but on default being made in payment of such sums, A. W. agreed" to give up all claims to the said goods and to deliver the same free from all damage or injury beyond fair wear and tear to the defendant.

**HELD**—that there was an agreement by A. W. to buy, that A. W. could not return the goods and put an end to the agreement with the defendant, and that the plaintiff had a good title under sect. 9 of the Factors Act, 1889.

*Lee v. Butler* ([1893] 2 Q. B. 318; 62 L. J. Q. B. 591; 42 W. R. 88; 69 L. T. 370; 4 R. 563—C. A.) followed.

*WYLDE v. LEGGE*, (1901) 84 L. T. 121—Div. Ct.

**2. Agreement by Hirer to preserve Chattel from Injury—Repairs to Chattel by Third Person—Lien for Repairs.**—By a hire-purchase agreement the plaintiff let a carriage on the hire-purchase system, payment to be made by monthly instalments, the property in the carriage to remain in the plaintiff until all the instalments were paid by the hirer, and the plaintiff to have liberty to retake possession of the carriage and terminate the hiring upon failure in payment of any instalment when due. The hirer agreed to keep and preserve the carriage from injury. The hirer failed to pay some of the instalments and the plaintiff gave him notice to terminate the hiring. After the instalments became in arrear and before the notice to terminate the hiring the hirer sent the carriage to the defendant, a coach builder, to have it repaired. The plaintiff demanded the carriage from the defendant, who claimed a lien on it for work done.

**HELD**—that as the hirer had agreed to preserve the carriage from injury, and had employed the defendant to do the necessary repairs, the defendant had a lien on it for those repairs.

*Singer Manufacturing Co. v. L. & S.W. Ry. Co.* ([1894] 1 Q. B. 833; 63 L. J. Q. B. 411; 42 W. R. 347; 70 L. T. 172—Div. Ct.) applied.

*KEENE v. THOMAS*, [1905] 1 K. B. 136; 74 [L. J. K. B. 21; 53 W. R. 336; 92 L. T. 19; 21 T. L. R. 2—Div. Ct.]

**3. Licence to Seize—True Nature of the Transaction.**—M. agreed to buy an hotel, including the furniture, fixtures, etc., but could not find the last £2,000 of the purchase-price. He applied to the defendants, who were wine-merchants, for a loan; but as he refused to give a bill of sale, it fell through. It was then arranged that the defendants should buy the furniture, etc., from the vendor for £2,000, and let it to M. on a hire-purchase agreement containing the usual licence to seize; and in return M. agreed to buy all wines from the defendants. In M.'s bankruptcy his trustee impeached

the agreement as being really a bill of sale, and void for want of registration.

**HELD**—that the Judge had rightly drawn the inference that the sale to the defendants and the letting by them to M. were only colourable; that the transaction was really a loan upon the security of the agreement, and was void against creditors for non-registration as a bill of sale.

Decision of C. A., *sub nom. Mellor v. Maas* ([1903] 1 K. B. 226; 72 L. J. K. B. 82, 88 L. T. 50; 18 T. L. R. 139; 10 Manson, 26), affirmed.

*MAAS v. PEPPER*, [1905] A. C. 102; 74 L. J. K. B. [452, 53 W. R. 513; 92 L. T. 371; 21 T. L. R. 304; 12 Manson 107—H. L. (E.)

**II. LIABILITY OF BAILEE.**

**4. Bailee—Jus tertii—Estoppel—R.S.C., Ord. 57, rr. 1, 2**—A bailee who is estopped from setting up the *jus tertii* may nevertheless be entitled to relief by way of interpleader.

*Dicta in Attenborough v. St. Katherine's Dock Co.*, (1878) 3 C. P. D. 450; 47 L. J. C. P. 763; 26 W. R. 583, 38 L. T. 404 followed.

**EX PARTE MERSEY DOCKS AND HARBOUR BOARD**, [1899] 1 Q. B. 546; 68 L. J. Q. B. 540; 47 W. R. 306; 80 L. T. 143; 15 T. L. R. 199—C. A.

**5. Bailee's Servant causing Injury to Article Bailed—Course of Employment.**—The plaintiff, whilst repairing the defendant's carriage, lent him another one to use. The defendant's coachman took the carriage out for his own purposes and without his master's knowledge, and through his negligence it was injured in a collision.

**HELD**—that the defendant was not liable for the cost of repairing it, as the coachman at the time of the collision was not acting in the course of his employment.

*Coupé Co. v. Maddick* ([1891] 2 Q. B. 413; 60 L. J. Q. B. 676; 65 L. T. 489—Div. Ct.) considered and distinguished.

Decision of Div. Ct. (51 W. R. 558; 89 L. T. 42) reversed.

*SANDERSON v. COLLINS*, [1904] 1 K. B. 628; 73 [L. J. K. B. 358; 52 W. R. 354; 90 L. T. 243; 20 T. L. R. 249—C. A.]

**6. Loss—Negligence—Burden of Proof—Detinue.**—The plaintiff left certain engraving plates in the custody of defendants, under circumstances which imposed upon them the duty of taking as much care of them as a reasonable man would take in the case of his own goods. While in the defendants' custody the plates were taken away by someone and lost. There was no evidence to show how they were taken away, and the defendants proved that the plates were kept in a proper place and under the charge of proper persons, and that the arrangements for their safe keeping were reasonably sufficient.

**HELD**—that the defendants had proved that

Liability of Bailee—Continued.

they had used such care in the custody of the plates as a reasonable man would use in the care of his own property, and that, therefore, they were not liable.

*Powell v. Graves* ((1886), 2 T. L. R. 663) discussed.

Decision of Walton, J. (22 T. L. R. 275), affirmed.

*BULLEN v. THE SWAN ELECTRIC ENGRAVING [Co., (1907) 23 T. L. R. 258—C. A.]*

7. *Negligence—Bailee Maintaining Action of Trespass against a Stranger—Bailee not Liable over to Bailor—Claim by Postmaster-General—Locus standi as Bailee—Loss of Mails in Transit—Measure of Damages.*—In an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

That possession is good against a wrongdoer, and that the latter cannot set up the *jus tertii* unless he claims under it, is well established. A long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. The wrongdoer, who is not defending under the title of the bailor, is quite unconcerned with what rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes, quite irrespective of the rights and obligations as between him and the bailor.

The obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed cannot now be questioned.

A collision occurred between the steamship "Mexican" and the steamship "Winkfield," which resulted in the loss of the former with a portion of the mails which she was carrying at the time. The owners of the "Winkfield," under a decree limiting liability to £32,514 17s. 10d., paid that amount into Court, and the Postmaster-General, on behalf of himself and the Postmasters-General of Cape Colony and Natal, claimed to recover out of that sum the value of letters, parcels, &c., in his custody as bailee, and lost on board the "Mexican." The case was dealt with as a claim by a bailee who was under no liability to his bailor for the loss in question, and also on the assumption that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident.

HELD—that the Postmaster-General, as bailee in possession, without regard to the question of his liability over, was entitled to recover, out of the fund which the owners of the "Winkfield" had paid into Court, such sum as the registrar and merchants might find to be due.

*Claridge v. South Staffordshire Railway Co.* ([1892] 1 Q. B. 422; 61 L. J. Q. B. 503; B.D.—VOL. I.

56 J. P. 408; 66 L. T. 655—Div. Ct.) overruled.

Decision of Jeune, P. ([1901] 49 W. R. 685; 17 T. L. R. 567), reversed.

*THE WINEFIELD*, [1902] P. 42; 71 L. J. P. D. & [A. 21; 50 W. R. 246; 85 L. T. 688; 18 T. L. R. 178; 9 Asp. M. C. 259—C. A.]

8. *Owner's Risk—Storage of Goods—Cold Storage Warehouse—Storing Cheese at too Low a Temperature—"Wilful Misconduct."*—The fact that a thing (in fact injurious) is done intentionally does not necessarily constitute wilful misconduct.

The defendants contracted to store the plaintiff's cheese in their cold storage warehouse, the cheese to be stored at owner's risk. The plaintiff alleged that the cheese was damaged owing to the defendant's negligence in having stored it at too low a temperature. In an action to recover damages for the injury to the cheese,

HELD—that, as the storing of the cheese at the low temperature, even assuming that there was evidence of negligence on the part of the defendants, was not done with any intention on their part of doing wrong, the defendants were not guilty of wilful misconduct, and were therefore not liable.

Meaning of "wilful misconduct" considered.

*Lewis v. Great Western Ry. Co.* (1878) 3 Q. B. D. 195; 47 L. J. Q. B. 131; 26 W. R. 255; 37 L. T. 774—C. A.) applied.

*CORDEY v. CARDIFF PURE ICE AND COLD STORAGE [Co., LD., (1903) 88 L. T. 192, 19 T. L. R. 256—C. A.]*

9. *Warehousemen—Goods Landed from Ship—Shed Let to Shipowner—Duty to Guard Shed—Keeping Goods in Place not Contracted for—Negligence.*—The plaintiffs sought to recover the value of a bale of furs, which had been stolen from the defendants' docks. By agreement with the owners of a vessel, having on board a consignment of furs for the plaintiffs, a shed was reserved by the defendants for the sole use of the owners of the vessel at an annual rent. The defendants locked the shed at night and unlocked it each morning, and employed a service of constables. The defendants charged a landing rate. The plaintiffs, before the arrival of their goods, paid the shipowners' charges on the bill of lading and got a discharge from them which they lodged with the defendants, having endorsed it with a direction to the defendants to transfer the goods to the defendants' dépôt at East Smithfield. The ship arrived, but the goods were not transferred by the defendants as directed; they were placed in shed B., where they remained. The shed was broken open and a bale of the plaintiffs' furs, weighing five cwt. and valued at £150, was stolen. The jury found that the defendants had not been sufficiently careful in watching.

**Liability of Bailee—Continued.**

**HELD**—that there was a bailment; that as the defendants had undertaken to house the goods or pile them on the quay, and undertook the duty of watching, the case was like that of *Lilley v. Doubleday*, (1881) 7 Q. B. D. 510; 51 L. J. Q. B. 310; 46 J. P. 708; 44 L. T. 814; and that the plaintiffs must succeed.

*LAMPSON & Co. v. LONDON AND INDIA DOCK JOINT CO.*, (1901) 17 T. L. R. 663—Phillimore, J.

**III. LIABILITY OF BAILOR.**

**10. Bailment for Reward—Hire of Goods—Damages—Remoteness.**—The defendant let out sacks to the plaintiffs, and knew that they were to be used for the purpose of unloading peas from the hold of a ship. While one of the sacks was being so used the neck of the sack gave way, and the sack fell upon a man who was engaged in the hold in the work of unloading, and injured him. The man sued the plaintiffs, and recovered £25 damages and costs.

**HELD**—that the sack was, at the time of the hiring, not fit for the purpose for which it was to be used, and that the damages were not too remote.

*Mowbray v. Merryweather* ([1895] 2 Q. B. 640; 65 L. J. Q. B. 50; 59 J. P. 804; 44 W. R. 49; 73 L. T. 459; 14 R. 767—C. A.) followed.

Decision of Wright, J. (79 L. T. 384; 15 T. L. R. 33), affirmed.

*VOGAN & Co. v. OULTON*, (1899) 81 L. T. 435; [16 T. L. R. 37—C. A.]

**11. Gratuitous Bailment—Loan of Chattel—Defect in Chattel—Lender's Knowledge thereof, and Duty—Consequential Injury to Borrower—Lender's Liability.**—The duty of a gratuitous lender is to communicate to the borrower defects in the chattel lent, with reference to the use for which the loan is accepted, of which he is aware, and if either deliberately or by gross negligence he does not discharge this duty, he is liable for injury resulting to the borrower.

*Blakemore v. Bristol and Exeter Railway* (1858) 8 E. & B. 1035; 27 L. J. Q. B. 167; 6 W. R. 336; 4 Jur. (n.s.) 657, and *MacCarthy v. Young*, (1861) 6 H. & N. 329; 30 L. J. Ex. 227; 9 W. R. 439; 3 L. T. (n.s.) 785 approved.

*COUGLIN v. GILLISON*, [1899] 1 Q. B. 145; 68 [L. J. Q. B. 147; 47 W. R. 113; 79 L. T. 627—C. A.]

**BAKER.**

See **FOOD AND DRUGS**; **TIME**, 4, 7.

**BAKEHOUSES.**

See **FACTORIES AND WORKSHOPS**; **LANDLORD AND TENANT**.

**BALLOT.**

See **ELECTIONS**.

**BANKERS AND BANKING.**

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• And see **BILLS OF EXCHANGE**; **COMPANIES**, 16; **LIBEL AND SLANDER**; **MISTAKE**; **MORTGAGE**, 72; **PRACTICE AND PROCEDURE**, 147; **WILLS**, 117—122, 353.

**I. APPROPRIATION OF PAYMENTS.**

**1. Deposit by Stockbrokers of Clients' Securities to secure Stockbrokers' Debt—Loan Account and Current Account—Clients' Right to Repayment.**—Securities belonging to the clients of a firm of stockbrokers were, without the authority of the clients, deposited with a bank to secure a debt due from the stockbrokers to the bank. The stockbrokers had two accounts with the bank—a loan and a current account. This debt was due on the loan account, but there was no agreement that the securities were deposited to secure the loan account exclusively. The stockbrokers became bankrupt. At the date of the bankruptcy they had a balance in their favour on the current account, which was at any rate partly made up of money they had received from clients for investment. The bank did not set off the balance due on the current account against the indebtedness on the loan account, but sold the securities and discharged the debt.

**HELD**—that in the absence of any agreement to the contrary, the securities were deposited to secure the indebtedness of the stockbrokers to the bank, and that this indebtedness was the amount due on all their accounts. Consequently, the clients of the stockbrokers were not entitled to be repaid out of the balance on the current account money which had been paid by them to the stockbrokers for investment, and paid by the stockbrokers into their current account.

Decision of Byrne, J. ([1899] 2 Ch. 556; 68 L. J. Ch. 668; 48 W. R. 62; 6 Manson, 424), reversed.

*MUTTON v. PEAT*, [1900] 2 Ch. 79; 69 L. J. Ch. [484; 48 W. R. 486; 82 L. T. 440—C. A.]

**2. Entries in Bankers' Books—Entries not communicated to the Customer.**—Where a creditor appropriates his debtor's payments in his books without communicating the appropriation to the debtor, the creditor is not bound by the appropriation.

*LONDON & WESTMINSTER BANK v. BUTTON*, [1907] 51 Sol. Jo. 466—Joyce, J.

**Appropriation of Payments—Continued.**

**3. Interest—Principal.]**—The rule as to the appropriation of payments to interest before principal is not applicable to money due on a banking account, where, according to the custom of bankers, the interest due and unpaid at the end of each half-year has been converted into principal.

**PARR'S BANKING Co., LD. v. YATES, [1898] 2 Q. B. 460; 67 L. J. Q. B. 851; 79 L. T. 321; 47 W. R. 42—C. A.**

**4. Trust Moneys—Right to appropriate against Overdraft of Customer.]**—A trustee who had received trust moneys for investment, opened a separate account at his bankers and paid the amount so received into it.

**HELD**—that the bank was justified in treating the amount as belonging to the customer, and to appropriate it against his overdrawn account, in the absence of any evidence to show that it had notice of the trust.

**UNION BANK OF AUSTRALIA v. MURRAY, [AYNSLEY AND ANOTHER, [1898] A. C. 693; 67 L. J. P. C. 123—P. C.**

**II. CHEQUES.**

*And see AUCTIONS, 2.*

**5. Customer's Cheque—Bank Dishonouring—Special Damage—Principal and Agent—Authority of Agent—Consideration.]**—T. had authority to obtain for the plaintiff, as his principal, a promise by the bank to pay certain cheques. The defendant bank promised T. as the agent, and for and on behalf of the plaintiff, to pay the cheques. T. deposited a store warrant of the plaintiff's sheep as the consideration for that promise. The bank dishonoured the cheques.

**HELD**—that there was consideration moving from the plaintiff; that the plaintiff had a cause of action, and that evidence of the plaintiff's loss of custom and of credit from particular individuals was not admissible, as no special damage was alleged.

**FLEMING v. BANK OF NEW ZEALAND, [1900] A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1; 16 T. L. R. 468—P. C.**

**6. Bank Dishonouring Customer's Cheque—Damage to Customer's Financial Reputation.]**—A customer with an account current at a bank is entitled to have his cheques honoured up to the amount of his credit balance. If a bank, with funds at a customer's credit, dishonour his cheque, it is liable to him for the damage done to his financial reputation.

**KING v. BRITISH LINEN BANK, [1899] 36 S. L. R. [733]**

**7. Certified Cheque — Alteration — Forgery — Payment through Clearing-house—Liability for Loss—Delay.]**—A customer of

the respondent bank drew a cheque upon that bank for five dollars, and had the cheque certified by the bank as good. The customer thereupon inserted the word "hundred" after the "five" and paid the cheque so altered into the appellant bank and opened an account there, and he drew against the amount which was placed to his credit. The appellant bank presented the cheque through the clearing-house, and it was paid by the respondent bank. The next day the respondent bank discovered the fraud, and claimed repayment of 495 dollars from the appellant bank. It was proved that certified cheques, apparently in order and presented through the clearing-house, were paid by bankers as a matter of course, and it was not usual for bankers to turn to their customers' account on the day of presentment to see whether there was anything wrong before passing the cheques, but it was usual to check the returns with the customers' account the next day.

**HELD**—that the respondent bank was entitled to recover the 495 dollars as money paid under a mistake of fact.

**Kelly v. Solari ((1841) 9 M. & W. 54; 11 L. J. Ex. 10) followed.**

**Decision of the Supreme Court of Canada (31 Can. Sup. Ct. Rep. 344) affirmed.**

**IMPERIAL BANK OF CANADA v. BANK OF HAMILTON, [1903] A. C. 49; 72 L. J. P. C. 1; 51 W. R. 289; 87 L. T. 457, 19 T. L. R. 56—P. C.**

**8. Cheque Bank Cheques not filled or Signed by Customers—Winding-up—"Outstanding Cheques"—Secured Creditors.]**—Customers of the Cheque Bank who at the date of the winding-up of the bank held cheques of the bank not filled up or signed by them.

**HELD**—to be creditors of the bank as the holders of "outstanding cheques" within the meaning of clause 6 of the trust deed of the bank.

**IN RE CHEQUE BANK, LD. (No. 1), (1902) 18 T. L. R. 8—Wright, J.**

**9. Cheque Bank Cheques not filled up to the Limit—Customer's Balance at Bank after all his Cheques are drawn—Winding-up—"Outstanding Cheques"—Documents of Title—Forms of Request for New Cheques—Secured Creditors.]**—Customers of the Cheque Bank, who at the time of the winding-up of the bank had exhausted their supply of cheques, but had drawn them for less than the limit perforated on the cheques, thus having a balance to their credit at the bank.

**HELD**—not to be secured creditors, as the sums remaining to the credit of the customers under those circumstances could not be called "outstanding cheques," nor could such customers be called holders of outstanding cheques; and that the forms of request for new cheques were not documents of title at all, and could not be regarded as

*Cheques—Continued.*

cheques at all, nor could the holders of them be regarded as the holders of outstanding cheques.

IN RE CHEQUE BANK, LD. (No. 2), (1902) 18  
[T. L. R. 22—Wright, J.]

10. *Certifying Cheque—Effect of—Entries in Pass-book Admissions only.*—The intialling of a cheque by a drawee bank has not the effect of making it current as cash in the absence of evidence of such a usage. A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn. The entries in the pass-book are not conclusive as showing that the bank accepts the cheque as cash; but such entries are admissions only, and, as in the case of the receipts for the payment of money, they do not debar the party sought to be bound by them from showing the real nature of the transactions which they are intended to record.

GADEN v. NEWFOUNDLAND SAVINGS BANK, [1899]  
[A. C. 281; 68 L. J. P. C. 57; 80 L. T. 329;  
15 T. L. R. 228—P. C.]

11. *Cheque Drawn by three Persons—Liability of Drawers to Bank.*—Three persons, none of whom had any funds to their credit at a certain bank, drew a cheque upon it in favour of blank or order. The bank cashed the cheque, paying the amount to one of the drawers, and opened an account in the names of the drawers, which they debited with the amount of the cheque.

HELD—that the drawers were jointly and severally liable to the bank for the amount of the cheque.

HENDERSON v. WALLACE AND PENNELL, (1903)  
[5 F. 166—Ct. of Sess.]

12. *Condition Attaching to Delivery—Proof by Parole—Negotiation—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), ss. 29, 38, 73, 100.]—The defender drew a cheque for £500 upon the Commercial Bank of Scotland in favour of C. W. S., and indorsed it to the pursuer. The defender agreed to grant this cheque only on condition that he should receive a cheque by R. that same afternoon, and if he did not, then he would countermand payment of the cheque.

HELD—that the condition in question was one which it was competent to prove by parole, both under sect. 100 of the Bills of Exchange Act and at Common Law, and was effectual against an indorsee who was not a holder in due course.

SEMPLE v. KYLE, (1902) 4 F. 421—Ct. of Sess.,  
[1st Division.]

13. *Countermand of Payment—Telegram Placed in Bank's Letter Box—Telegram Overlooked—Notice—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 75.]—A cheque drawn upon the defendant's bank was given by the plaintiff on October 31st to a third person. Upon the same day the plaintiff, after banking hours, sent a telegram to the bank countermanding payment of the cheque. The bank being closed, the telegram was put into the bank letter-box. On the next morning, November 1st, the bank cashier, when clearing the letter-box, by some accident left the telegram lying in the box, where it remained until the following morning, November 2nd, when it was opened. In the meantime, the cheque was presented for payment on November 1st, and was paid. In an action by the plaintiff to recover the sum so paid away as money had and received,

HELD—that there was at any rate no countermand of payment until the telegram was brought to the notice of the bank, and that the plaintiff could not recover. Moreover, although a bank may reasonably postpone payment of a cheque on receipt of a telegram in order to make inquiries, *semble*, it is not in law bound to accept an unauthenticated telegram as sufficient authority to refuse payment.

Decision of Div. Ct. (23 T. L. R. 594) reversed.

CURTICE v. LONDON CITY AND MIDLAND BANK,  
[(1907) 24 T. L. R. 176—C. A.]

14. *Crossed Cheque—Conversion—Collection for Customer—Forged Indorsement—Credit for Cheque given in Account before it is cleared—Banker not acting as mere Agent for Collection—Cheque crossed by Collecting Banker—Draft by one Branch of a Bank on another Branch—"Not Negotiable"—Protection of Banker—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 3, sub-s. 1; ss. 60, 73; s. 77, sub-s. 6; s. 79, sub-s. 2; ss. 80, 82—*Revenue Act, 1883* (46 & 47 Vict. c. 55), s. 17—*Stamp Act, 1853* (16 & 17 Vict. c. 59), s. 19.]—When a banker receives from a customer a crossed cheque drawn upon another bank, and places the amount thereof to the customer's account and allows him to draw against it, without waiting for the cheque to be paid by the bank on which it is drawn, the banker receives payment as a holder for value, and not for the customer, so as to entitle him to the protection of sect. 82 of the Bills of Exchange Act, 1882.

Sect. 82 only protects a banker when the cheque is crossed before it comes into his hands: it does not apply to an uncrossed cheque, which the banker himself crosses on receiving it.

A banker's draft drawn by one branch of a bank upon its head office is not a bill of exchange or cheque within the Act of 1882, nor is it within sect. 17 of the Revenue Act, 1883; it is, however, within sect. 19 of the Stamp Act, 1853, which protects the banker if the endorsement be forged.



**Cheques—Continued.**

The plaintiff, who traded under the firm name of Gordon and Munro, had in his employ a clerk named Jones, who opened accounts with the defendant banks respectively. After Jones had opened an account with them, he commenced a series of dealings with cheques which belonged to the plaintiff, and most of which were drawn upon banks other than the defendant bank, payable to the order of Gordon and Munro, and crossed. Having obtained possession of these cheques by larceny, he forged the signature of the plaintiff's firm on the back of them, and then handed them to the defendant bank, who crossed them all with their own rubber stamp, and at once credited him with the amount of the cheques, and allowed him to draw against them before they were cleared. His account with the defendant bank would, it appeared, have been overdrawn during a large portion of the period covered by these transactions, but for the cheques paid in as before mentioned. The action was brought by the plaintiff, as the true owner of the cheques, against the defendants, as persons who had dealt with the cheques in a manner amounting to a conversion of them. The question was whether the defendants, who were *prima facie* liable, because the forged endorsements gave no title to the cheques, were protected by the provisions of the Bills of Exchange Act, 1882. There were different classes of instruments dealt with:—(1) Uncrossed cheques payable to G. & M., or order, not drawn on the appellants: (2) uncrossed cheque payable to G. & M., or bearer, not drawn on the appellants: (3) uncrossed banker's drafts payable to G. & M., or order, drawn on the appellants by one of their branches: (4) crossed cheques payable to G. & M., or order, drawn on the appellants: (5) crossed and "not negotiable" cheques payable to G. & M., or order, not drawn on the appellants: (6) crossed cheques payable to G. & M., or order, not drawn on the appellants: (7) crossed cheques payable to G. & M., or bearer, and not drawn on the appellants: (8) crossed instruments payable to G. & M., on signature of a special receipt at foot and not drawn upon the appellants. It was admitted at previous stages of the action that the plaintiff could not succeed on classes 2, 4, and 7, i.e., bearer cheques, and order cheques drawn on the appellants themselves. The other classes were now in dispute.

Jones was admitted to be a "customer" of the appellants within the meaning of sect. 82; and the jury had found that the appellants had not been guilty of any negligence.

**HELD**—(affirming the C. A.) that the plaintiff could recover on classes 1, 5, 6, and 8, for the reasons given in the first two paragraphs of this note; but (varying the decision of the C. A.) that he could not recover on class 3 for the reasons given in the third paragraph of this note.

Decision of C. A. ([1902] 1 K. B. 242; 71 L. J. K. B. 215; 50 W. R. 276; 86 L. T. 98; 18 T. L. R. 156; 7 Com. Cas. 37), reversing deci-

sion of Bucknill, J. ([1901] 83 L. T. 762; 17 T. L. R. 176), affirmed with a slight variation.

**CAPITAL AND COUNTIES BANK v. GORDON; LONDON CITY AND MIDLAND BANK v. GORDON**, [1903] A. C. 240; 72 L. J. K. B. 451; 51 W. R. 671; 88 L. T. 574; 19 T. L. R. 462; 8 Com. Cas. 221—H. L. (E.).

15. *Crossed Cheque—Forgery—Receiving Payment for Customer—Entering Amount to Credit of Customer in Ledger—Crossing Cheque specially to Banker for Collection—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61) ss. 77, 78, 82.]—The defendants, who were bankers, received for collection a cheque from a customer drawn upon another bank and crossed generally. The defendant's clerk at once entered the amount in the bank ledger to the credit of the customer, and crossed the cheque specially to the defendants' clearing bankers, and beneath the special crossing stamped words denoting that it was for account of the defendants' bank. The next day, when the cheque was honoured, the defendants entered the amount thereof to the customer's credit in his pass-book, and the customer was then allowed to draw against it. The cheque was a forged cheque, but the defendants acted throughout in good faith and without negligence.

**HELD**—that the defendants had merely received payment of the cheque for their customer, and were protected by sect. 82 of the Bills of Exchange Act, 1882.

**AKROKERRI (ASHANTI) MINES, LD. v. THE [ECONOMIC BANK, LD., AND HOBBS; BIPPOSSU MINES, LD. v. SAME; ARTASI MINES, LD. v. SAME; ASHANTI MINES, LD. v. SAME]**, [1904] 2 K. B. 465; 73 L. J. K. B. 742; 52 W. R. 670; 91 L. T. 175; 20 T. L. R. 564; 9 Com. Cas. 281—Bigham, J.

16. *Crossed Cheque—Receiving Payment for a Customer—Giving Credit to Customer before Cheque Cleared—Crediting Customer in Bank's Books—Negligence—Holding out—Name of Individual same Name as firm—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 82.]—A banker does not lose the protection of sect. 82 of the Bills of Exchange Act, 1882, merely because, before a crossed cheque paid in by a customer is cleared, he makes a credit entry in the bank's books or in the pass-book not communicated to the customer.

**Capital and Counties Bank v. Gordon** ([1903] A. C. 240; 72 L. J. K. B. 451; 51 W. R. 671; 88 L. T. 574; 19 T. L. R. 462—H. L., No. 14, *supra*) distinguished.

It may be negligence on the part of a banker to receive payment for a customer of a crossed cheque marked "account of payee," where the banker has information which may lead him to think that the account to which he is crediting the amount of the cheque is not the payee's account.

Where a person carries on business in the

**Cheques—Continued.**

name of an individual with the addition of the words "and Co.," and employs that individual as manager of the business, to whom the entire control of the business is left, his conduct does not amount to a holding out of that person as the sole owner of the business. It may amount to a holding out that he is a partner in the business.

BEVAN v. THE NATIONAL BANK, LD.; BEVAN v. [THE CAPITAL AND COUNTIES BANK LD., (1906) 23 T. L. R. 65—Channell, J.

17. *Crossed Cheque*—"Not Negotiable"—"Customer"—*Fraud*—*Defective Title—Liability of Banker—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), ss. 81, 82.]—A person who takes a cheque, which is upon its face "not negotiable," and treats it as a negotiable security, takes the risk of the person for whom he negotiates it having no title to it.

To make a person a "customer" of a bank there must be some sort of account, either a deposit or a current account, or some similar relation.

A rate collector at N. had been in the habit of cashing cheques received by him as collector of rates at the respondents' bank at W. His employers, the overseers, kept their account at another bank in N. It did not appear that he cashed cheques at the respondents' bank in any cases except those in which he had to make payments out of the rate collected as poor-rate to the credit of the waywardens or rural district council, who kept their accounts with the respondents. In all instances which were put in evidence the transaction was similar to the one in question, namely, a payment to the credit of a customer of the respondents by means of a large cheque out of which he received the change. He had no banking account anywhere. He falsely pretended to the plaintiffs that a rate had been made, and so induced them to give him their cheque for £142 10s, the amount. The cheque was drawn in his favour or order. It was crossed generally "and Co.," and marked "not negotiable." He, in accordance with his usual course of dealing with the respondents, handed it across the counter to the bank clerk at W., and the latter filled up a paying-in slip, which the rate collector signed. £25 was placed to the credit of the W. Rural District Council and the balance paid to the rate collector in cash. The respondents crossed it to themselves, and sent it to their head office in London for collection. It was duly presented and paid. In an action for money had and received or damages for conversion of the cheque, it was found that the respondents received the payment in good faith and without negligence.

HELD—that the rate collector never had any real title to the cheque, and it being marked "not negotiable" the respondents never acquired title to it as against the ap-

pellants; that it was not proved that he was a customer, or that the respondents undertook to collect the cheques on his behalf, so as to bring them within the protection of sect. 82 of the Bills of Exchange Act, 1882; and that the respondents were liable to the appellants for the amount of the cheque.

Decision of the Court of Appeal ([1900] 2 Q. B. 464; 69 L. J. Q. B. 741; 48 W. R. 662; 82 L. T. 746; 16 T. L. R. 453; 5 Com. Cas. 282) reversed.

GREAT WESTERN RAILWAY v. LONDON AND [COUNTY BANKING CO., [1901] A. C. 414; 70 L. J. K. B. 915; 50 W. R. 50; 85 L. T. 152; 17 T. L. R. 700; 6 Com. Cas. 275—H. L. (E.).

18. *Crossed generally—Collection for Customer—No Title—Negligence—Liability to True Owner—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 82.]—The Bills of Exchange Act, 1882, s. 82, provides that where a banker without negligence, receives payment of a crossed cheque for a customer who has no title to the cheque, the banker shall not incur any liability to the true owner of the cheque.

A cheque for £542 was drawn in favour of the plaintiffs, or order, and crossed generally. The plaintiffs' secretary indorsed the cheque with the name of the plaintiffs, followed by his own name and the word "secretary," and, without the authority of the plaintiffs, paid the cheque into his account at the defendant's bank for collection. The secretary had never previously paid into his own account a cheque drawn in favour of the plaintiffs. The defendants, without making any inquiry as to the authority of the secretary to deal with the cheque, placed the amount to the credit of the secretary, and collected the proceeds from the paying bank.

HELD—that the defendants had not acted without negligence, and were liable to the plaintiffs for the amount of the cheque.

HANNAN'S LAKE VIEW CENTRAL, LD. v ARM- [STRONG & Co., (1900) 16 T. L. R. 236; 5 Com. Cas. 188—Kennedy, J.

19. *Forged Indorsement—"Fictitious or non-existing Person"—Intention of Drawer—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 7, sub-s. 3.]—A confidential clerk in the plaintiff's employment made out cheques payable to the order of certain of their customers, and obtained the signature of the plaintiffs to them. At the time the cheques were drawn no money was owing to the customers. The clerk then forged the indorsements and obtained cash for the cheques from the defendant, who acted with good faith in the matter. The cheques were duly paid on presentment. In an action to recover the amount so received by the defendant,

HELD—that the payees were not "fictitious" persons within sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882, inasmuch as at

**Cheques—Continued.**

the time the cheques were drawn the plaintiffs intended to pay the amounts to the persons named therein, who were their customers; and that, therefore, the defendant was not entitled to retain the amounts.

*Bank of England v. Vagliano Bros.* ([1891] A. C. 107; 60 L. J. Q. B. 145; 55 J. P. 676; 39 W. R. 657; 64 L. T. 353—H. L.) and *Clutton v. Attenborough & Sons* ([1897] A. C. 90; 66 L. J. Q. B. 221; 45 W. R. 276; 75 L. T. 556—H. L.) distinguished.

*VINDEN AND ROGERS v. HUGHES*, [1905] 1 K. B. 795; 74 L. J. K. B. 410; 53 W. R. 429; 21 T. L. R. 324—Warrington, J.

20. *Forged Indorsement—Payee—"Fictitious Person"*—*Belief or Intention of Drawer—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 7, sub-s. 3.]—A payee is not a "fictitious person" within sect. 7 (3) of the Bills of Exchange Act, 1882, if he is a real person intended by the drawer to receive payment.

W. falsely represented to the plaintiff that he had agreed to purchase from K. certain shares and had arranged to resell the shares at a profit. The plaintiff was thereby induced to assist him in financing the transaction, and for this purpose drew a cheque payable to K. or order for the amount of the purchase-money. This cheque he delivered to W. with instructions to hand it to K. in payment for the shares. W. forged K.'s indorsement to the cheque and paid it into his own account with the defendant bank, who credited him with the amount, and collected the money from the plaintiff's bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company. In an action by the plaintiff against the defendant bank for the conversion of the cheque,

**HELD**—that, as K. was an existing person designated by the plaintiff and intended by him to be the payee of the cheque, the payee was not a "fictitious person" within sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and that the defendant bank was liable to pay to the plaintiff the amount of the cheque.

*Vinden v. Hughes* ([1905] 1 K. B. 795; 74 L. J. K. B. 410; 53 W. R. 429; 21 T. L. R. 324—Warrington, J., *supra*) approved.

*Decision of Bray, J.* ([1906] 2 K. B. 718; 75 L. J. K. B. 1026; 11 Com. Cas. 293) affirmed.

*MACBETH v. NORTH AND SOUTH WALES BANK*, [1908] 1 K. B. 13; 77 L. J. K. B. 19; 97 L. T. 699; 13 Com. Cas. 69; 24 T. L. R. 5—C. A.

Affirmed H. L., [1908] W. N. 66; 77 L. J. K. B. 464.

21. *Forgery—Drawer's Name Forged to Cheque—Negligence of Customer—Estoppel.*—The directors of a limited company appointed the son of the chairman as

secretary of the company. There were three directors, including the chairman. The chairman knew that his son had four years before forged his signature to a document, but since that time the son had apparently lived a blameless life. The directors allowed the secretary to have the custody of the company's cheque-book and bank pass-book, and they did not require the secretary to produce the cheque-book for inspection at their meetings. The signatures of a director and of the secretary were necessary when drawing cheques on behalf of the company. The secretary forged the signature of a director to a number of cheques purporting to be drawn on behalf of the company, and obtained payment thereof from the company's bankers. The company claimed to recover from the bankers the amounts so paid.

**HELD**—that the company were not estopped by negligence from recovering the sums claimed.

*LEWES SANITARY STEAM LAUNDRY Co. v. BARCLAY & Co.*, (1906) 95 L. T. 444; 22 T. L. R. 737; 11 Com. Cas. 255—Kennedy, J.

22. *Fraudulent Alteration—Negligence of Drawer—Leaving Space before Amount—Estoppel.*—Whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilise them for the purpose of forgery is not in itself any violation of that duty.

Cheques were written out by one of three executors upon their account at a bank, and were then signed by the three, the executor who wrote out the cheque signing last. Five of these cheques were so written out as to leave a space to the left of the statement of the amount of the cheque, both as given in words and as given in figures. The executor who wrote out the cheques increased the amount thereof, after they were signed, by adding words and figures to the left of those originally written on the cheques, and the cheques so altered were paid by the bank, who could not by the exercise of ordinary care and caution have detected the forgery. In an action by the two executors against the bank,

**HELD**—that the plaintiffs had not violated any duty which they owed to the bank, and were therefore not negligent, and were not estopped from alleging that the cheques as altered were not their cheques.

*Scholfield v. Londesborough* ([1896] A. C. 514; 65 L. J. Q. B. 593; 45 W. R. 124; 75 L. T. 254—H. L.) applied.

*Decision of the High Court of Australia* (1 Com. L. R. 632) affirmed.

*THE COLONIAL BANK OF AUSTRALASIA, LD., v. MARSHALL AND ANOTHER*, [1906] A. C. 559; 75 L. J. P. C. 76; 22 T. L. R. 746—P. C.

23. *Indorsement—Sans Recours—Indorser*

**Cheques—Continued.**

not a Party to the Cheque—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 16, 56.]—The defendant, who was not a party to a cheque, at the request of the payee wrote his name on the back thereof, adding the words *sans recours*.

HELD—that under sect. 16 of the Bills of Exchange Act, 1882, the defendant could negative his liability as indorser by adding *sans recours*.

WAREFIELD v. ALEXANDER & Co., (1901) 17 [T. L. R. 217—Ridley, J.

24. *Non-collection of—London or County Cheque paid in by Customer—Dishonouring Customer's Cheque—Custom of Bankers—Liability of Banker.*—The plaintiff, a customer of the defendant bank in the City of London, paid into his account before 3 p.m. on May 21st a cheque for £500, drawn in the following form: "Norwich Union Life Insurance Society, No. 889. Norwich, May 20, 1901. Barclay and Company (Ltd.), with which has been incorporated Gurneys, Birbecks, Barclay and Buxton, Bank Plain, Norwich, or head office, 54, Lombard-street, London. Pay to Thomas W. Forman—or order, Five hundred pounds." At the time this cheque was paid in the plaintiff had a balance standing to his credit of £103 6s. 10d. It was a rule of the defendant bank that, if cheques drawn on City banks were paid in before 3 p.m., they could be drawn against the next day. On May 22nd the plaintiff drew a cheque upon the defendant bank for £239 in favour of a third person, which was presented on May 23rd and dishonoured. The defendants treated the Norwich Union cheque as being payable at Norwich, and presented it through the country clearing-house, and in consequence the amount was not collected when the cheque for £239, which was dishonoured, was presented on May 23rd. In an action for dishonouring the cheque.

FOUND by the jury—that the Norwich Union cheque was a cheque on a City bank, and that there was a recognised and general custom amongst London bankers that cheques in this form should be treated as London cheques. Judgment was entered for the plaintiff.

FORMAN v. BANK OF ENGLAND, (1902) 18 [T. L. R. 339—Lord Alverstone, C.J., and a special jury.

25. *Obtained by Fraud—Right to Follow Proceeds.*—The payee of a cheque had obtained it by false pretences.

HELD—that the drawer could avoid the transaction and follow the proceeds into the payee's banking account.

LEVENE v. MATON, (1907) 51 Sol. Jo 532—[Joyce, J.

26. *Receipt Form Indorsed on Cheque—*

*Unconditional Order to Pay—Negotiable Instrument.*—An order cheque bore at the foot the following words: "The receipt at back hereof must be signed, which signature will be taken as an indorsement of this cheque." On the back was a receipt form.

HELD—that the cheque was a negotiable instrument since the order to pay was unconditional, the words at the foot not being addressed to the bankers and not affecting the order to them.

NATHAN AND OTHERS v. OGDENS, LD., (1905) • [94 L. T. 126; 22 T. L. R. 57—C. A.

**III. IN GENERAL.**

And see 15, 16.

27. *Account Current—Mortgage of Life Policy to Bank—Power of Sale—Closing Account Current by Customer.*—A customer mortgaged to his bankers a policy of assurance on his life to secure the amount owing by him to the bank from time to time in account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (*inter alia*) the customer made default in payment of the balance due on the account current for the space of one month after the account current had been closed. The customer got into difficulties, and, after some correspondence with the bank, wrote to the manager on the 9th of November, 1899, informing him that there had been a meeting of his creditors and a trustee had been appointed. By a deed of the 17th of November he assured all his real and personal estate to the trustee for the benefit of his creditors. On the 28th of November notice of the deed was given to the bank, who, on the 18th of December, sold the policy under the power.

HELD—that, though the bank had not itself closed the account, the debtor's letter of the 9th of November must be taken to have amounted to a closing of the account within the meaning of the clause in the mortgage deed; and, consequently, that the power of sale had been properly exercised by the bank.

BERRY v. HALIFAX COMMERCIAL BANKING CO., [Ld., [1901] 1 Ch. 188; 70 L. J. Ch. 85; 49 W. R. 164; 83 L. T. 665—Kekewich, J.

28. *Banker's Books—Books "used in the ordinary business of the bank"—Successors of Bank—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), ss. 3, 4, 7, 9.]—The Bankers' Books Evidence Act, 1879, applies to books which are in the custody or control of the successors to the bank by whom the entries in the books were originally made.*

A book is "used in the ordinary business of the bank" within the meaning of sect. 9 of the Act, though it may not be in daily use, if it is kept by the bank, so that they may have it in case it is desired to refer to it.

THE ASYLUM FOR IDIOTS v. HANDYSIDES AND [OTHERS, (1906) 22 T. L. R. 573—C. A.,

*In General—Continued.*

**29. Breach of Contract—Draft accompanied by Shipping Documents—Frozen Meat Trade — Unusual Form of Policy.]—**The plaintiff carried on business in London as an importer of frozen meat. The defendant bank, at the plaintiff's request, undertook to negotiate, at the bank's option, drafts drawn by the shippers on the plaintiff in respect of consignments of frozen meat, the drafts to be accompanied by shipping documents—i.e., bills of lading, invoices and a policy of insurance. The bank negotiated a draft attached to which was a policy containing a clause: "To pay a total loss by total loss of vessel only." The usual form of policy in the frozen meat trade is a policy covering all risks. The plaintiff, in the usual course of business, accepted the draft before he had examined the documents. A partial loss of the consignment took place, which, by reason of the clause in the policy, the plaintiff could not recover from the underwriters.

**HELD**—that the bank had committed a breach of its contract with the plaintiff in negotiating a draft which was not accompanied by a policy of insurance in the proper form, and that the bank was liable to make good the loss to the plaintiff.

**BORTHWICK v. BANK OF NEW ZEALAND, (1901)**  
[17 T. L. R. 2; 6 Com. Cas. 1—Mathew, J.]

**30. Chairman of Bank—Directors—Preparation of Accounts by Cashier—Duty of Chairman to detect Misstatements in Accounts.]—**The defendant was the president of a banking company in Quebec which was constituted by a Canadian statute, and he was paid a salary as president. The cashier of the bank was the principal executive officer under the directors, and he improperly allowed overdrafts to certain customers, which caused losses. The cashier prepared the accounts, which were periodically submitted to the defendant and the other directors, and these accounts were duly audited. The accounts were so framed as not to disclose the fact that the totals included unauthorised overdrafts. There was nothing to show that the defendant or the other directors had any reason to suspect or distrust the cashier.

**HELD**—that the defendant was not negligent for having, in the circumstances, trusted the regularly authorized officer of the company.

**PRÉFONTAINE v. GRENIER, (1906), 23 T. L. R. 27**  
[—P. C.]

**31. Clearing-house — Failure to return Country Cheques.]—**By the Bankers' Clearing House Rules, published June, 1893, it is provided (1) A clearing to be held in the middle of each day for the interchange among the London bankers of cheques or their correspondence in the country placed

in their hands for collection. . . (3) Country bankers wishing to avail themselves of this clearing, to remit their country cheques to their own London agents, to stamp across their own name and address and that of their London agent; (4) Any country bank not intending to pay a cheque sent to it for collection to return it direct to the country or branch bank, if any, whose name and address is across it.

The above rules and the liability of a country bank, not intending to pay a cheque sent to it for collection, for failing to return it direct to the country or branch bank, discussed and considered.

**PARR'S BANK v. ASHEY, (1898) 14 T. L. R. 563—**  
[Bigham, J.]

**32. Deposit of Deeds—Constructive Notice — Debentures — Mortgage — Priority.]—**There is no rule of law that a banker, in his dealings with each customer, is to be deemed to be fixed with notices of the contents of every document deposited with him as security by every other customer.

Sect. 3 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39) shows that a restriction, rather than extension, of the old doctrine of constructive notice was intended.

The managing director of a company deposited with a bank the company's title deeds of their premises by way of security for an overdraft. At the time the deposit was made four first mortgage debentures issued by the company creating a floating charge over its assets, and containing a condition that nothing therein contained should authorise the creation of a charge having priority over the charge created by the debentures, had been deposited with the bank by another customer, but the bank did not know of the condition, and made no inquiries.

**HELD**—that the managing director of the company, by making the deposit, represented that he had the power to make a valid deposit, and that the bank had a stronger equity than the debenture-holders, and was entitled to priority.

**HELD, FURTHER**—that the bank was not affected with constructive notice of the conditions endorsed on the first mortgage debentures, by the deposit at a still later date of some of a further series of debentures, ranking as a second charge next after the first debentures.

**IN RE VALLETORT SANITARY STEAM LAUNDRY CO.,**  
[**LD., WARD v. THE COMPANY, [1903] 2 Ch.**  
**654; 72 L. J. Ch. 674; 89 L. T. 60; 19 T. L. R.**  
**593—Eady, J.**]

**33. Deposit of Deeds — Equitable Incumbrancers—Possession of Title Deeds—Priority — Inquiry—Negligence—Conflicting Equities—Postponement of Prior Incumbrance—One Man Company—Debentures issued to Director to make good Private**

**In General—Continued.**

*Breach of Trust by Him—Investment of Trust Funds in Business—Notice to Director not Notice to Company.*—The directors of a limited company had power under the articles of association to raise by mortgage or debenture such sums as they should think expedient, and to charge the property of the company therewith. The company was formed to take over the business of M. M. was managing director, and practically the owner of the company, the shares never having been offered to the public, and except for the limitation of liability, the concern went on as before the formation of the company.

On April 1st, 1897, the company being indebted to its bankers, and requiring further advances, issued debentures in favour of the bank, charging the same on all the property of the company. These documents showed that there was power to issue further debentures. There was a collateral agreement by the company authorising the bank to hold the debentures as a collateral security for advances and transactions.

On April 16th, 1897, two further debentures charged on the property of the company for the sum of £11,000 were issued to M. and T., who were the trustees of the estate of B., deceased. According to affidavits in the case £9,323, representing the B. trust estate, was (in breach of trust) invested by M. and T. in M.'s business prior to the incorporation of the company, and the company took over the liability for his debt. It was also stated in the affidavits that a further sum of £2,962, also portion of the B. trust estate, was that the company had undertaken to give security for all the moneys due by the company to the trust estate.

On May 28th, 1897, M. deposited certain title deeds of the company's property with the bank as a collateral security for all moneys then due, or to become due by the company to the bank. When this charge was given, the amount due to the bank exceeded the nominal amount of the debentures issued to them on April 1st. The bank had no notice of the existence of the debentures of April 16th, and made no inquiries. The bank commenced an action to enforce its securities, and the company passed a resolution for voluntary winding up. By the judgment of the Court the debentures issued to the bank were declared valid, and a sale was directed. An application was made on behalf of the *cestuis que* trust of the estate of B. for liberty to intervene in the action, and to have it declared that the debentures of April 16th issued to M. & T. were charged on the property of the company in priority to the equitable charge in favour of the bank by deposit of title deeds on May 28th.

**HELD**—on the assumption that, at the date of the issue of the two debentures for £11,000 there was money due by the company to M. & T. as trustees of the B. estate,

that the bank, as having the stronger equity, were entitled to priority in respect of their equitable mortgage over these two debentures.

Subsequently it was established by oral evidence taken in Court that the trust funds had been mainly spent by M. in Stock Exchange transactions, and that so far as any had been invested by him in the business, they constituted a private debt of M., and that his liability was not taken over by the company, and that any trust monies advanced to the company had been repaid.

**HELD**—that, neither in fact nor in law had the company any notice of the trust, and that the debentures were issued without authority and without consideration, and did not bind the assets of the company, as against creditors.

**BANK OF IRELAND v. COGREY SPINNING Co., [1900]**  
[1 Ir. R. 219—M. R.]

**34. Deposit of Shares with Bank by Directors—Priority of Bank over Debenture-holders—Notice—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.**—The C. company issued debentures secured by a trust deed, creating a floating charge on its property and undertaking. One of the indorsed conditions provided that no prior charge should be created, except that the company might mortgage the premises with its bankers up to £20,000. The debentures were duly registered. The four directors, having an overdraft with the M. bank (not the company's ordinary bank), executed a memorandum of deposit, and transferred to the bank certain shares in the R. company then standing in the name of the C. company. At a later date a receiver was appointed on behalf of the debenture-holders of the C. company, and he objected to the said shares being registered in the name of the bank, the transferee.

**HELD**—that the transfer should be registered. The transaction with the bank was within the ordinary powers of the directors, who were by its articles empowered to borrow money for the company's purposes. It was no answer to say that some of the overdraft was perhaps applied to the directors' own purposes, for the bank was entitled to its security if anything was properly owing to it; and notice could not be imputed to the bank, for an inspection of the register of the debentures would not have disclosed the restrictive conditions.

**Re STANDARD ROTARY MACHINE Co., LD., (1907)**  
[95 L. T. 829—Kekewich, J.]

**35. Draft by Branch—In India on Head Office in London—Forgery of Indorsement—Protection of Banker paying on Forged Indorsement—Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 5 (2), 60.**—T. & Co. sent to the plaintiffs, in payment for goods supplied, a draft for £391 drawn by the Madras

**In General—Continued.**

branch of the defendant bank upon their head office in London. It was in the form of a first and second of exchange, both of which were posted to the plaintiffs. The first of exchange was stolen in the post, the plaintiff's signature forged to it, and in this form it was presented at the defendant's head office, where it was paid in good faith and in the ordinary course of business. The plaintiffs duly received the second of exchange, and presented it at the defendant's head office, where payment was refused. It was admitted that there was no defence at common law, but two statutory defences were set up—the first under sect. 19 of the Stamp Act, 1853, and the second under sect. 60 of the Bills of Exchange Act, 1882.

**HELD**—that neither of the statutory defences was good, and that judgment must be given for the plaintiffs.

*Gordon v. London City and Midland Bank* [(1902) 1 K. B. 242; 71 L. J. K. B. 215; 50 W. R. 276; 86 L. T. 98, 18 T. L. R. 157; 7 Com. Cas. 37—C. A., No. 14, *supra*] followed.

*BROWN, BROUGH & CO. v. NATIONAL BANK OF INDIA, LD.*, (1902) 18 T. L. R. 669—Bigham, J.

**36. Duty of Banker—Account of Limited Company—Private account of Managing Director of Company—Adjusting the two Accounts—Ultra Vires—Rights of Banker].**—The respondent company carried on the business of a creamery and butter factory. B. carried on business in Melbourne as a dairy-farm produce merchant, and kept his banking account at a branch of the appellant bank. B. purchased all the shares in the respondent company with a view to the amalgamation of his own and the company's business. This was effected, and B. was elected chairman of the board and managing director of the company. On September 5th, 1898, B.'s account was overdrawn, and he suggested to E., the manager of the branch of the bank where an account was opened by B. in the name of the company, that the accounts should be adjusted by making a transfer from the company's account. On November 25, 1898, B.'s account was in credit and the company's account was overdrawn. The company went into liquidation, and B.'s estate was placed under sequestration.

**HELD**—that B.'s proposal to work his own business in connection with that of the company as disclosed by him to E. was certainly not *ultra vires*; nor was the giving of blank cheques for the purpose of adjusting the two banking accounts in itself *ultra vires*; that there was no duty on the part of the bank or its manager to inquire into the state of the account between B. and the company, and that the bank was not affected with notice of any irregularity on B.'s part, and

not liable to account for the proceeds of the cheques.

*BANK OF NEW SOUTH WALES v. GOULBURN [VALLEY BUTTER COMPANY PROPRIETARY, (1902) A. C. 543; 71 L. J. P. C. 112; 87 L. T. 88; 18 T. L. R. 735, 51 W. R. 367—P. C.]*

**37. Duty of Banker — Instructions to Bankers to Pay Money on Receipt of Documents—Duty of Banker to make Inquiries.]**—A bank was instructed on behalf of the plaintiffs to pay to a vendor the price of goods upon receipt from him of bill of lading, insurance policy, and a certificate of analysis.

**HELD**—that the bank owed no duty to the plaintiffs to make inquiries as to whether the samples analysed were fairly taken from the parcel of goods actually shipped; and that, the vendor having acted fraudulently in the matter, the bank was not liable to refund the money handed by the plaintiffs to them, and by them to him in exchange for documents apparently regular.

*BASSE AND SELVE v. BANK OF AUSTRALASIA*, [(1904) 90 L. T. 618; 20 T. L. R. 431—Bigham, J.]

**38. Floating Charge — Equitable Mortgage — Priorities — Possession of Title Deeds—Negligence.]**—C. & B., Limited, was a company formed in Dec., 1884; and in May, 1885, issued, in pursuance of its borrowing powers, debentures to the amount of £28,000, each of which purported to charge all the property of the company, whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, and was indorsed with conditions, the first of which provided that such charge was to be a floating security, "but so that the company is not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debenture."

No legal mortgage of the freehold or leasehold hereditaments was ever made to the debenture-holders, and the title deeds remained in the possession and under the control of the company. The title deeds were, in 1892, deposited by the company with the U. Bank of L. to meet overdrafts on an account opened by the company there. A first overdraft was paid off, but in August, 1895, the title deeds still remaining in the custody of the bank, the company was allowed a second overdraft on its giving a memorandum of equitable charge on the deeds, and an undertaking that the company and all other necessary parties would, on demand, make and execute valid legal mortgages in favour of the bank.

In February, 1897, the bank was served with notice of a judgment appointing a receiver, and directing inquiries as to the charges and their priorities, in an action which had been brought by the debenture-holders against the company, the interest on their debentures having fallen into arrear.

*In General—Continued.*

The overdraft on the amount at the bank at that date amounted to some £220, and the bank stated this notice was the first they had of the company's having issued any debentures or created any charge on the property comprised in the title deeds deposited with the bank.

The company was insolvent, and was being voluntarily wound-up under the supervision of the Court.

The bank claimed to have a prior charge for £220 and interest, and to retain the deeds until their debt was paid.

**HELD**—that, the bank being in possession of the title deeds without any negligence on their part, and the restriction on the creation by the company of mortgages or charges in priority to the debentures being a mere private arrangement between the company and the debenture-holders, which could not be set up as against the equitable mortgage to the bank which had taken the deeds without any notice of it, the bank had the stronger equity, and was entitled to priority over the debenture-holders.

RE CASTELL AND BROWN, LD., *ROPER v. CASTELL [AND BROWN, LD., (1898) 1 Ch. 315, 67 L. J. Ch. 169; 78 L. T. 109; 14 T. L. R. 194; 46 W. R. 248—Romer, J.]*

**39. Money Paid under a Mistake of Fact to Bankers—Credited by Bank to Principal's Account—Recovery of Money so Paid from the Bank—Position of Bankers Not Altered by Reason of the Payment.**—The plaintiffs owed to K. & Co. two sums of money, one of which had been assigned to B. & Co., and the other to the defendants, with whom K. & Co. had an overdrawn account. By an error both sums were paid to the defendants, who thereupon credited them to K. & Co.'s account with them. K. & Co. knew that one payment must have been made in error, but the defendants believed both sums to have been really due to K. & Co. from the plaintiffs.

It was proved that, though the defendants subsequently allowed K. & Co. to increase their debt to them, they were not induced to do so by reason of the erroneous payment.

**HELD**—that under the circumstances the plaintiffs could recover the sum erroneously paid, as being money received by the defendants to their use.

*Seemle*, the decision would have been otherwise if the mistake had led the defendants to alter their position as regards K. & Co. to their own prejudice.

CONTINENTAL CLOTHING CO AND GUTTA PERCHA CO [v. KLEINWORT, SONS & CO., (1904) 52 W. R. 489; 90 L. T. 474; 20 T. L. R. 403; 9 Com. Cas. 240—C. A.]

**40. Negligence—Conditional Order for Payment of Money—Trover—Measure of**

*Damages—Money had and received.*—An order in writing, directing a bank to pay to the plaintiffs or their order a sum of money conditionally upon the signature by the plaintiffs of a receipt form at the foot of the document, was stolen from the plaintiffs and taken to the defendant bank for collection on behalf of a customer of theirs. The signature of the plaintiffs had been forged, both on the indorsement and on the receipt, but both signatures were badly written, and the name of one of the plaintiffs was written as "Trench," instead of "Junior." The defendant bank, without making any inquiries, received the order, collected the amount from the paying bank, and placed it to the credit of their customer. The plaintiffs subsequently gave notice to the defendant bank that the order had been stolen, and claimed the amount received by the defendant bank. The account of the customer of the defendant bank had been drawn upon in the interval, but nothing had occurred to disentitle the defendant bank from cancelling the credit given to their customer.

**HELD**—that the defendant bank had been guilty of negligence, and consequently could not avail itself of the benefit of sect. 82 of the Bills of Exchange Act, 1882, as enlarged by sect. 17 of the Inland Revenue Act, 1883; and that the plaintiffs could recover the amount from the defendant bank as money had and received to the use of the plaintiffs.

Decisions of Kennedy, J. (15 T. L. R. 226), affirmed.

BAVINS, JUNR., AND SIMS v. LONDON AND SOUTH [WESTERN BANK, [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 48 W. R. 210; 81 L. T. 655; 16 T. L. R. 61; 5 Com. Cas. 1—C. A.]

**41. Set off—Company—Special Arrangement—Setting off one Account against Another—Voluntary Liquidation of Company.**—A bank agreed with the directors of a company, which had an overdrawn account, to close that account, and open a No. 2 account. This was done for the purpose of winding-up the business of the company, which was in difficulties, and the bank was so informed. Moneys were lodged to the No. 2 account and cheques drawn against it. The company afterwards went into voluntary liquidation. The bank declined to allow the liquidator to draw against the No. 2 account, and claimed to set off the credit balance on that account against the debit balance of No. 1 account.

**HELD**—that there was a special arrangement which prevented the bank exercising its ordinary right of setting off one account of a customer against another.

IN RE JOHNSON & CO., LD., [1902] 1 Ir. R. 439—[M. R.]

**42. Trust Moneys—Executor Paying Trust Money into Credit of his own Account—Notice—Liability of Bank.**—A. lodged to the credit of his private account at a bank moneys which belonged to him and B. as



*In General—Continued.*

executors of C. The bank had notice that the moneys so lodged were trust moneys, but had no notice that A. intended to commit a breach of trust, and placed moneys to the credit of A.'s account in the ordinary way. A. afterwards became insolvent, and his account was overdrawn. B. brought an action against the bank and A. to have it declared that the bank were trustees of the moneys so lodged on behalf of B. and A. as executors of C.

HELD—that the bank was not liable. •

SHIELDS v. BANK OF IRELAND, [1901] 1 Ir. R. [222—M. R.

And see BANKRUPTCY AND INSOLVENCY, 200.

**IV. BANK OF ENGLAND.**

And see AGENCY, 67.

43. *Inspection of Lists—Stock Transferred to National Debt Commissioners—List of Names and Residence of Parties—National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 52.*—By sect. 52 of the National Debt Act, 1870, where unclaimed Government Stock is transferred to the National Debt Commissioners, the Banks of England and Ireland are directed to enter in a list the names in which the stock stood immediately before the transfer, and the residence of the parties, and the amount transferred, "which list shall be open for inspection at the usual hours of transfer."

HELD—that to entitle a person to inspection of the list he must, at least, show some ground for claiming, either on his own behalf or on behalf of some other person, an interest in the stock.

*Reg. v. Bank of England* ([1891] 1 Q. B. 785; 60 L. J. Q. B. 497; 55 J. P. 695; 39 W. R. 558; 64 L. T. 468; 7 T. L. R. 421—Div. Ct.) followed.

REX v. BANK OF ENGLAND, EX PARTE COLLIS, [(1906) 22 T. L. R. 477—Div. Ct.

**BANKRUPTCY AND INSOLVENCY.**

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See also CHOSER IN ACTION; COMPANIES, 271; CONTEMPT AND ATTACHMENT, EXECUTORS, 12, 134—141, 197; FRAUDULENT AND VOLUNTARY CONVEYANCES; HUSBAND AND WIFE, 74; LANDLORD AND TENANT, 48, 50, 175, 183.

**I. MISCELLANEOUS.**

1. *Books of Account—Underwriter Carrying on Business for Self and "Names"—Bankruptcy of Underwriter—Trustees' Right to Books of Account.*—An underwriter at Lloyds carried on business on his own account, and also on behalf of five "names," under agreements requiring him to keep proper books of account, which were at all times to be open to inspection by the "names" concerned: under the agreements each "name" paid him a fixed yearly sum for conducting the business, keeping and providing books, clerks, and offices, &c. In respect of transactions in which he and the "names" were jointly interested, he kept one set of books, each book having six parallel columns, one for himself and one for each "name."

HELD—that, upon his bankruptcy, the trustee was not entitled to the books, as the "names" had a joint property in them; but that the "names" must give the trustee reasonable facilities for inspecting the books.

Decision of Buckley, J. (90 L. T. 292; 20 T. L. R. 342) reversed.

IN RE BURNAND, EX PARTE SUTTON & Co., [1904] 2 K. B. 68; 73 L. J. K. B. 413; 52 W. R. 437; 91 L. T. 46; 20 T. L. R. 377; 11 Manson, 113—C. A.

2. *Debtors Act (Ireland), 1872—Payment by Instalments—Customs—Pensioner—Pension inalienable.*—An order to pay a judgment debt by instalments will not be made against a Customs pensioner whose only property consists of a pension which is inalienable under the Customs and Inland Revenue Act, 1876, and no part of which has been received by him since the date of the judgment.

**Miscellaneous—Continued.**

Such a pension while accruing does not constitute "means" within the Debtors Act (Boyd, J., dissenting).

BANK OF SCOTLAND v. CUNNINGHAM, [1899] 2 [Ir. R. 780—Q. B.

3. *Domicile of Debtor Ordinarily Resident in England—Bankruptcy Act, 1883, s. 6 (1) (d).*—On an appeal against the dismissal of a bankruptcy petition the question to be decided was whether the debtor had "within a year before the date of the presentation of the petition ordinarily resided in England." The year to be considered began in May, 1897, and ended in May, 1898. The evidence showed that the debtor was frequently in London from October, 1897, till May, 1898, stopping sometimes at an hotel and sometimes at a boarding house, though he was often away in Paris. The Court held that all the section required was that within the above period the debtor should have ordinarily resided in England, that it said nothing as to how long, nor as to what period in the year, nor as to the residence being in one place, and that on the evidence the debtor might properly be said to have been residing in London during that time.

RE A DEBTOR; EX PARTE THE PETITIONING [CREDITORS, (1898) 14 T. L. R. 568—C. A.

4. *Foreigner—Residing Abroad—Trading in England through Agent—"Debtor"—Act of Bankruptcy—Status of Foreigner—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (a), (h); s. 6, sub-s. 1 (d).*—A foreigner, who has never been in this country and has himself personally done no act within the jurisdiction of the Bankruptcy Court of this country, cannot be made bankrupt by reason of his having traded through an agent in this country, and having done an act in his own country which, if he had done it here, would undoubtedly be an act of bankruptcy.

In re Pearson ([1892] 2 Q. B. 263; 61 L. J. Q. B. 585; 40 W. R. 532; 67 L. T. 367; 9 M. B. R. 185; 8 T. L. R. 622—C. A.) followed. Decision of the Court of Appeal ([1900] 1 Q. B. 541; 69 L. J. Q. B. 375; 48 W. R. 424; 82 L. T. 169; 16 T. L. R. 238) affirmed.

COOKE v. CHARLES A. VOGELER Co., [1901] A. C. [102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 8 Manson, 113—H. L. (E.).

5. *Married Woman—Wife Carrying on Trade—Farmer—Trader—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5).*—A married woman carrying on a farm separately from her husband is not carrying on a "trade" within the meaning of sect. 1, sub-sect. 5 of the Married Women's Property Act, 1882, and cannot therefore be made a bankrupt.

IN RE LONG, [1905] 2 Ir. R. 343—C. A.

**6. Proceedings in Name of Official Re-**

*ceiver—Taxation of Costs—Official Receiver not Represented—New Taxation Ordered.*—By an order of a Divisional Court in Bankruptcy a litigant was allowed to institute proceedings in the name of the Official Receiver upon giving him an indemnity. The proceedings failed, and the amount of the taxed costs exceeded the amount of the indemnity given. No notice was given to the Official Receiver of the taxation, at which only £79 was taxed off a bill of £993.

HELD—that the Official Receiver ought to have an opportunity of being represented at the taxation by his own solicitor; and that therefore the bill should be remitted for re-taxation.

RE DILLON, EX PARTE OFFICIAL RECEIVER, (1903) [88 L. T. 127—Wright, J.

7. *Vendor and Purchaser—Protected Transaction—Notice of Act of Bankruptcy—Act of Bankruptcy by Vendor after Contract and before Date of Completion—Payment after Notice of Act of Bankruptcy—Return of Deposit—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.*—The plaintiff entered into a contract to purchase a public-house, the purchase to be completed within four weeks, and paid a deposit. By the contract the deposit was to be forfeited in case of neglect or refusal on the part of the purchaser to perform his part of the contract, and to be returned in case of such neglect or refusal on the part of the vendor. Before the expiration of the four weeks the vendor committed an act of bankruptcy. The plaintiff thereupon gave notice refusing to complete the purchase, and requiring the deposit to be returned. The vendor never, in fact, became bankrupt.

HELD—that, as the plaintiff had at the date fixed for completion notice of an available act of bankruptcy, payment of the purchase-money to the vendor would not have been protected by sect. 49 of the Bankruptcy Act, 1883, in the event of the vendor's bankruptcy upon a petition presented within three months of the act of bankruptcy, and the vendor was not in a position to complete the purchase by executing a conveyance and giving a good receipt for the purchase-money; and that the plaintiff was accordingly entitled to the return of the deposit.

POWELL v. MARSHALL, PARKES & Co., [1899] [1 Q. B. 710; 68 L. J. Q. B. 477; 47 W. R. 419; 80 L. T. 509; 15 T. L. R. 289; 6 Manson, 157—C. A.

**II. ACT OF BANKRUPTCY.**

8. *Assignment for Benefit of Trade Creditors only—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. (1) (a).*—By the Bankruptcy Act, 1883, sect. 4 (1), a debtor commits an act of bankruptcy in the following case:—(a) If in England, or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

**Act of Bankruptcy—Continued.**

**HELD**—that the words mean an assignment which is not limited to any particular class of creditors, *e.g.*, trade creditors only.

**IN RE PHILLIPS, EX PARTE BARTON, [1900] 2 Q. B. 329; 69 L. J. Q. B. 604; 49 W. R. 16; 82 L. T. 691; 7 Manson, 277—Div. Ct.**

**9. Assignment of Debtor's whole Property—Goodwill, Stock-in-Trade, Plant, Fixtures and Implements of Trade or Business—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (b).—**If a person who is engaged in trade or business and whose property chiefly consists in the goodwill of such trade, and the plant, fixtures and implements thereof, assigns his trade or business and everything in connection with it, and by doing so renders himself incapable of carrying it on any longer, that is substantially an assignment of all his property, and an act of bankruptcy.

**IN RE RAYMENT, EX PARTE PARKES, (1899) 80 [L. T. 807; 6 Manson, 288—Wright, J.]**

**10. Assignment of Business and Book Debts to a Company—Assignment Set Aside—13 Eliz. c. 5—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4.—**A debtor bought on credit large quantities of goods, and also agreed to purchase for £4,000 a genuine business carried on by M. He then sold to N. as trustee for a company to be formed, his business, stock in trade, book debts, &c., and the benefit of his contract with M. Two nominees of the debtor were the first directors of the company, and they allotted £3,000 debentures to M. in discharge of the purchase money, £3,000 to N. as "commission," £700 to B., £1,500 to L., and to the debtor the remaining debentures and virtually the whole of the share capital. The debtor owed trade debts amounting to £13,000, which were left unprovided for.

**HELD**—that, as there were some *bona fide* shareholders in the company, and as M.'s business was acquired by it in good faith, the transaction ought not to be held void under the Statute of Elizabeth;

But that the transfer of all the debtor's assets was a fraudulent act of bankruptcy, and that the company, through its directors, had notice of the fraud;

And that, therefore, the trustee in bankruptcy was entitled to have it set aside, without prejudice to the rights (if any) of the debenture holders.

**RE SLOBODINSKY, EX PARTE MOORE, [1903] 2 [K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 19 T. L. R. 616; 52 W. R. 156; 10 Manson, 341—Wright, J.]**

**11. Assignment of Business to a Company—Fraudulent Conveyance—Hire-purchase Agreement—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. (1) (b).—**In May and July, 1900, D. who had for some time financed W., demanded a transfer of part of W.'s property. D. purchased certain

chattels of W. for £3,000 and entered into hire-purchase agreements with W. in respect of such chattels. At this time there was no insolvency or anything suspicious. In February, 1901, W. owed about £4,000 besides his indebtedness to D., and by an assignment to a company he parted with all his property, except his book debts amounting to £1,750 which realised £700, and interests in other property of very small value, for second debentures which were practically worthless and which he hoped to distribute among his creditors in satisfaction of their debts. D. took first debentures of the nominal value of £3,000. The company went into liquidation in June, 1901.

**HELD**—that the hire-purchase transactions were not sales, but loans, and as they contained a licence to seize and sell they were void for want of registration; that W. hoped to compel his creditors to take the second debentures or lose their money and not to carry on his business, and the assignment to the company was void as an act of bankruptcy.

**WHEATLEY'S TRUSTEE v. H. WHEATLEY, LD. [(1901) 85 L. T. 491—Wright, J.]**

**12. Sale of Business to One-Man Limited Company—Bankruptcy of Vendor—Winding-up of Company—Rights of Trustee in Bankruptcy and Liquidator respectively—13 Eliz. c. 5—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (b), ss. 43, 44.—**Where an insolvent trader, for the purpose of defeating his creditors, transfers his business to a one-man limited company, the transfer is an act of bankruptcy within subsect. 1 (b) of sect. 4 of the Bankruptcy Act, 1883; and if he is made bankrupt on a petition presented within three months after the transfer, the title of his trustee in bankruptcy relates back to the date of the transfer, so as to enable the trustee to avoid the transfer and to claim the property fraudulently transferred to the company, even after a winding-up order has been made.

**Saloman v. Saloman & Co. (Limited) ([1897] A. C. 22; 66 L. J. Ch. 35; 45 W. R. 193; 75 L. T. 426; 4 Manson, 89) distinguished.**

Decision of Wright, J. ([1899] 1 Q. B. 616; 68 L. J. Q. B. 290; 45 W. R. 192; 79 L. T. 391), reversed.

**IN RE HIRTH, EX PARTE TRUSTEE, [1899] 1 Q. B. [612; 68 L. J. Q. B. 287; 47 W. R. 243; 80 L. T. 63; 15 T. L. R. 153; 6 Manson, 10—C. A.]**

**13. Bankruptcy Notice—Issue of Judgment Summons—Expiration of Seven Days before Order made on Summons—Act of Bankruptcy available for other Creditor—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4—County Court Rules, 1889, Ord. 25.—**A creditor having obtained judgment in the High Court issued a bankruptcy notice and also a County Court judgment summons. An order upon the summons was only made

**Act of Bankruptcy—Continued.**

after seven days had expired from the date of service of the notice.

**HELD**—that an act of bankruptcy founded on the notice had been committed before the making of the order, of which other creditors might avail themselves by presenting a petition even after the order.

*Montgomery v. De Bulnes* ([1898] 2 Q. B. 420; 67 L. J. Q. B. 768; 47 W. R. 22; 78 L. T. 671—C. A. (see PRACTICE, No. 150)) distinguished.

**IN RE A DEBTOR, EX PARTE ROCK RED BRICK Co.,** (1904) 52 W. R. 302; 90 L. T. 64—Div. Ct.

**14. *Handing over Bankrupt's Entire Property—Arrangement to Pay all Creditors—Some Creditors Omitted and not Paid—Protected Transaction—Bankruptcy Act, 1883*** (46 & 47 Vict. c. 52), ss. 4 (1) (a) (c), 49.]—A publican owed trade debts amounting to about £3,000, and his interest in his premises was under mortgage to his lessors for amounts beyond his means, so that he was insolvent. He arranged with the lessors for a surrender of his leases in return for a release of the mortgages, and the lessors agreed to take over his stock-in-trade, paying for it a sum calculated as sufficient to pay all the creditors. He had no other property. A list of creditors was furnished the lessors, which was supposed to include all the creditors, showing the sums due to be about £2,800, which were paid by a cheque of the lessors, handed over to two of the creditors, the respondents, who paid such creditors. Some creditors had, however, been omitted from the list. An unsatisfied creditor made the publican a bankrupt. The trustee sought to recover the sum of £2,800 from the respondents.

**HELD**—that the handing over to the respondents the cheque which represented the bankrupt's entire property was an act of bankruptcy, and although not fraudulent in fact, was fraudulent in law, as necessarily tending to defeat the omitted creditors, and to substitute for the administration of the estate in bankruptcy a different mode of administration.

**HELD ALSO**—that the respondents were not protected by sect. 49 of the Bankruptcy Act, 1883, as that section does not extend to payments made not in the ordinary course of business.

*Shears v. Goddard* ([1906] 1 Q. B. 406; 65 L. J. Q. B. 344; 44 W. R. 402; 74 L. T. 128; 12 T. L. R. 234; 3 Manson, 24—C. A.) distinguished.

**RE SHARP, EX PARTE GUNDREY & JOHNSTON,** [(1901) 83 L. T. 416—Wright, J.]

**15. *Married Woman—"Carrying on a Trade Separately from her Husband"—"Absenting" Herself with Intent to delay or defeat Creditors—Married Women's Pro-***

**erty Act, 1882** (45 & 46 Vict. c. 75), s. 1, sub-s. 5—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (d).]—Where a husband is an undischarged bankrupt, and the business is his wife's business, bought with her money, and the only circumstances opposed to the view that it was hers were that the house in which it was carried on was connected with the house in which the husband lived, and that he took some part in the management, the trade is nevertheless being carried on by the wife separately from her husband within the meaning of sub-sect. 5 of sect. 1 of the Married Women's Property Act, 1882. Where a shop is shut up, no address left, and no means of finding out where the trader—a married woman—has gone, and when the evidence is sufficient to show an intention to evade service of proceedings, that is "an absenting" within sub-sect. 1 (d) of sect. 4 of the Bankruptcy Act, 1883. The mere fact of the wife leaving the district—Manchester—to join her husband in London, is not sufficient to show that there was no "absenting" within the meaning of the sub-section.

Where there are debts remaining undischarged of a married woman which have been incurred in connection with a business carried on by her separately from her husband, it is no answer to proceedings in bankruptcy, at any rate in respect of those debts, to say that she had given up business before the proceedings had been actually taken.

*In re Dagnall* ([1896] 2 Q. B. 407, 65 L. J. Q. B. 666; 45 W. R. 79; 75 L. T. 142, 3 Manson, 218—Div. Ct.) approved.

**IN RE WORSLEY,** [1901] 1 Q. B. 309; 70 [L. J. Q. B. 93; 49 W. R. 182; 84 L. T. 100; 17 T. L. R. 122; 8 Manson, 8—C. A.]

**16. *Married Woman—Trading Separately from her Husband in Firm Name—Judgment against Firm—Non-compliance with Bankruptcy Notice—Married Women's Property Act, 1882*** (45 & 46 Vict. c. 75), s. 1 (5)—*R. S. C. Ord. 48A, rr. 4, 5, 8, 11.*]—Where a judgment has been obtained against a married woman trading separately from her husband in the name of a firm, even if in the form prescribed by *Scott v. Morley* ((1887) 20 Q. B. D. 120; 57 L. J. Q. B. 43; 36 W. R. 67; 57 L. T. 919) as applicable to married women, she is not liable to be made a bankrupt upon a bankruptcy notice founded on that judgment. The judgment is merely a judgment against her separate estate.

**IN RE HANDFORD & Co.,** [1899] 1 Q. B. 566; 68 [L. J. Q. B. 386; 47 W. R. 391; 80 L. T. 125; 15 T. L. R. 197; 6 Manson, 131—C. A.]

**17. *Notice of Suspension of Payment—Intention—Bankruptcy Act, 1883*** (46 & 47 Vict. c. 52), s. 4 (1).]—A mere declaration by a debtor of his inability to pay his debts, or an admission of insolvency, is not of itself a notice that he is about to suspend pay-

**Act of Bankruptcy—Continued.**

ment of his debts within the meaning of sect. 4 (1) of the Bankruptcy Act, 1883.

An outside stock-broker being in difficulties consulted his solicitor. his two largest creditors were called in and were told that they might close their accounts in order to minimise losses. at the same time it was arranged for the solicitor to give similar permission to two other brokers who had accounts open. Upon all the facts,

**HELD**—that the debtor's only desire was to gain time, and that he did not contemplate giving notice to these creditors that he intended to suspend payment.

*Decision of C. A. (sub nom. In re Reis, Ex parte Clough* [1904] 2 K. B. 769; 73 L. J. K. B. 929; 20 T. L. R. 547; 11 Manson, 229) affirmed.

*CLOUGH v. SAMUEL AND OTHERS*, [1905] A. C. [442; 74 L. J. K. B. 918; 54 W. R. 114; 93 L. T. 491; 21 T. L. R. 702; 12 Manson, 1—H. L. (E.)

**III. ADMINISTRATION OF BANKRUPT'S PROPERTY.**

**18. Assignment of Debt—Order to Broker to Pay Money to Creditor—Notice Thereof to Creditor—Subsequent Bankruptcy of Assignor—Trustee in Bankruptcy Purporting to Revoke Assignment—Validity.**—In April W. & Co. wrote from Chili to their brokers in England requesting them to sell goods, of which bills of lading were enclosed, and, after paying £400 to B., to pay the rest of the proceeds to the plaintiffs, to whom they were indebted. By the same mail they informed the plaintiffs of the instructions so given by them. In May W. & Co. became bankrupt, and their trustee wired to the brokers revoking the directions. In June the two letters arrived, and the plaintiffs claimed the proceeds of the goods less £400.

**HELD**—that there was a completed assignment, and the plaintiffs were entitled to succeed.

*ALEXANDER (or JAFFÉ & SONS) v. STEINHARDT*, [WALKER & Co., [1903] 2 K. B. 208; 72 L. J. K. B. 490; 8 Com. Cas. 209; 10 Manson, 258—Bigham, J.

**19. Bill of Sale—Bankruptcy of Grantor—Costs of Preparation and Redemption—Taxation—Declaration in Bankruptcy—Solicitors Act, 1843 (6 & 7 Vict. c. 73). s. 38—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102.**—A receiving order was made against the grantor of a bill of sale to F. F. seized the chattels under the bill of sale, and sold them for an amount greater than the amount secured by the bill of sale; but he and his solicitor claimed to deduct out of the balance the costs of the preparation and redemption of the bill. The Official Receiver having discharged these costs under protest moved in the county court for a declaration that certain heads of these costs

could not be claimed. The county court judge held that he had no jurisdiction.

**HELD**—that the Official Receiver was not bound to apply for taxation under sect. 38 of the Solicitors Act, 1843, but could, if he thought fit, move in bankruptcy; and that under sect. 102 of the Bankruptcy Act, 1883, the county court judge could deal with the matter if he chose to do so.

*IN RE FORD, EX PARTE THE OFFICIAL RECEIVER*, [1901] 84 L. T. 329—Div. Ct.

**20. Compromise—Compromise of Claims By and Against the Trustee—Trustee Accepting Shares in Limited Company—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, sub-ss. 7, 8.**—The Court sanctioned a compromise of claims by and against a trustee in bankruptcy, whereby the claim against the trustee was reduced and the claim by the trustee was satisfied by the issue to the trustee of shares in a limited company.

*RE MACFADYEN*, (1907) 52 Sol. Jo. 134—[Phillimore, J.]

**21. Disclaimer—Lease—Disclaimer by Trustee of Bankrupt Assignee—Mortgage by Assignee by Sub-demise—Application by Lessor for Order Vesting Property in Mortgagee—Lessee Solvent—Persons to be Served with Notice—Discretion—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, sub-s. 6—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13.**—Where the trustee in bankruptcy of an assignee of a lease has disclaimed the lease which the bankrupt had mortgaged by a sub-demise, the original lessor is, under sect. 55, sub-sect. 6, of the Bankruptcy Act, 1883, entitled, notwithstanding the solvency of the original lessee, to apply to the Court for an order vesting the property in the mortgagee subject to the same liabilities as the bankrupt was subject to under the original lease at the date when the bankruptcy petition was filed, and if the mortgagee declines to accept such an order he will be excluded from all interest in and security upon the property.

It is a matter within the discretion of the Registrar whether he will require the lessee or anyone else to be served with notice of the application. The mortgagee is in no way prejudiced by the absence of the lessee, with whose rights and liabilities he is not concerned. Nor is the lessee prejudiced because he is not present when the order is made. If it should turn out that he is solvent, and he is sued by the lessor on his covenants, there is no reason why he should not apply for and obtain an order vesting the property in him.

*In re Cock* ((1887) 20 Q. B. D. 343; 57 L. J. Q. B. 169; 36 W. R. 187; 58 L. T. 588; 5 M. B. R. 14—Div. Ct.), *In re Finley*, ((1888) 21 Q. B. D. 475; 57 L. J. Q. B. 626; 37 W. R. 6; 60 L. T. 134; 5 M. B. R. 248—C. A.), and *In re Morgan* ((1889) 22 Q. B. D. 592; 58 L. J. Q. B. 295; 37 W. R. 344; 60 L. T. 941; 6 M. B. R. 57—C. A.) followed.

**Administration of Bankrupt's Property—Contd.**

IN RE BAKER, EX PARTE LUTON, [1901] 2 K. B. 628; 70 L. J. K. B. 856; 49 W. R. 691; 85 L. T. 33; 17 T. L. R. 673; 8 Manson, 279—C. A.

**22. Disclaimer — Lease — Guarantor for Rent in Arrear—Liability of Guarantor for Rent accruing after Date of Disclaimer—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, sub-s. 2**—Where a lessee for a term of years becomes bankrupt, and his trustee disclaims the lease under sect. 55 of the Bankruptcy Act, 1883, the term, as between the lessor and lessee, is put an end to, the legal effect of sect. 55, sub-sect. 2, being to accelerate the reversion; and, therefore, a surety for the payment of rent in arrear under the lease is discharged as and from the date of the disclaimer, there being no rent due from the lessee after that date.

*In re Finley* ((4888) 21 Q. B. D. 475; 57 L. J. Q. B. 626; 37 W. R. 6, 60 L. T. 134; 5 M. B. R. 248—C. A.) referred to.

Judgment of Phillimore ((1900) 69 L. J. Q. B. 796) affirmed.

STACEY v. HILL, [1901] 1 Q. B. 660; 70 L. J. K. B. 435; 49 W. R. 390; 84 L. T. 410; 17 T. L. R. 311; 8 Manson, 169—C. A.

**23. Disclaimer—Leasehold Property—Mortgages by Subdemise—Vesting Order—Proper Terms to be Imposed on Sub-Lessees—Assignment of Lease—Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), s. 55, sub-ss. 1, 2, 6, and 1890 (53 & 54 Vict. c. 71), s. 13**—A lease of certain houses for 99 years was granted to two persons. The lease contained no restriction upon the right of the lessees to assign. The lessees mortgaged the premises by subdemise for the term of 99 years, less one day. The lessees were subsequently adjudicated bankrupt, and their trustees in bankruptcy disclaimed the lease. There had been no breach of any covenants.

The Registrar, upon the application of the lessor, made an order that unless the mortgagees elected to accept an order vesting in them the premises, and making them subject to the same liabilities as the bankrupts were subject to under the lease at the date of the filing of the petition, they should be excluded from all interest in and security upon the premises.

HELD—that, in the circumstances, the Registrar's order was wrong, and an order should be made under sect. 13 of the Bankruptcy Act, 1890, vesting the premises in the mortgagees, subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed, as this order gave the mortgagees nothing more than they would have had if there had been no disclaimer, and no injustice would be done to the lessor.

IN RE CARTER AND ELLIS, EX PARTE SAVILL BROTHERS, LD., [1905] 1 K. B. 735; 74 L. J. K. B. 442; 53 W. R. 433; 92 L. T. 523; 21 T. L. R. 334; 12 Manson, 118—C. A.

**24. Disclaimer—Onerous Property—Time for Disclaiming—"Within twelve months after the first appointment of a trustee"—Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), ss. 21, 54, 55; and 1890 (53 & 54 Vict. c. 71), s. 13**—The "twelve months after the first appointment of a trustee" within which the trustee of a bankrupt may, under sect. 55, sub-sect. 1, of the Bankruptcy Act, 1890, disclaim onerous property, runs from the date of the certificate of the appointment of the trustee under sect. 21 of the Act of 1883, and not from the date of the order of adjudication, when the official receiver becomes trustee until a trustee is appointed by the creditors. The Official Receiver may, however, disclaim upon becoming "the trustee" by an adjudication; he may be required under sect. 55 (4) to decide whether he will do so or not.

IN RE COHEN, [1905] 2 K. B. 704, 74 L. J. K. B. 864, 54 W. R. 83, 21 T. L. R. 725, 12 Manson, 358—C. A.

**25. Disclaimer—"Unprofitable Contract"—Contract for Sale of Lease—Disclaimer of Contract without Disclaiming Lease—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55.**—A bankrupt was the lessee of some houses, and he had agreed to sell one of them, and a sum of £50 had been paid by the purchaser as a deposit. This leasehold house was subject to a mortgage, and by the contract a day was fixed for completion. The vendor was to pay all the outgoing up to that date, and after that date the purchaser was to take over the property. After the sale the vendor became bankrupt, and the trustee, having considered the matter, was willing to treat the contract for sale as binding upon him if, as he said, it should turn out to be beneficial to the estate, and he claimed that the unpaid balance of the purchase-money should be paid to him. Some time afterwards it appeared that there were some outgoing to be paid which the purchaser claimed to deduct from the unpaid balance of his purchase-money. Thereupon the trustee refused to be bound by the contract for sale, and claimed the right to disclaim it under the Bankruptcy Act without disclaiming his interest in the lease.

HELD—that sect. 55 of the Bankruptcy Act, 1883, did not cover this kind of transaction, as the disclaimer would have the effect, not of getting rid of burdensome property in the hands of the bankrupt and of the trustee representing him, but of divesting from a purchaser an interest which had already passed to him.

Decision of Divisional Court ((1901) 84 L. T. 328) affirmed.

IN RE BASTABLE, EX PARTE THE TRUSTEE, [1901] 2 K. B. 518, 70 L. J. K. B. 784; 49 W. R. 561; 84 L. T. 825; 17 T. L. R. 560; 8 Manson, 239—C. A.

**Administration of Bankrupt's Property—Contd.**

**26. Employment of Solicitor by Trustee—Permission of the Committee of Inspection—Particular Things to be Specified—Costs—Taxation—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, sub-s. 3. Bankruptcy Rules, 1886, rr. 117, 285—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15, sub-s. 3.]**—A tenant for life of settled estates became bankrupt. The Official Receiver at first acted as trustee with a committee of inspection, and with the sanction of the committee employed A. and A. as his solicitors in various matters arising in the bankruptcy. M., on his appointment as trustee, was desirous of continuing the employment of A. and A. as his solicitors in the same capacity as they had been employed by the Official Receiver, and thereupon the committee of inspection passed the following resolution: "That Messrs A. and A. be employed by the trustee where necessary." Under this resolution, M. employed A. and A. as his solicitors in various matters arising in the bankruptcy, including all matters relating to the letting and management of the settled estates. On A. and A. carrying in their bills of costs for taxation, the bankrupt objected to all the items and charges relating to the letting and management of the estates on the ground that the trustee had not obtained specific permission notified in the minutes of the committee of inspection to employ legal aid in the matters in question, as required by sect 57 of the Bankruptcy Act, 1890.

**HELD**—that it was not necessary for a specific resolution to be passed for every step in an action, but that the resolution that the solicitors "be employed by the trustee where necessary" was too vague and insufficient; that the resolution must specify in some way or other the particular matter in which the solicitors may be employed; that a written authority was not necessary; and that the matter must go back to the taxing master to reconsider it from that view.

**IN RE VAVASOUR.** [1900] 2 Q. B. 309, 69 L. J. [Q. B. 685; 48 W. R. 543; 82 L. T. 622, 7 Manson, 263—Wright, J

**27. Execution—"Costs of the Execution"—Prolonged Possession by Sheriff—Liability for His Fees—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), ss. 1, 11 (1).]**—A sheriff, who had levied under a writ of *fi fa.*, remained in possession of the goods seized for two months at the request of the judgment creditor and debtor; before he withdrew, a receiving order was made on the debtor's petition, and the title of the trustee dated back to the 21st day of the sheriff's possession—such possession for twenty-one days constituting an act of bankruptcy. The sheriff claimed possession money for the whole two months from the trustee, as "costs of the execution" within sect. 11 (1) of the Act of 1890.

**HELD**—that the trustee was only liable for twenty-one days' possession money, for, after the 21st day he became the creditor by operation of law, and he had never consented to the sheriff remaining in possession.

**IN RE ENGLISH AND AYLING, EX PARTE MURRAY**  
[AND CO., [1903] 1 K. B. 680; 72 L. J. K. B. 248, 88 L. T. 127, 19 T. L. R. 255; 10 Manson, 34—Wright, J.

**28. Execution—Landlord's Claim for Rent—Sheriff's Promise to pay—Receiving Order—Official Receiver's Claim—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1.]**—A sheriff levied on 15th November to satisfy a judgment for £74 and costs. On the 18th November he had notice of the landlord's claim of £42 for rent. Before any sale the sheriff promised the landlord that the rent should be paid, and the landlord thereupon assented to the execution proceeding. On the 23rd November some of the goods were sold. On the 24th November the debtor presented his own petition, and the sheriff had notice of it, and wrote to the Official Receiver for leave to sell on his account. On the 25th of November a receiving order was made, and there was an adjudication. The same day the Official Receiver, without knowledge of the landlord's claim, assented to the sale going on. On the 29th November the Official Receiver gave notice to the sheriff of the receiving order, and on the same day the sale was completed. The sheriff paid the landlord, and tendered the balance to the Official Receiver.

**HELD**—that, with the assent of the Official Receiver, the sale was not completed on his behalf, but under the writ.

**IN RE DRIVER, EX PARTE THE OFFICIAL RECEIVER,**  
[1899] 80 L. T. 840, note, p. 841—C. A.

**29. Sale by Court—Consent signed by the Assignees and Mortgagees for Sale according to the course of the Court—Conditions of Sale—Rent and Outgoings to be paid up to last Gale Day preceding the Sale—Assignees' Account—Proper Deductions.]**—Where property of a bankrupt was mortgaged and a consent was signed by the assignees and mortgagees thereon that the property should be sold according to the course of the Court, and the net proceeds of the sale should be distributed under the order of the Court, and the conditions of sale provided that the rent and other outgoings should be paid up to the last gale day preceding the sale, the amount of rent up to the last gale day, and the municipal and non-municipal rates, are proper debits against the proceeds of the sale, and should not be charged against the general estate of the bankrupt.

**IN RE GREENE,** [1900] 2 I. R. 433—C. A.

**30. Secured Creditor — Valuation of Security in Petition — Redemption by**

**Administration of Bankrupt's Property—Contd**

*Trustee at Valuation—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *Sched. II*, rr. 11, 12, 13 ]—Where a secured creditor has assessed the value of his security in his petition, but has not yet proved in the bankruptcy, the trustee cannot call upon him to surrender his security upon payment of the value at which it has been assessed in the petition.

*In re Lacey* ((1884), 13 Q. B. D. 128; 1 M. B. R. 113—Div. Ct.) distinguished.

*IN RE VAUTIN, EX PARTE SAFFERY*, [1899] 2 Q. B. [549; 68 L. J. Q. B. 971; 48 W. R. 96; 6 Manson, 391—Wright, J.

*And see* No. 120, *infra*.

**31. Sequestration of Benefice—Offer of Sum for Withdrawal of Sequestration—Acceptance of Offer by Trustee—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), s. 52.]—A beneficed clergyman was adjudicated bankrupt, and a sequestrator of the profits of the benefice was appointed under sect. 52 of the Bankruptcy Act, 1883, and the bishop of the diocese appointed a curate for the performance of the services of the church under the Sequestration Act, 1871, during the continuance of the sequestration. The stipend of the curate and a claim for dilapidations more than swallowed up the income from the benefice. An offer of £300 was made to the Official Receiver on behalf of the debtor on condition that he would consent to the relaxation or withdrawal of the sequestration. This offer was supported by three creditors, but was opposed by the other creditor (there being only four creditors) whose proof largely exceeded the proofs of the other three. The Registrar authorised the Official Receiver to accept the offer.

**HELD**—that the Official Receiver could agree to the relaxation or withdrawal of the sequestration in consideration of the payment of a sufficient sum, and that the Registrar had rightly exercised his discretion in authorising him to accept the offer.

*IN RE BARRATT*, (1906) 22 T. L. R. 427—Div. Ct.

**IV. ANNULMENT OF PROCEEDINGS.**

**32. Abuse of Process of Court—Evasion of Committal Order by presenting Petition—Personal Earnings.**]—A judgment debtor's sole income was derived from a weekly salary, and commission on sales. Under pressure of a committal order he paid certain instalments; but on a second committal order being made at a later date, he himself presented a petition and was adjudicated bankrupt. The judgment creditor—the only creditor—applied to have the bankruptcy proceedings annulled on the ground that they were an abuse of the process of the Court as being an attempt to evade compliance with the committal order.

**HELD**—that the proceedings could not be regarded as an abuse of the process of the Court, and that the application must be refused.

The proceedings would not, in fact, prejudice the creditor, for in the bankruptcy the debtor's personal earnings beyond what was necessary for the maintenance of himself and family could be applied towards payment of the debt in accordance with *In re Roberts* ([1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 48 W. R. 132; 81 L. T. 467; 7 Manson, 5—C. A. No. 238, *infra*).

*IN RE HANCOCK, EX PARTE HILLEARYS*, [1904] 1 [K. B. 585; 73 L. J. K. B. 245, 52 W. R. 546; 90 L. T. 389; 11 Manson, 1—C. A.

**33. Composition—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), s. 23.]—The Court, upon approving a composition or scheme under sect. 23 of the Bankruptcy Act, 1883, after the debtor has been adjudicated bankrupt, will not, as a matter of course, annul the adjudication. It may in its discretion refuse or postpone the application for annulment.

*In re Taylor, Ex parte Taylor* ([1901] 1 K. B. 744; 70 L. J. K. B. 531; 49 W. R. 510, 84 L. T. 426, 8 Manson, 230—Div. Ct. No. 36, *infra*) followed.

*IN RE SULLIVAN AND HUGHES*, (1904) 20 T. L. R. [393—Registrar.

**34 Debtor Presenting Petition to Escape Pressure of Judgment Summons—Not an Abuse of Legal Process—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), ss. 8, 35.]—It is not an abuse of the process of the Court for a debtor to present a bankruptcy petition in order to escape the pressure of a judgment summons, even where there are practically no assets.

*Ex parte Painter* ([1895] 1 Q. B. 85; 64 L. J. Q. B. 22; 43 W. R. 144; 71 L. T. 581; 1 Manson 499—Div. Ct.) followed.

A judgment summons was taken out against a debtor by his only creditor, who had obtained a judgment for £100 in a breach of promise action. He thereupon filed his own petition and was adjudicated bankrupt thereon. There were some assets.

**HELD**—that the adjudication could not be set aside as an abuse of the process of the Court.

*IN RE ARCHER, EX PARTE ARCHER*, (1904) 20 [T. L. R. 390—Div. Ct.

**35 Annulment of Adjudication—Debts "paid in full"—Release of Debts—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), s. 35, sub-s. 1.]—A bankrupt paid part of his debts in full, and the rest were released by the various creditors. He thereupon applied for an annulment of the adjudication in bankruptcy.

**HELD**—that the debts had not been "paid in full" within the meaning of sect. 35 (1) of the Bankruptcy Act, 1883, and that the Court could not annul the adjudication.

"Debt" in sect. 35 means debts which have been rightly admitted to proof.

The principles on which an order of annulment should be granted discussed.



**Annulment of Proceedings—Continued.**

Decision of Div. Ct. (53 W. R. 416; 92 L. T. 540, 21 T. L. R. 391) reversed.

IN RE KEET, EX PARTE OFFICIAL RECEIVER, [1905]  
[2 K. B. 666; 74 L. J. K. B. 694; 54 W. R.  
20, 93 L. T. 259, 21 T. L. R. 615, 12  
Manson, 235—C. A.]

**36. Payment of Debt in Full—Falsifying Statement—Substantial Concealment of Assets—Discretion to Refuse Order—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35, sub-s. 1**—A debtor admittedly was guilty of falsifying his statement of affairs and of substantial concealment of assets on his public examination. Afterwards he handed to the Official Receiver a sum sufficient to pay all the creditors of the bankrupt in full, with interest and expenses. He applied under sect. 35, sub-sect. 1 (1) of the Bankruptcy Act, 1883, for an order annulling his adjudication. The Registrar refused to make the order. On appeal,

Held—that it could not be said that the discretion of the Registrar had been wrongly exercised, as the debtor had been guilty of two of the worst crimes which a bankrupt could commit; and that it would be useless for the bankrupt to apply again for such an order until a period of something like five years from the bankruptcy had elapsed.

IN RE TAYLOR, EX PARTE TAYLOR, [1901] 1 K. B. [744; 70 L. J. K. B. 531; 49 W. R. 510; 84 L. T. 426, 8 Manson, 230—Div. Ct.]

**V. BANKRUPTCY NOTICE.**

**37. Address of Creditors—Bankruptcy Rules, 1886—1890, App. Form 6.**—A creditor gave as her address in a bankruptcy notice a London hotel where she often stopped, and was then living, but where she had no room permanently engaged. On the morning of the last of the seven days limited for compliance with the notice, she left for France, leaving no address behind her, and remained away for seven or eight weeks.

Held—that she must not be taken to have abandoned her address, and that it was sufficient.

If the address given in a bankruptcy notice is that of a place where the creditor can be found during the seven days, occasional absence, even for a whole day, will not invalidate the notice, unless the absence is such as to deprive the debtor of a reasonable opportunity of complying with the notice. *Secus*, if the creditor abandon his place of address.

In *re Stogdon*, *Ex parte Leigh* ([1895] 2 Q. B. 534; 65 L. J. Q. B. 47; 73 L. T. 279, 2 Manson, 382—C. A.) considered.

BEAUCHAMP v. BEAUCHAMP, [1904] 1 K. B. 572, [73 L. J. K. B. 311; 52 W. R. 545; 90 L. T. 594; 20 T. L. R. 269; 11 Manson, 5—C. A.]

And see No. 249, *infra*.

**38. Application to Set Aside Bankruptcy Notice—Adjournment—Sufficient Ground for Setting Aside—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g)—Bankruptcy Rules 1886 and 1890, Rules 138 (2), 139, Form 8.**—A bankruptcy notice can only be set aside, or an application to set aside a bankruptcy notice adjourned, on the grounds mentioned in the Act and Rules. The fact that the granting of time to the debtor to allow him to make a proposed arrangement would be fair and right, is not a ground for setting aside a bankruptcy notice within the words of the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g), nor within the terms of rule 138 (2) or rule 139, or of Form 8, and is therefore insufficient to justify the adjournment of an application to set aside a bankruptcy notice.

RE COLE, EX PARTE ATTENBOROUGH, [1898] 1 [Q. B. 290, 67 L. J. Q. B. 302; 78 L. T. 23; 5 Manson 19; 46 W. R. 352—Div. Ct.]

**39. Application to Set Aside—Counterclaim—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g)**—When a debtor applies to set aside a bankruptcy notice on the ground that he has a counterclaim which equals or exceeds the amount of the judgment on which such notice is founded, such counterclaim must be mutual and due in the same right. In answer to a judgment obtained against him by executors the debtor cannot set up a claim against their testator's estate.

RE MOLESWORTH, (1907) 51 Sol. Jo. 653—C. A.

**40. "Creditor"—Equitable Assignment of Judgment Debt—Bankruptcy Notice by Trustee of Judgment Debt—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g)—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1.**—A judgment creditor who has equitably assigned his judgment debt does not thereby cease to be a "creditor" within the meaning of sect. 4, sub-sect. 1 (g) of the Bankruptcy Act, 1883, as explained by sect. 1 of the Bankruptcy Act, 1890, so as to disentitle him from serving a bankruptcy notice upon the judgment debtor.

*Ex parte Dearle*, *Re Hastings* (14 Q. B. D. 184) followed.

RE PALMER, EX PARTE BRIMS, [1898] 1 Q. B. [419; 67 L. J. Q. B. 316; 77 L. T. 709; 5 Manson, 50, 14 T. L. R. 175; 46 W. R. 342—C. A.]

**41. Final Judgment—Decree of Court of Session in Scotland—Registration in England—Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), ss. 3, 4—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g).**—A certificate of a decree of the Court of Session in Scotland, which has been registered in the High Court of Justice under sect. 3 of the Judgments Extension Act, 1868, is not a "final judgment" within the meaning of sect. 4, sub-sect. 1 (g) of the Bank-

**Bankruptcy Notice.—Continued.**

ruptcy Act, 1883, so as to enable the creditor to found a bankruptcy notice upon it.

RE A BANKRUPTCY NOTICE, [1898] 1 Q. B. 383; 67 [L. J. Q. B. 308, 77 L. T. 710; 5 Manson 7; 14 T. L. R. 175, 46 W. R. 325—C. A.]

42. *Final Judgment—Joinder of two Judgments—Claim and Counterclaim—Different Parties—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g).—Two plaintiffs brought an action to recover £105 for money lent. The defendant put in a defence and counterclaimed against the plaintiffs and two other persons for damages for fraudulent conspiracy. The action was settled by the defendant consenting to judgment for the plaintiffs for £105 and costs to be taxed, and for the plaintiffs and the two other persons for the costs of the counterclaim to be taxed. The plaintiffs and the two other persons served a bankruptcy notice on the defendant requiring him to pay to the plaintiffs the sum of £230, and to the two other persons the sum of £231, being the amount claimed as due to them on the judgment.

HELD—that the judgment on the claim and for costs on the counterclaim ought to be treated as separate judgments, and that, there being two judgment debts in favour of different persons comprised in the bankruptcy notice, it was bad.

Re Low ([1891] 1 Q. B. 147; 60 L. J. Q. B. 265; 63 L. T. 694; 39 W. R. 181—C. A.) followed.

IN RE A BANKRUPTCY NOTICE (OR, A DEBTOR), [(1907) 96 L. T. 133, 23 T. L. R. 169, 14 Manson, 133—C. A.]

43. *Final Judgment—Joinder of two Judgment Debts—Irregularity—Point not taken Below—Appeal against Receiving Order—Amendment—Costs—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 4, 143.—A bankruptcy notice, founded on two judgment debts and therefore admittedly bad (see *In re Low*, [1891] 1 Q. B. 147; 60 L. J. Q. B. 265; 63 L. T. 694; 39 W. R. 181), was served on a debtor, and a receiving order was made upon his non-compliance therewith.

On appeal against the order he impugned the notice for the first time.

HELD—that the objection was fatal; and that leave to amend ought not to be given (following *In re Collier*, (1891) 8 Morrell, 80, 83); but that the appellant should not be allowed the costs of the hearing below.

IN RE O. C. S., EX PARTE THE DEBTOR, [1904] 2 [K. B. 161; 73 L. J. K. B. 585; 52 W. R. 595; 91 L. T. 224; 11 Manson, 122—C. A.]

44. *“Final Judgment”—Judgment under Ord. 14—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4 (1) (g).—Creditors obtained an order under Ord. 14 empowering them to enter up judgment for the amount of their claim. They subsequently entered up judgment, and issued a bankruptcy notice for the amount. On motion to set aside the notice,

HELD—that while the order of the Court was not final, the judgment when entered up was final and a good subject matter for a bankruptcy notice

IN RE A DEBTOR, [1903] W. N. 6; 114 L. T. Jo. [289, 38 L. J. N. C. 46; 19 T. L. R. 152—C. A.]

45. *“Final Judgment”—Order Enforcing an Award—Arbitration Act, 1889* (52 & 53 Vict. c. 49), s. 12—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g).—An order made under sect. 12 of the Arbitration Act, 1889, enforcing an award is not a “final judgment” within sect. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, so as to enable a bankruptcy notice to be founded on it.

IN RE A BANKRUPTCY NOTICE (OR, IN RE A DEBTOR), [1907] 1 K. B. 478; 76 L. J. K. B. 171; 96 L. T. 131; 23 T. L. R. 214; 14 Manson, 1—C. A.]

46. *“Final Judgment”—Order made on Petition for Revocation of Patent—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g)—*Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 26.—An order of the Chancery Division revoking a patent with costs, under sect. 26 of the Patents, Designs, and Trade Marks Act, 1883, is not a “final judgment” within the meaning of sect. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be founded thereon, because the order did not purport to be a judgment but only a declaration, and it was not made in an action but on a petition, which is commenced not by writ nor in any manner prescribed by Rules of Court, but in manner prescribed by sect. 26 of the Patents, Designs, and Trade Marks Act, 1883.

In re Binstead, Ex parte Dale ([1893] 1 Q. B. 199; 62 L. J. Q. B. 207; 41 W. R. 452, 68 L. T. 31; 4 R. 146; 9 Morr. 319—C. A.), and In re A Bankruptcy Notice, Ex parte Official Receiver ([1895] 1 Q. B. 609; 64 L. J. Q. B. 429; 43 W. R. 305; 72 L. T. 312; 2 Manson, 164; 14 R. 362—C. A.) applied.

IN RE OWEN, EX PARTE PETERS, (1901) 70 [L. J. Q. B. 92; 49 W. R. 379; 83 L. T. 572; 8 Manson, 24—Wright, J.]

47. *Issue of by Trustee of Judgment Creditor—Leave to issue Execution—“Entitled to enforce a final Judgment”—Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 1, sub-s. 1 (g)—*R. S. C. Order XVIII., r. 4, Order XLII., r. 23*.—A trustee in bankruptcy of a judgment creditor was added as a party under Order XVII., and was during all material times a party to the proceedings. Without obtaining express leave under Order XLII., r. 23, to issue execution, the trustee issued a bankruptcy notice on the judgment debtor.

HELD—that the trustee must obtain leave under Order XLII., r. 23, to issue execution, and until he had done so he was not a person “entitled to enforce a final judgment.”

**Bankruptcy Notice—Continued.**

ment" within the meaning of sect. 1 of the Bankruptcy Act, 1890, and was, therefore, not entitled to issue the bankruptcy notice

IN RE CLEMENTS, EX PARTE CLEMENTS, [1901] 1 Q. B. 260, 70 L. J. Q. B. 58; 49 W. R. 176, 83 L. T. 464, 8 Manson, 27—Div. Ct.

48. *Judgment Debt—Debtor required to pay Debt without Costs—Costs not Taxed—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g).—A creditor recovered judgment against his debtor for £1,500, and costs to be taxed. Before the costs were taxed the creditor served on the debtor a bankruptcy notice requiring him to pay the £1,500 judgment debt. The notice not having been complied with, the creditor, after the costs had been taxed, presented a bankruptcy petition, in which he alleged that the debtor was indebted to him in the sum of £1,513 3s. 8d., the amount due on the final judgment, being as to £1,500 money lent, and as to £13 3s. 8d. the costs of the judgment.

Held—that, having regard to the fact that under Order 42, r. 18, of the Rules of the Supreme Court, the creditor had a right to issue execution for the £1,500, independently of the costs, there was a "final judgment" for the £1,500 within sect. 4, sub-sect. 1 (g) of the Bankruptcy Act, 1883, and the bankruptcy notice was a valid notice, as it required the debtor to pay the judgment debt in accordance with the terms of the judgment.

IN RE G. J., EX PARTE G. J., [1905] 2 K. B. 678; [74 L. J. K. B. 932; 93 L. T. 193; 21 T. L. R. 698; 12 Manson, 354—C. A.

49. *Judgment in Detinue—Damages exceeding £50—Non-compliance with Notice—Subsequent Return of Article—Debt Reduced Below £50—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 4, 6.]—The debtor, having won a silver challenge cup at a regatta two years in succession, sent it away in the belief that it had become his property. The regatta committee sued for the cup, and recovered judgment for its return, or £50 its value, and damages and costs amounting together to £35. The money not having been paid, nor the cup returned, the judgment creditors served the debtor with a bankruptcy notice for payment of the £35, which was not complied with, and the creditors presented a bankruptcy petition. Before the day fixed for the hearing the debtor returned the cup to the creditors' solicitors. The Registrar dismissed the petition upon the ground that, by the return of the cup, the petitioning creditors' debt had been reduced below £50. On appeal:

Held—that after the act of bankruptcy was complete the creditors' right to a receiving order could not be defeated by the return of the cup, and the creditors, by issuing the bankruptcy notice and presenting the petition, finally elected to abandon their pro-

perty in the cup, which became vested in the debtor.

IN RE A DEBTOR, EX PARTE THE PETITIONING [CREDITOR, (1907) 97 L. T. 140; 23 T. L. R. 618; 14 Manson, 198—Div. Ct.

50. *Notice Requiring Payment of Part of Debt—Agreement to pay Judgment by Instalments—Instalments in Arrear—Notice to pay such Instalments—Validity—Garnishee Order nisi—Whether a Stay of Execution—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4 (1) (g).—A notice requiring payment of part of a judgment debt, leaving a balance to be subsequently claimed, is not a valid bankruptcy notice, though (*per* Vaughan Williams, L.J.) a notice requiring payment of part only of the debt by reason of credit being given for sums already paid is a valid notice to pay "in accordance with the terms of the judgment."

A notice, in order to be valid, must be founded upon the actual terms of the judgment, and not upon those terms as modified by agreement between the parties; at the same time it must not be inconsistent with any such agreement that may exist.

Therefore, where the parties agree simply that a judgment debt shall be paid by instalments, and some instalments are in arrears, a bankruptcy notice cannot be issued for the whole judgment debt by reason of the collateral agreement, nor can one be issued for the amount of the instalments in arrear, for it leaves a balance to be claimed in the future, and does not require payment "in accordance with the terms of the judgment."

If, however, the agreement provides for the whole debt becoming due upon failure to pay any instalment, a notice may then be issued in respect of the whole judgment debt.

In *re* Feast ((1887) 4 Morrell, 37) distinguished.

*Semble*—A garnishee order nisi obtained by a judgment creditor does not operate as a stay of execution so as to prevent the issue of a valid bankruptcy notice.

IN RE H. B. OR IN RE A DEBTOR, [1904] 1 K. B. [94; 73 L. J. K. B. 1, 52 W. R. 178, 89 L. T. 592, 20 T. L. R. 32; 10 Manson, 361—C. A.

51. *Partnership—Dissolution—Judgment against Partnership—Bankruptcy Notice addressed to Dissolved Partnership—Petition against late Partners Separately—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 115, 143—*Bankruptcy Rules, Form 6—R. S. C. Ord. 48A, rr. 1–8.*]—A creditor issued a writ for the recovery of a sum of money against a recently dissolved firm of partners. The writ was served personally on each of the late partners, and judgment was obtained against the late firm. The creditor subsequently served a bankruptcy notice addressed to the late firm on each of the two former partners, but neither of them complied with its terms, and he thereupon presented separate petitions against them, addressed to each in his individual name.

**Bankruptcy Notice—Continued.**

**HELD**—that, even if the bankruptcy was technically incorrect and insufficient, yet that this was a case in which the Court might overlook the defect under the terms of sect. 143 of the Bankruptcy Act, 1883; but

**HELD ALSO** (Collins, L. J., dissenting)—that the bankruptcy notice was, as a matter of fact, technically correct and sufficient within the terms of sect. 115 of the Bankruptcy Act, 1883.

*Per* Rigby, L. J.: The general rule of law or equity embodied in Ord. 48A, though not the order itself, is applicable in bankruptcy.

**IN RE WENHAM, EX PARTE BATTAMS**, [1900] 2 [Q. B. 698; 69 L. J. Q. B. 803; 48 W. R. 626; 83 L. T. 94; 7 Manson, 309—C. A.]

52. *Security given to Satisfaction of Creditor—Right to Issue Second Bankruptcy Notice—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4 (1) (g).—A creditor having obtained a judgment against a debtor issued a bankruptcy notice on it, but subsequently entered into an agreement with the debtor by which the latter gave certain property by way of security, part of which property he was to be at liberty for a year from the date of the agreement to repurchase. Six months after the agreement the creditor issued a second bankruptcy notice in respect of the debt against the debtor, on which a receiving order was made.

**HELD**—that the creditor had no right to issue the second notice while the option to repurchase existed.

**IN RE SMITH, EX PARTE DURBAN**, [1903] 1 K. B. [33; 51 W. R. 118; 19 T. L. R. 13; 72 L. J. K. B. 30; 87 L. T. 586; 9 Manson, 341—C. A.]

53. *Seizure by Sheriff under fi. fa.—Withdrawal by Sheriff Without Return to Writ—Right of Creditor to Issue Notice—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g).—A judgment creditor issued a writ of *fi. fa.* against a judgment debtor's goods. The debtor's wife claimed the greater part of the goods which the sheriff had seized, and the trustees of the debtor's antenuptial settlement claimed the remainder of the goods. Pursuant to instructions from the judgment creditor's solicitor, the sheriff withdrew from possession of the goods and made no return to the writ. On the same day the judgment creditor issued against the debtor a bankruptcy notice under the Bankruptcy Act, 1883 (sect. 4, sub-sect. 1 (g)), for the whole of the judgment debt.

**HELD**—that on the evidence no goods of the debtor were seized; that the judgment creditor had a right to serve the bankruptcy notice, for there was no stay, express or implied, and the sheriff had not realised anything by the seizure or by the sale of the goods of the debtor, for which he was bound to account or make a deduction from the judgment debt mentioned in the bankruptcy

notice, nor was the sheriff in possession of the goods of the judgment debtor, nor had he ever been so.

*Miller v. Parnell* ((1815) 6 Taun. 370; 2 Marsh. 78) is not overruled by *Peploe v. Galliers* ((1820) 4 Moore, 163); nor impaired by *Lee v. Danger* ([1892] 2 Q. B. 337, 61 L. J. Q. B. 780, 56 J. P. 678; 40 W. R. 469; 66 L. T. 548—C. A.).

**IN RE A DEBTOR, EX PARTE SMITH**, [1902] 2 K. B. [260, 71 L. J. K. B. 664; 50 W. R. 609; 87 L. T. 314; 18 T. L. R. 683, 9 Manson, 243—C. A.]

**VI. COUNTY COURTS.**

54. *Administration Order—Total Debts not exceeding £50—Subsequent Creditors—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 122, sub-s. 5].—Where an administration order has been made, under sect. 122 of the Bankruptcy Act, 1883, in a County Court against a judgment debtor, whose total indebtedness does not exceed £50, a creditor whose debt has accrued due after the date of the administration order has, by virtue of sub-sect. 5, like prior creditors, no remedy against the person or property of the debtor except with the leave of the County Court, so long as the administration order is in existence, his remedy being to come in under sub-sect. 12 as a creditor under the administration order.

**PEARSON v. WILCOCK**, [1906] 2 K. B. 440, 75 [L. J. K. B. 717; 95 L. T. 431; 22 T. L. R. 562, 653; 13 Manson, 214—Div. Ct. and C. A.]

55. *Appeal from County Court—Leave to Appeal—Property under £50—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 104—*Bankruptcy Appeals (County Courts) Act, 1884* (47 Vict. c. 9), s. 2].—Where it is apparent on the face of the proceedings that the money, or money's worth affected by any order of a County Court Judge in Bankruptcy does not exceed £50, no appeal lies to the Divisional Court except by leave of the County Court Judge. And his refusal to grant such leave is not an "order subject to appeal" within the meaning of sect. 104 (2) of the Bankruptcy Act, 1883.

**IN RE EVERSON, EX PARTE OFFICIAL RECEIVER**, [1904] 2 K. B. 619; 52 W. R. 656; 91 L. T. 81, 74 L. J. K. B. 38, 11 Manson, 339—Div. Ct.]

56. *"Enforceable as a County Court Judgment"—Jurisdiction of County Court Judge to convict—Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37), Sched. II., cl. 8—*Debtors Act, 1869* (32 & 33 Vict. c. 62), s. 5].—A County Court Judge has jurisdiction to enforce an award, made under the Workmen's Compensation Act, 1897, by means of an order of committal under sect. 5 of the Debtors Act, 1869.

**BAILEY v. PLANT**, (1900) 49 W. R. 103; 83 J. T. [458; 17 T. L. R. 48—C. A.]

## County Courts—Continued.

57. *Judgment Summons—Debtor not present—No Evidence as to His Means—No Power to Make Receiving Order—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 103 (5).—Upon the hearing of a judgment summons, there being no evidence as to the debtor's means, the Judge cannot make a committal order, and therefore cannot make a receiving order "in lieu thereof" under sect. 103 (5) of the Bankruptcy Act, 1883.

*R. v. Sussex County Court Judge* ((1888) 59 L. T. 32—Div. Ct.) distinguished.

RE A DEBTOR, EX PARTE THE DEBTOR, [1905]  
[1 K. B. 374; 53 W. R. 29; 91 L. T. 321; 74 L. J. K. B. 362; 12 Manson, 17—Div. Ct.]

58. *Jurisdiction—Claim Arising out of the Bankruptcy—Lease—Disclaimer—Mortgages by Demise—Option to take Vesting Order be Excluded—Merger—Intention—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 102 (1).—In 1880 W. let premises to M. for 95 years. In 1881 M. demised the term less three days at a nominal rent to H. to secure advances now amounting to £8,000. In 1882 M. bought the fee, and in 1885 conveyed it for value to F. subject to the lease of 1880. In 1902, in M.'s bankruptcy, the County Court Registrar ordered that H.'s representatives should be excluded from all interest in the lease unless they accepted a vesting order with a rent equal to that payable by M. They did not appeal; but now claimed that a merger took place in 1882, and that the only subsisting term was that created in 1881.

Held—that, under sect. 102 (1) of the Bankruptcy Act, 1883, the Registrar had jurisdiction, without any consent of the parties, to decide such question of merger, and that his decision was now final; and, further, that his decision was correct, for, judging from M.'s dealings with the property after 1882, he intended there to be no merger.

*LEA v. THURSBY*, [1904] 2 Ch. 57; 73 L. J. Ch. [513; 90 L. T. 667; 20 T. L. R. 470; 11 Manson, 151—Eady, J.]

59. *Jurisdiction—Matter not Arising out of the Bankruptcy—Amount in Dispute Exceeding £200—Reference to Registrar—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 102 (1).—Sect. 102 (1) of the Bankruptcy Act, 1883, does not authorise a County Court Judge to refer a claim exceeding £200, and not arising out of the bankruptcy, to his Registrar, for the latter to take an account, and report the amount actually due.

*RE HEALEY*, (1906) 93 L. T. 704—Div. Ct.

60. *Order for Arrest—County Court Judge exercising Bankruptcy Jurisdiction—Certiorari—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 25, sub-s. 1 (a)—*Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 7.—A writ of certiorari cannot be issued to bring up to be quashed an order of a County Court Judge

for the issue of a warrant of arrest made when exercising bankruptcy jurisdiction. The position of a County Court Judge sitting in bankruptcy and exercising bankruptcy jurisdiction, and acting within that jurisdiction, is a position similar to that of a judge of the High Court exercising his jurisdiction, and so long as a County Court Judge is exercising bankruptcy jurisdiction the remedy by which to question an order made by such a judge when exercising such jurisdiction, if such order requires alteration or amendment, is by application to the judge himself sitting in bankruptcy, and then possibly by appeal, and not by certiorari to bring up the order into the Queen's Bench Division. Under sect. 25, sub-sect. 1 (a) of the Bankruptcy Act, 1883, amended by sect. 7 of the Bankruptcy Act, 1890, the power to grant a warrant is not limited as to time, and applies to the case of a debtor absconding before a bankruptcy notice has been issued or a bankruptcy petition presented.

Decision of the Court of Appeal ([1898] 2 Q. B. 680; 68 L. J. Q. B. 24; 79 L. T. 327; 15 T. L. R. 9, 5 Manson, 300) affirmed.

*SKINNER v. NORTHALBERTON COUNTY COURT* [JUDGE, [1899] A. C. 439; 68 L. J. Q. B. 896; 63 J. P. 756, 80 L. T. 814; 15 T. L. R. 433; 6 Manson, 274—H. L. (E.)]

61. *Power to Stay Proceedings in High Court—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 9 (1), 10 (2), 168 (1).—After the Chancery Division has allowed a matter to go on with a knowledge of bankruptcy proceedings it is out of the question that those proceedings can be stayed by a County Court.

*RE RICHARDSON AND COOK, EX PARTE GRIMES'* [EXECUTORS, (1902) 86 L. T. 690—Div. Ct.]

62. *Summary Administration—Claim Over £200 not arising out of the Bankruptcy—Jurisdiction of the Bankruptcy Court—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 102, 121—*Bankruptcy Rule* 273.—In April, 1901, a farmer authorised an auctioneer to sell the effects on his farm, and arranged that the proceeds should be paid into his banking account. On 2nd May, 1901, the auctioneer paid the proceeds of the sale—£343 14s.—into the bank. On 11th May, 1901, a receiving order was made against the farmer on his own petition, and on the same day he was adjudicated a bankrupt. On May 24th, 1901, an order for summary administration was made under sect. 121 of the Bankruptcy Act, 1883, and the Official Receiver became trustee. The Official Receiver applied to the Judge of the County Court for an order on the auctioneer to repay the £343 14s.

Held—that the claim was clearly one which did not arise out of the bankruptcy, and the County Court Judge was right in holding that he had no jurisdiction to make the order asked for.

*IN RE BILLING, EX PARTE OFFICIAL RECEIVER v. [BLAKELY, (1902) 86 L. T. 689—Div. Ct.]*

## County Courts—Continued.

63. *Assignment for Benefit of Creditors—Alleged Acquiescence by Petitioning Creditor—Trustee ordering Goods—Execution of Order for Cash—Notice of Execution of Deed.*—At a meeting of creditors the representative of C. & Co. refused to have anything to do with a deed of assignment for the benefit of creditors. After he left the room, a deed was signed. On the same day the trustee under the deed, writing "as trustee of the estate," sent a small order to C. & Co., who by return of post sent an invoice saying that the goods were "ready awaiting remittance." After having received a cheque, but before they sent off the goods, they were informed of the execution of the deed.

Held—that C. & Co. were not estopped from relying on the execution of the deed as an act of bankruptcy, for the order did not necessarily convey to them that a deed had been signed, and the transaction was completed on receipt of the cheque before they in fact got specific notice of the deed.

IN RE CROW, EX PARTE COLLIER & CO., (1907) 97 [L. T. 140—Div. Ct.]

## VII. DEED OF ARRANGEMENT.

64. *Assignment for Benefit of Specified Creditors—Non-registration—Validity—Deeds of Arrangement Act, 1887* (50 & 51 Vict. c. 57), ss. 4, 5, 19.]—A deed of assignment of certain property by a debtor to a trustee for the benefit of certain specified creditors of the debtor, there being other creditors who had no right to come in under the deed, is not a deed of arrangement for the benefit of creditors generally within the Deeds of Arrangement Act, 1887, and is not void for want of registration.

*Hedges v. Preston* ([1899] 80 L. T. 847—dictum of Vaughan-Williams, L.J., No. 67 *infra*) explained.

IN RE SAUMAREZ, EX PARTE SALAMAN, [1907] 2 [K. B. 170; 76 L. J. K. B. 828; 97 L. T. 121; 23 T. L. R. 477; 14 Manson, 170—C. A.]

65. *Creditor's Deed—Trustee of Creditors' Deed—Preferable Right or Security.*—A. S. conveyed his whole estate to M. "as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends and purposes after specified," viz., to manage the farm, to sell the stock, &c., and sue and defend actions, pay rent and wages, and out of the remainder pay the creditors of A. S. A. S. was declared bankrupt. M. claimed a preferential right to be paid a balance due to him in respect of his management.

Held—that there was no deed in existence constituting any preferable right or security; that M. had no such possession of any part of the estate stipulated for and obtained as a security for his advances as to give him a preference over other creditors, that the

possession of M. was all along that of the bankrupt, by his authorised agent or commissioner, and not possession excluding that of the bankrupt, that M.'s position was not different in substance from creditors who had lent money or sent goods to the bankrupt, A. S., of which the general creditors took the benefit on bankruptcy.

MESS v. HAY, [1899] A. C. 233; 15 T. L. R. [74—H. L. (Sc.)]

66. *Excluding Names of Creditors—Registration—Affidavit not Containing Names of all Creditors—Benefit Retained by the Grantor—Fraudulent Conveyance—13 Eliz. c. 5—Deeds of Arrangement Act, 1887* (50 & 51 Vict. c. 57), s. 6 (1).]—A deed of arrangement is not necessarily void under the Statute of Elizabeth, as tending to delay creditors, merely because it reserves a benefit to the debtor; it is nevertheless a valid deed, if it is *bonâ fide*, i.e., if it is not a mere cloak for retaining a benefit to the debtor.

A debtor's intention to exclude, and his exclusion of, the names of particular creditors from a *bonâ-fide* deed of arrangement, does not render the deed void, nor is the registration of such a deed avoided, because the statutory affidavit does not contain the name of every creditor.

*Alton v. Harrison* ([1869] L. R. 4 Ch. 622; 38 L. J. Ch. 669, 17 W. R. 1034, 21 L. T. (N.S.) 282) followed.

Judgment of Div. Ct. ([1902] 2 K. B. 158; 71 L. J. K. B. 476, 86 L. T. 832; 18 T. L. R. 498, 9 Manson, 139) affirmed.

MASKELYNE AND COOKE v. SMITH, PALMER [CLAIMANT, [1902] 1 K. B. 671; 72 L. J. K. B. 237; 51 W. R. 372; 88 L. T. 148; 19 T. L. R. 270; 10 Manson, 121—C. A.]

67. *For Benefit of Creditors Generally—Registration—Validity—Deeds of Arrangement Act, 1887* (50 & 51 Vict. c. 57), ss. 4, 5, 19.]—A deed recited that H. was indebted to a considerable amount to his trade and other creditors; that he was desirous of not having a receiving order made against him, and had negotiated with his creditors for the payment of a composition in discharge of their debts; that it had been arranged that the creditors should accept a composition of 5s. in the pound in discharge of their debts, and that P. had agreed to provide the necessary funds to pay the composition upon having the whole estate of H. conveyed and assigned to him absolutely, and not as trustee for H. or the creditors. Then, in consideration of £50 paid by P. to H., H. conveyed and assigned all his estate to P. absolutely, and not as trustee for H. or the creditors. P. covenanted to pay all preferential claims in full, and the composition of 5s. in the pound on all debts due from H. to the creditors not exceeding £1,800.

Held—that the deed was a "deed of arrangement for the benefit of his creditors generally" within sect. 4 of the Deeds of

**Deed of Arrangement.**—*Continued.*

Arrangement Act, 1887, and was made void to all intents and purposes because it was not registered under the Act.

HEDGES v. PRESTON, (1899) 80 L. T. 847—C. A.  
And see No. 64, *supra*.

68. *Foreigner—Assignment for Benefit of Creditors—Debtors' Goods in England—Non-Registration—Conflict of Laws—Validity—Deeds of Arrangement Act, 1887* (50 & 51 Vict. c. 57)]—The word "debtor" in the Deeds of Arrangement Act, 1887, means "debtor subject to the Bankruptcy Acts." The plaintiffs were trustees under a deed of assignment for the benefit of creditors, executed by foreign debtors in the country of their domicile.

HELD—that the plaintiffs could establish in the courts of this country a good title, as against execution creditors, to goods in this country, belonging at the date of the assignment to the debtors, without the deed of assignment being registered pursuant to the Deeds of Arrangement Act, 1887, and there was no *lex rei sitæ* to interfere with the operation of the maxim, "*Mobilia sequuntur personam*."

Cooke v. Charles A. Vogeler Co. ([1901] A. C. 102; 70 L. J. Q. B. 181, 84 L. T. 10, 17 T. L. R. 153, 8 Manson, 113—H. L. (E) No. 4 *supra*) referred to.

DULANEY v. MERRY & SON, [1901] 1 Q. B. 536; [70 L. J. Q. B. 377, 49 W. R. 331; 84 L. T. 156, 17 T. L. R. 253; 8 Manson, 152—Channell, J.

69 *Not Providing for Creditors Generally—Deeds of Arrangement Act, 1887* (50 & 51 Vict. c. 57), s. 4.]—The debtor became joint tenant with S. of a farm. In consequence of disagreements with S., the debtor determined to wind up his affairs. He instructed M. to make a valuation of his farm stock, and it was agreed that T., a solicitor, should advance the debtor £100 and prepare a deed to secure the £100. In July, 1896, by a deed between the debtor T. and M., the debtor assigned all his interest in the farm to T. and M., and all other his personal estate whatsoever upon trust to sell and stand possessed of the proceeds, (a) to pay T. the sum of £100, (b) to pay all his just debts, (c) to pay the income of the residue when invested to the debtor's daughter till she attained twenty-one, and then the principal for the debtor absolutely. The deed was communicated to the debtor's creditors almost immediately after its execution, and the debtor shortly afterwards left for Paris. On the 1st April, 1898, a receiving order was made, and the debtor was subsequently made bankrupt. The trustee claimed the property as part of the estate.

HELD—that the governing principle of the deed was not to provide for creditors generally. The assignment was for value, and could not be impeached under sect. 47 of the

Bankruptcy Act, 1883, until an act of bankruptcy came into operation: all payments down to the bankruptcy were protected: and the application to set the deed aside failed.

*In re Holden, Ex parte Official Receiver* ((1887) 20 Q. B. D. 43; 57 L. J. Q. B. 47; 36 W. R. 189, 48 L. T. 118; 58 L. T. 119), followed.

IN RE HOBBS, EX PARTE OFFICIAL RECEIVER,  
[1899] 6 Manson, 212—Wright, J.

70. *Trustee—Account—Wilful Default—Misconduct—Full Decree—R. S. C. Ord. 55, r. 10.*]—By a creditors' deed a debtor assigned all his real and personal estate to a chartered accountant, as trustee. Under the provisions of the deed the trustee was empowered to carry on the debtor's business. The debtor afterwards assigned all his interest under the deed to his wife for her separate use. The debtor's wife brought an action against the trustee, in which she made various charges against him, and claimed an account of all dealings and transactions under the creditors' deed on the footing of wilful default.

HELD—that under Ord. 55, r. 10, the Judge has a discretion, and is not bound to give to the plaintiff a decree for a common account, if the questions between the parties can be properly determined without such a decree. The discretion must be exercised upon due consideration of all the facts of the case. Under the circumstances, it was not right to make a full administration decree, notwithstanding the defendant was guilty of some misconduct.

CAMPBELL v. GILLESPIE, [1900] 1 Ch. 225; 48 [W. R. 151; 81 L. T. 514—Cozens-Hardy, J.

**VIII. DISCHARGE.**

71. *Application for—Hearing before Judge Allowed on Certain Grounds.*]—An application on behalf of the bankrupt, that the hearing of the motion to obtain his discharge should be before the Judge, will not be granted on the ground that the Registrar has had something to do with the making of the order for the prosecution of the bankrupt for certain offences under the Debtors Act, 1869; but it may be granted on the ground that the report of the Official Receiver raises issues of great importance and magnitude.

IN RE HOOLEY, EX PARTE HOOLEY, (1899) 80 [L. T. 495; 6 Manson, 176—Wright, J.

72. *Application for Official Receiver's Report—Notice to Dispute Statements in Report—Bankruptcy Rules, 1886 and 1890, r. 238 (a).*]—Where upon an application by a bankrupt for his discharge the Official Receiver in his report to the Court makes detailed statements as to the bankrupt's conduct and affairs, and then states the conclusions at which he has arrived, namely, that one or more of the facts specified in

**Discharge—Continued.**

sect. 8, sub-s. 3, of the Bankruptcy Act, 1890, have been proved, if the bankrupt desires to dispute any of the statements upon which the conclusions are founded he must specify the statements in his notice under rule 238 (a) of the Bankruptcy Rules, 1886 and 1890, and it is not sufficient to give a general notice of his intention to dispute the conclusions.

IN RE WOOLF, (1906) 22 T. L. R. 501—

[Registrar.

**73. Assets not equal to 10s. in the £—Burden of Proof—Official Receiver's Report—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.]**—Upon an application by a bankrupt for an order of discharge the *onus* lies upon the person opposing the discharge to prove facts which entitle the Court under sect. 8, sub-ss. 2, 3, of the Bankruptcy Act, 1890, to refuse or suspend the discharge. The Official Receiver's report is, however, by sub-s. 5, made *prima facie* evidence, if there is any definite finding therein.

IN RE VAN LAUN, EX PARTE THE INTERNATIONAL [ASSETS Co., LD., (1907) 23 T. L. R. 371—  
[C. A.

**74. Conditional Discharge — Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8, sub-ss. 2, 3.]**—The Court may grant a discharge to a bankrupt, against whom some of the facts specified in sect. 8, sub-s. 3, of the Bankruptcy Act, 1890, have been proved, and, without obtaining his consent to judgment for any part of his unpaid debts, order him to pay over a portion of his earnings for the benefit of his creditors.

IN RE DALLMEYER, (1906) 22 T. L. R. 337, 445—  
[C. A.

**75. Conditional Discharge—Granted Subject to a Judgment Payable by Instalments—No Reasonable Probability of Instalments being Paid—Variation of Order—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.]**—A bankrupt's discharge was granted subject to his consenting to a judgment for £1,500 payable by five annual instalments. One instalment was paid a year late, and the Court saw no reasonable probability of the debtor being able to pay the remainder.

A relative offered £500 in satisfaction of the £1,200 remaining due, and a majority of the creditors desired to accept the offer.

HELD—affirming the Registrar, that the offer should be accepted and the original order varied according.

RE ROBERTS, EX PARTE BONZOLINE MANUFACTURING Co., [1904] 2 K. B. 299; 73 L. J. K. B. 724; 91 L. T. 222; 20 T. L. R. 474; 11 Manson, 134—C. A.

**76. Conditional Discharge—Judgment not Satisfied—Power to Revoke—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104.]**—The Court has power, under sect. 104 of the Bank-

ruptcy Act, 1883, to rescind a conditional order of discharge in the terms of Form 63A, granted under sect. 8, sub-s. 2 (iv.), of the Bankruptcy Act, 1890.

A debtor who had been adjudicated bankrupt, and whose assets were of less value than 10s. in the pound on the amount of his unsecured liabilities, was granted his discharge upon condition that he consented to judgment being entered against him in the King's Bench Division for a certain amount, and it was further ordered that the amount should be paid by monthly instalments. The debtor gave his consent, and judgment was accordingly entered up against him for the amount. Subsequently the debtor made default in paying the instalments.

HELD—that the payment of the amount by instalments was part of the condition of the discharge, and, if the Court was satisfied that the debtor had after-acquired property or earnings out of which he might have paid the instalments, the condition was not fulfilled, and the Court might revoke the discharge.

IN RE SUMMERS, EX PARTE OFFICIAL RECEIVER, [1907] 2 K. B. 166; 76 L. J. K. B. 707, 96 L. T. 791; 23 T. L. R. 465; 14 Manson, 101—  
Bigham, J.

**77. Conditional Discharge — Subject to Judgment—Refusal to Consent to Judgment—Probability of Payment—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2).]**—The debtor, an officer in receipt of pay and allowances amounting to £460 a year, filed his own petition. His only liability was a judgment in a breach of promise action for £1,500 and costs: the assets realised 9d. in the pound. Upon the bankrupt's application for his discharge, the Registrar granted it, conditionally, upon his consenting to a judgment being entered for £600. The bankrupt refused to consent, and applied under Rule 240 (3) of 1886 & 1890 for a rehearing. The Registrar thereupon made a similar order, refusing a discharge upon any other conditions, and the bankrupt appealed.

HELD—that, as the bankrupt had been guilty of no misconduct, and as there was no reasonable prospect of a judgment being fruitful, the proper course was to suspend his discharge for two years, and relieve him of his liabilities.

*Seemle*, the Registrar had no power to insist upon making the same order over again upon the bankrupt refusing to consent to a judgment; but the bankrupt could not, as of right, claim to have his discharge at the end of only two years suspension.

IN RE GASKEILL, [1904] 2 K. B. 478; 73 L. J. K. B. 656; 91 L. T. 221; 20 T. L. R. 469; 11 Manson, 125—C. A.

**78. Damages against Applicant in Divorce Suit—Onus—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.]**—A bankrupt applying for



**Discharge—Continued.**

his discharge must show special reasons to induce the Court to make an order under sect. 10 of the Bankruptcy Act, 1890, releasing him from the debts there specified, including damages awarded against him in the Divorce Court.

IN RE SCHUMACHER, (1907) 23 T. L. R. 336—  
[Registrar.

79. *Damages against Bankrupt as Co-Respondent in Divorce Court—Release of—Discretion—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.*—A bankrupt's assets realised only 8s.; his liabilities were £5,000, of which £4,000 were damages given against him in a divorce suit. He had lived in an unjustifiably extravagant way.

HELD—that his discharge must be suspended for two years, and that the Court would not release him from liability under the judgment.

IN RE PALMER, (1905) 21 T. L. R. 344—  
[Registrar.

83. *Discretion of Court—"Fraud"—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (1).*—The word "fraud" in sect. 8 (3) (1) of the Bankruptcy Act, 1890, means fraud in the ordinary sense of the word, as distinct from "constructive" fraud within sect. 48 of the Bankruptcy Act, 1883.

Certain traders, unable to pay their debts as they fell due, transferred all their assets and business to a company, in which their wives were the holders of most of the shares and debentures.

HELD—that they had not been guilty of fraud within the meaning of sect. 8 (3) (1), but that their dealings with their property amounted to "gross misconduct," and that their discharge must be suspended for four years.

IN RE J. ROWLEY AND SONS, (1903) 19 T. L. R. 602—Registrar.

81. *Refusal until Debtor has paid 10s. in the Pound—Suspension—Forthcoming Funds—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.*—On appeal by a bankrupt from an order of a county court Judge refusing his discharge until he paid 10s. in the pound to his creditors,

HELD—that it is the usual practice not to make such an order unless there is a reasonable prospect that some funds or property will be forthcoming, which may be made available for the payment of the debts of the bankrupt, and that the better order to make would be to suspend the discharge for two years.

IN RE MARLEY, (1900) 16 T. L. R. 333—  
[Wright, J.

82. *Release of Debts—Debts provable in*

*Bankruptcy—Debt Contracted with Notice of Act of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 30, 37.*—The Bankruptcy Act, 1883, by sect. 37 (2) provides that "a person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice."

A debt so contracted is a "debt provable in bankruptcy," from which a bankrupt is released by an order of discharge.

BUCKWELL v. NORMAN, [1898], 1 Q. B. 622; 67 [L. J. Q. B. 435; 78 L. T. 248; 5 Manson, 64, 14 T. L. R. 292; 46 W. R. 339—C. A.

83. *Special Reasons—Commission of a Misdemeanour under the Debtors Act, 1869—Special Reasons for Granting Discharge—Special Reasons not stated—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.*—Where the Court, for "special reasons" under sect. 8 of the Bankruptcy Act, 1890, grants the discharge of a bankrupt who has been convicted of offences under the Debtors Act, 1869, it should state the "special reasons" on which it acts. The fact that the jury recommended the bankrupt to mercy is not a "special reason" within the meaning of the statute.

STEVENS, RE, EX PARTE BOARD OF TRADE, [1898] [2 Q. B. 495; 67 L. J. Q. B. 932; 79 L. T. 80; 5 Manson, 223; 14 T. L. R. 556; 47 W. R. 61—Div. Ct.

84. *Special Reasons—Conviction for Falsifying Books—Refusal of Discharge—Period of Probation—Practice—Registrar refusing to hear Application for Discharge—Appeal—Court of Appeal hearing the Substantive Application—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.*—Where a debtor appeals against a Registrar's refusal to hear, or rehear his application for discharge, the Court of Appeal will in a proper case themselves hear the substantive application, instead of ordering the Registrar to do so.

The fact that a debtor has been convicted of an offence under sect. 11 of the Debtors Act, 1869, e.g. for falsifying books, is not an absolute bar to an application for discharge. Circumstances which go to mitigate such offence, e.g. facts which induced the Court to pass only a nominal sentence, may be taken into consideration as "special reasons" for eventually granting a discharge under sect. 8 (2) of the Bankruptcy Act, 1890: in such case, however, the Court will probably require a period of probation to elapse before granting the discharge.

Quære, whether good conduct since the offence is in itself a "special reason" for granting the discharge.

IN RE SOLOMONS, [1904] 1 K. B. 106; 73 L. J. [K. B. 55, 52 W. R. 473; 89 L. T. 637; 10 Manson, 369—C. A.

**Discharge—Continued.**

85. *Suspending Discharge — Guaranteeing Debts of a Third Person—Whether “Contracting Debts without Expectation of Being Able to Pay Them”—Security Given to Creditor by the Principal Debtor—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (d).*—A bankrupt, who has guaranteed a debt owed by a third person, may be regarded as having contracted a debt without having any reasonable expectation of being able to pay it, even though the debtor deposited security with the creditor. The question is whether the bankrupt had any reasonable prospect of being able to satisfy the debt himself in the event of his being called upon to do so.

IN RE ADAMS, (1903) 19 T. L. R. 640—Registrar.

86. *Suspension—Assets less than 10s. in the Pound on the Unsecured Liabilities—Release of Liability after Receiving Order—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8, sub-s. 3 (a).*—The “unsecured liabilities” of a bankrupt within the meaning of sect. 8, sub-s. 3 (a) of the Bankruptcy Act, 1890, include a liability which existed at the date of the receiving order, but from which he has since been released. Therefore the Court has no power to grant an immediate unconditional discharge where the assets at the date of the receiving order are not of a value equal to 10s. in the pound on the amount of the increased liabilities, including such subsequently released liability, unless the bankrupt satisfies the Court that the fact that the assets were not of that value arose from circumstances for which he is not responsible.

IN RE DE BERNALES, (1902) 18 T. L. R. 505—[Registrar.

87. *Suspension—Assets not equal to 10s. in the Pound—Suspension for Two Years—Dating back Period of Suspension—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8, sub-ss. 2, 3 (a).*—Where it is proved on the hearing of an application for an order of discharge that the assets of the bankrupt are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities, and he does not satisfy the Court that he is not responsible for this state of his affairs, the Court, in suspending the discharge for two years, has no power to order that the period of suspension shall run from a date anterior to the hearing of the application.

IN RE MUZEEN, (1906) 22 T. L. R. 322—[Registrar

88. *Suspension—Previous Adjudication in Bankruptcy — Annulment of Adjudication with Consent of Creditors—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8, sub-s. 3 (k)*—A bankrupt who had been adjudicated bankrupt in 1892 applied for an order of discharge. His assets were not of a value equal to 10s. in the pound on the unsecured liabilities, and the bankrupt had been on a pre-

vious occasion, in 1864, adjudged bankrupt, but this bankruptcy was annulled in 1865 with the consent of the creditors.

HELD—that, notwithstanding the annulment of the previous bankruptcy, the bankrupt had on a previous occasion been “adjudged bankrupt” within the meaning of sect. 8, sub-s. 3 (k), of the Bankruptcy Act, 1890, and the discharge would therefore be suspended for two years.

IN RE DENNY, (1905) 21 T. L. R. 297—[Registrar.

89. *Trading with Knowledge of Insolvency—Rash and Hazardous Speculations—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8, sub-s. 3 (c), (f).*—A debtor does not trade after knowing himself to be insolvent, who believes that a careful, prudent, and unhurried realisation of his assets will produce 20s. in the pound for his creditors, although he may know that a forced sale at breaking-up prices will not produce that result. In alleging that a debtor has brought on his bankruptcy by rash and hazardous speculations, it is necessary to specify such speculations, so that the Court may apply its mind to all the circumstances surrounding them, and it is not sufficient to allege generally that the whole of the debtor's trading was speculative.

IN RE JOHN BROWN & Co., (1906) 22 T. L. R. 291—Registrar.

90. *Withdrawal of Application for—Discretion of Court—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.*—The Court will refuse to allow an application for an order of discharge to be withdrawn only in cases where witnesses are brought forward by the official receiver in opposition to the discharge, and the opposition might be prejudiced by the application being withdrawn, and renewed at a later date.

IN RE ROBERTSON, (1902) 18 T. L. R. 670—[Registrar.

91. *Withdrawal of Application for—Opposition by Official Receiver—Discretion of Court—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8*—The Official Receiver having reported unfavourably on the bankrupt's conduct, and stating that he had evidence in support of his report which might not be available in the future, the Registrar refused in his discretion to allow the application for discharge to be withdrawn, or to call on the Official Receiver to give particulars of the evidence, the bankrupt offered an undertaking not to dispute the report, if his application should be renewed in the future, but the Registrar refused to allow a withdrawal even on these terms.

IN RE TANNER, (1903) 19 T. L. R. 28—Registrar.

92. *Withdrawal of Application for—Payment of Costs of Opposing Creditor.*—Where a bankrupt applying for his discharge finds

**Discharge—Continued.**

that it will not be granted, and therefore asks leave to withdraw his application, leave will only be granted upon condition of his paying the costs of any creditor who has appeared to oppose the discharge.

IN RE RICHARDS, (1904) 20 T. L. R. 79—Registrar.

**IX. DIVIDENDS.**

93. *Charging Order on Dividends in favour of Stranger to Bankruptcy—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 102—*Solicitors Act, 1860* (23 & 24 Vict. c. 127), s. 28.]—At common law there is no jurisdiction to make a charging order in the case of bankruptcy. There is no power under sect. 28 of the Solicitors Act, 1860, for the Court of Bankruptcy to give a solicitor a charge on property recovered in another court, even if that property has been converted into a dividend. Section 102 of the Bankruptcy Act, 1883, gives the Court of Bankruptcy no power to make such an order, and no legal right to deal in such a way with funds in the hands of the trustee in bankruptcy.

IN RE COOK, EX PARTE CRIPPS, [1899] 1 Q. B. [863; 68 L. J. Q. B. 597; 47 W. R. 524; 80 L. T. 495; 6 Manson, 185—Div. Ct.

94. *Payment to Assignee of Debts—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 58, 63, r. 225, forms 122 (a), 126.]—An assignee of debts in a bankruptcy cannot obtain payment of dividends on such debts from the trustee except by proving in place of the creditors, whose proofs had been allowed, who have assigned, or producing to the trustee written authorities from each of such creditors in accordance with form 126.

IN RE FROST AND FROST, EX PARTE THE OFFICIAL RECEIVER AND FROST, [1899] 2 Q. B. 50, 68 L. J. Q. B. 663; 47 W. R. 512, 80 L. T. 496; 6 Manson, 194—Div. Ct.

95. *Retainer by Trustee—Set-off—Costs owing by Creditor—Assignment of Debt—Right of Assignee.*—A creditor of a bankrupt lodged a proof against the estate, and this proof was rejected by the trustee. The Judge upon appeal affirmed the rejection. The creditor appealed to the Court of Appeal, and assigned to her solicitors whatever sums she might become entitled to receive out of the bankrupt's estate. The appeal was dismissed, but without prejudice to a fresh proof being sent in. The solicitors lodged a fresh proof, and the trustee in bankruptcy claimed to retain the dividend on the proof against the taxed costs of the appeals due to him from the creditor.

HELD—that he was entitled to do so

IN RE MAYNE, EX PARTE OFFICIAL RECEIVER, [1907] 2 K. B. 899; 76 L. J. K. B. 1086; 23 T. L. R. 758—Bigham, J.

**X. FRAUDULENT PREFERENCE.**

96. *Creditor taking Substantially the whole Property of Debtor for Past Debt—Protected Transaction—Knowledge of Existence of other Creditors—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 4, 49.]—Sect. 49 of the Bankruptcy Act, 1883, does not protect a creditor who takes over the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knows that there are other creditors, as in so doing he cannot be said to be acting in good faith.

*Shears v. Goddard* ([1896] 1 Q. B. 406, 65 L. J. Q. B. 344, 44 W. R. 402; 74 L. T. 128; 3 Manson, 24—C. A.) distinguished.

IN RE JUKES, EX PARTE OFFICIAL RECEIVER, [1902] 2 K. B. 53; 71 L. J. K. B. 710; 50 W. R. 560, 86 L. T. 456; 9 Manson, 249—Wright, J.

97. *Mortgage made under Agreement of Equitable Deposit.*—A legal mortgage, executed in pursuance of an obligation imposed under an agreement of equitable deposit, is not a fraudulent preference.

HERMOUX v. HARBORD, (1898) 14 T. L. R. 243—[Wright, J.

98. *Onus of Proof—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 48.]—When a trustee in bankruptcy impeaches a payment made by the bankrupt as a fraudulent preference, the onus of proof of intention to prefer lies upon the trustee throughout the case, and it is not for the respondent to prove absence of intention to prefer after the trustee has proved that the bankrupt knew he was insolvent at the time when he made the payment impeached.

RE LAURIE, EX PARTE GREEN, (1898) 67 L. J. [Q. B. 431, 5 Manson, 48; 46 W. R. 491—Wright, J.

99. *Payment by Debtor to Bank with the Object of Benefiting Debtor's Surety—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 48.]—A payment was made by an insolvent debtor within three months prior to the bankruptcy in order to discharge her debt, to which, jointly and severally with two sureties, she was liable on a promissory note to the payees, and the money was kept by them and not applied to any other purpose than the discharge of the debt, and the result of the payment was that the makers of the promissory note were released from all liability upon it.

HELD—that such payment did not make it a payment to or in favour of the respondents, the payees, and that it was not a fraudulent preference within sect. 48 of the Bankruptcy Act, 1883, and that the sureties could not be ordered to pay over to the trustee in bankruptcy the amount paid by the debtor.

In re Paine, Ex parte Read ([1897] 1 Q. B.

**Fraudulent Preference—Continued.**

122; 66 L. J. Q. B. 71; 45 W. R. 190; 75 L. T. 316; 3 Manson, 309—Vaughan Williams, J.) not followed.

*In re Mills, Ex parte Official Receiver* ((1888) 58 L. T. 871; 5 Morr. 55—C. A.) followed.

IN RE WARREN, EX PARTE TRUSTEE, [1900] 2 Q. B. 138; 69 L. J. Q. B. 425; 82 L. T. 502—Div. Ct.

100. *Repayment of Loan in Good Faith—Dominant View—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 48.]—Where a debtor, though knowing himself to be insolvent, repays a loan to a creditor in the belief on reasonable grounds that he is bound by contract to return the money, he does not commit a fraudulent preference.

IN RE VAUTIN, EX PARTE SAFFERY, [1900] 2 Q. B. 325; 69 L. J. Q. B. 703, 48 W. R. 652; 82 L. T. 722; 7 Manson, 291—Wright, J.

101. *Trustee and Cestui que Trust—Voluntarily repairing Breach of Trust—Dominant Motive—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 48.]—The bankrupt, a solicitor, was one of the trustees of a marriage settlement, and his firm acted as solicitors to the trust estate. The bankrupt misappropriated money part of the trust estate. He afterwards—being hopelessly insolvent—voluntarily, and without any communication with his co-trustees or his *cestuis que trust*, deposited in the trust box, containing the trust securities, four debentures of a railway company standing in his own name and belonging to him, accompanied by a memorandum, from which it appeared that he or his daughter had, at the time of their misfortunes, received benefits from the persons to whom it was intended to be addressed, and purported to show that he had become aware that he or his firm were largely indebted to the trust. Within two months the receiving order was made and adjudication followed.

HELD—that upon the memorandum the bankrupt's dominant motive was not fraudulent preference, but the wish to repair his breach of trust as trustee; and that the deposit and memorandum did not constitute a "fraudulent preference" within sect. 48 of the Bankruptcy Act, 1883.

Whether the relation between a *cestui que trust* and a trustee who has misappropriated the trust fund is that of creditor and debtor, doubted. Dictum of Lord Halsbury, L.C., in *Sharp v. Jackson* ([1899] A. C. 419, 426; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson, 264—H. L. (E.), *infra*), questioned.

Decision of Wright, J. (49 W. R. 280; 17 T. L. R. 222), reversed.

IN RE LAKE EX PARTE DYER, [1901] 1 Q. B. 710; 70 L. J. K. B. 390; 49 W. R. 291; 84 L. T. 430; 17 T. L. R. 296; 8 Manson, 145—C. A.

102. *Voluntary Conveyance to make good Breaches of Trust—Pressure—State of Mind of Bankrupt—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 48.]—A trustee, who had committed breaches of trust, two days before his bankruptcy executed a deed by which he conveyed an estate in trust to make good his breaches of trust without any pressure or request by his *cestuis que trust*.

HELD—that the deed was not a fraudulent preference within sect. 48 of the Bankruptcy Act, 1883, as its object was to shield him from the consequences of his breaches of trust and not a preference of creditors. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so.

*New, Prance & Garrard's Trustee v. Hunting* ([1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 45 W. R. 577; 76 L. T. 742; 13 T. L. R. 269; 4 Manson, 103—C. A.) affirmed.

SHARP v. JACKSON, [1899] A. C. 419; 68 [L. J. Q. B. 866, 80 L. T. 841; 15 T. L. R. 418; 6 Manson, 264—H. L. (E.)

**XI. INTERIM RECEIVER.**

103. *Official Receiver—Acting as Interim Receiver—Power to appoint special Manager of Business—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 5, 12.]—The Official Receiver, while acting as *interim* receiver, has power to appoint a special manager of the estate or business of a debtor, if satisfied that the nature of the estate or business, or the interests of the creditors generally, require his appointment. Section 5 of the Bankruptcy Act, 1883, does not cut down sect. 12.

IN RE BANKRUPTCY PETITION, (1900) 69 [L. J. Q. B. 222; 82 L. T. 798—C. A.

104. *Special Manager—Petition ultimately Dismissed—Accounts of Special Manager—Jurisdiction—Bankruptcy Act, 1883* (46 & 47 Vict., c. 52), ss. 10, 12—*Bankruptcy Rules*, 1886, rr. 170–175.]—The duty of the Court is to protect its officers. The Official Receiver in bankruptcy is entitled out of the debtor's estate to all expenses properly incurred by him during the pendency of a bankruptcy petition, whether by himself personally in the capacity of an *interim* manager under sect. 10 of the Bankruptcy Act, 1883, or by a special manager appointed by him under sect. 12 of the same statute. And this is true even in cases in which the petition is ultimately dismissed for lack of jurisdiction.

Where a bankruptcy petition is presented, and an *interim* receiver and a special manager of the debtor's property are appointed pending its hearing, the validity of these appointments and of acts done under them, so

**Interim Receiver—Continued.**

long as they endure, is not affected even in cases in which the petition is ultimately dismissed for lack of jurisdiction.

IN RE A. B. & Co., [1900] 2 Q. B. 429; 69 [L. J. Q. B. 568; 48 W. R. 485; 82 L. T. 544, 16 T. L. R. 365; 7 Manson, 268—C. A.

**XII. OFFENCES.**

And see CRIMINAL LAW.

105. *Deed of Assignment to Trustee of all Debtor's Property—Debtor quitting England with over £20 not Disclosed to such Trustee—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 12—"His" Property.*—By a voluntary deed dated April 24th, 1903, the defendant assigned all his property, including all sums of money, to a trustee for his creditors. The deed was executed by the defendant and by the trustee, but not by any of the creditors, nor did it appear that any of the creditors had known of the defendant's intention to execute the deed or of the existence of the deed. The trustee took possession next day of the defendant's property and carried on the business, but beyond this did nothing under the deed, which was duly registered on April 27th.

At the time when the defendant executed the deed he had in his possession £161 in money, which he retained and did not hand over to the trustee, and immediately after the registration of the deed the defendant quitted England, taking with him £120, part of the said £161.

The defendant was adjudged bankrupt, and was subsequently indicted under sect. 12 of the Debtors Act, 1869, for having, within four months next before the presentation of a bankruptcy petition against him, quitted England, and taken with him a part of his property to the amount of £20 or upwards, viz., £120, which ought by law to be divided amongst his creditors.

**HELD**—that the £120 when taken away by the defendant was his property which ought by law to be divided amongst his creditors.

R. v. Creese (1874), L. R. 2 C. C. R. 105; 43 L. J. M. C. 51 distinguished.

REX v. HUMPHRIS, [1904] 2 K. B. 89; 73 L. J. [K. B. 464; 63 J. P. 325; 52 W. R. 591; 90 L. T. 555; 20 T. L. R. 425; 11 Manson, 139, 20 Cox C. C. 620—C. C. R.

106. *Debtor not Discovering or Delivering up his Property—Intent to Defraud—Evidence—Defendant's Evidence Negating Intent—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-ss. 1, 2, 4, 6.*—The defendant was indicted under sub-ss. (1) (2) (4) and (6) of sect. 11 of the Debtors Act, 1869, for not discovering or delivering up, &c., to his trustee the sums of money received by him for certain property of his that he had sold. He tendered evidence to show that before he was adjudicated bankrupt he had

at a private meeting of his creditors disclosed the sale of this property and the receipt by him of the money for it.

**HELD**—that this evidence was admissible for the purpose of negating the intent to defraud.

REX v. WISEMAN, (1902) 71 L. J. K. B. 128; 66 [J. P. 40; 50 W. R. 333; 85 L. T. 791; 18 T. L. R. 177; 9 Manson, 12; 20 Cox C. C. 144—C. C. R.

107. *Punishment—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31—Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 11, 13.*—The maximum punishment for an offence under sect. 31 of the Bankruptcy Act, 1883, which provides that the provisions of the Debtors Act, 1869, shall apply to proceedings under such section, is imprisonment with hard labour for one year.

REX v. TURNER, [1904] 1 K. B. 181; 73 L. J. K. B. [46, 68 J. P. 15; 52 W. R. 214; 89 L. T. 676; 20 T. L. R. 67; 20 Cox C. C. 590—C. C. R.

108. *Obtaining Credit under False Pretences—Credit given to Person other than the Defendant—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13 (1).*—Before a person can be convicted of an offence within sect. 13 (1) of the Debtors Act, 1869, it must be shown that he obtained credit to be given to himself. It is not sufficient to show that he has obtained credit to be given to someone else.

If a person induces another to enter into an executory contract for sale for the delivery of goods at a future day at a specified price to be paid on delivery of the goods, a debt is incurred and credit given on the making of the contract.

REG. v. BRYANT, (1899) 63 J. P. 376—The [Common Serjeant, C. C. C.

109. *Offence Under the Debtors Act, 1869, by Bankrupt—Report of Official Receiver—Prosecution—Consideration by Court—Filing of Report—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 16—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 31, 163, 164, 166.*—Under sect. 16 of the Debtors Act, 1869, in conjunction with sect. 164 of the Bankruptcy Act, 1883, when the Official Receiver has reported to the Court that in his opinion a bankrupt has been guilty of any offence under those Acts, the Court must consider—when it thinks right to do so—the report and determine whether it will or will not order the bankrupt to be prosecuted for his offence. The Official Receiver when he makes his report, or at any subsequent time, may apply for the directions of the Court with reference to the report. The Court may postpone its decision, or may require a further report to be made or further information to be given, or may decline to make an immediate order for a prosecution. The Court cannot refuse to consider the report merely because the Official Receiver has not made up his mind whether there ought or ought not to be a prosecution, or will not make a sub-

**Offences—Continued.**

stantive application for an order to prosecute. When the report of the Official Receiver is sent in it should be filed.

IN RE DUNN, EX PARTE SENIOR OFFICIAL [RECEIVER, [1902] 1 K. B. 107; 71 L. J. K. B. 83; 50 W. R. 183, 85 L. T. 567; 18 T. L. R. 67; 9 Manson, 1—C. A.

**XIII. PETITION.**

110. *Assignment for Benefit of Creditors—Acquiescence in — Estoppel — Clause Empowering Trustee to Prefer Non-Assenting Creditor—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7, sub-s. 3.]*—A debtor executed a deed of assignment of his property to a trustee for the benefit of his creditors. The deed contained a clause giving power to the trustee to pay in full, or otherwise than by dividends, any creditor who should decline to execute the deed. The petitioning creditors, who did not then know of this clause, refused to execute the deed unless they were paid two items in their account in full, upon the ground that as to them they had special grounds of complaint. The debtor and the trustee refused to pay the items in full, and the petitioning creditors presented a petition in bankruptcy. It appeared that the petitioning creditors, subsequently to the deed, supplied certain goods to the trustee under the deed as such and received payment from him by cheque, which they cashed. The Registrar refused to make a receiving order.

HELD—that the petitioning creditors had by their conduct recognised the deed as valid and taken an advantage under it, and could not afterwards present a bankruptcy petition founded upon the ground that the deed was an act of bankruptcy, and void as against them and the other creditors.

Decision of the Div. Ct. (75 L. J. K. B. 46; 22 T. L. R. 115; 12 Manson, 387) reversed.

Per Cozens-Hardy, J., a preference clause in a deed of assignment, such as that referred to above, is objectionable, and may go far towards invalidating the deed.

IN RE BRINDLEY, EX PARTE TAYLOR & Co., [1906] 1 K. B. 377; 75 L. J. K. B. 211; 54 W. R. 301; 94 L. T. 116; 22 T. L. R. 155; 13 Manson, 1—C. A.

111. *Assignment for Benefit of Creditors—Creditors not entitled to found Petition thereon—Right to found Petition on other Act of Bankruptcy.]*—Although a creditor may have so acted with reference to a deed of assignment for creditors executed by his debtor as to have waived his right to found a bankruptcy petition on such assignment, he may yet (if not bound by the deed) found a petition upon some other act of bankruptcy; his right to do so is not affected by the fact that in the bankruptcy the deed

of assignment will be avoided as against the trustee.

IN RE MILLS, EX PARTE MILLS, [1906] 1 K. B. [389, 75 L. J. K. B. 247; 54 W. R. 322; 94 L. T. 41; 13 Manson, 9—C. A.

112. *Attestation—Amendment at Hearing.]*—A petition in bankruptcy was presented jointly by two creditors, but the signature of only one creditor was attested by a solicitor.

HELD—that the attestation by a solicitor ought to have been allowed at the hearing.

RE A DEBTOR, EX PARTE PETITIONING CREDITORS [v. THE DEBTOR, (1902) 86 L. T. 688—Wright, J.

113. *Attestation—Formal Defect—Amendment—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 143—Bankruptcy Rules, 1886 to 1890, rr. 146, 350.]*—A Bankruptcy petition was presented by two creditors, the signature of one of the petitioners not being attested as required by Rule 146 of the Bankruptcy Rules 1886 to 1890.

HELD—that this was a formal defect within the meaning of sect. 143 of the Bankruptcy Act, 1883, and could be amended under Rule 350 by allowing the creditor to re-sign the petition and to have his signature properly attested, though three months had elapsed since the act of bankruptcy upon which the petition was founded.

IN RE DEAN, EX PARTE BLAIN AND BREFFIT, (1902) [18 T. L. R. 606—Div. Ct

114. *Debtor's "Place of Business"—"Ordinarily resided"—Debtor using Company's Office for Transaction of his Private Business—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, sub-s. 1 (d).]*—Where a debtor was a director of a company whose registered office and place of business was in Cophthall-avenue and he had from 1898 down to the present time for many months in each year done all his private business in connection with the company at that place,

HELD—that that place was his "place of business" within sect. 6 (1) (d) of the Bankruptcy Act, 1883.

Where a debtor had so much business in England that he came over and remained in England during the greater part of four years in succession,

HELD—that the Court could conclude that the place where the debtor habitually stayed was his place of "ordinary residence."

IN RE BRIGHT, (1902) 18 T. L. R. 37—C. A.

115. *Hearing—Adjournment—Discretion—Bankruptcy Rules, 1886, r. 169.]*—Upon the day appointed for the hearing of a bankruptcy petition, the debtor made an offer to settle the debt and costs. The local solicitor, who appeared for the petitioning creditor, said that the offer was a reasonable one, but he would not accept it without communicat-

**Petition—Continued.**

ing with his principals. Both sides asked for an adjournment to enable the solicitor to get instructions. The Registrar refused, and made a receiving order.

**HELD**—that the Registrar had exercised his discretion wrongly in refusing to allow an adjournment, and that the receiving order must be rescinded.

IN RE FARLEIGH, (1905) 21 T. L. R. 198—  
[Div. Ct.]

116. *Judgment Debt—How far conclusive in Court of Bankruptcy—Irrregularity in form of Judgment—Consideration—Judgment Substantially Unsupportable—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) s. 7 (3).*—On the hearing of a petition the Bankruptcy Court can go behind a judgment, if there be no consideration, and possibly also if the action be one in which no judgment ought to have been given against the debtor, but otherwise the judgment is conclusive and a mere informality in it is immaterial.

An action was commenced against a married woman, described as such, whose husband had at that date obtained a decree nisi for divorce. After decree absolute judgment was given against her for £5,000. On a motion for a new trial the plaintiff consented to accept £1,500, and the judgment was amended. Upon the hearing of a bankruptcy petition founded on this debt the defendant objected that (1), the judgment was wrongly drawn up as against an unmarried woman; and (2), the judgment erroneously gave interest from the date of the trial instead of from the date of the amendment.

**HELD**—that, as to (1) it was a mere informality, for the defendant being in fact unmarried at the date of the trial the pleadings could have been amended, and a valid judgment given against her as a *femme seule*; and as to (2) the judgment was conclusive.

BEAUCHAMP v. BEAUCHAMP, or IN RE BEAUCHAMP, Ex PARTE B., [1904] 1 K. B. 572, 73 L. J. K. B. 311; 90 L. T. 594; 11 Manson, 5—C. A.

117. *Limited Company Petitioners—“Officer” to present Petition—Clerk—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148.*—Any person *bonâ fide* chosen by a limited company to be their agent for the presentation of a petition in bankruptcy becomes thereby an officer of the company for the purpose. Accordingly, a person who was originally nominated by a company, though only a clerk of the company, and not in any ordinary sense an officer of the company before he was appointed under the seal of the company, became thereby, sufficiently for the purposes of the Bankruptcy

Act, 1883, s. 148, an “officer” of the company to present a petition in bankruptcy.

IN RE TOMKINS & Co., [1901] 1 Q. B. 476, 70 L. J. Q. B. 223, 49 W. R. 294; 84 L. T. 341; 17 T. L. R. 198, 8 Manson, 132—C. A.

118. *“Liquidated Sum payable at a certain future Time”—Agreement—Suspension of Payment—Damages for Breach of Agreement—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (h), s. 6, sub-s. 1 (b).*—By an agreement between S. M., a stock-broker, and V. T., after reciting that V. T. was desirous of becoming a member of the Stock Exchange, and when he should have become a member thereof, of entering into partnership with S. M., it was agreed that V. T. should pay £2,000 into a bank to be used by S. M. for the purposes of his business, but not for any hazardous or speculative purpose or otherwise, and if he did so V. T. should have the option of cancelling the agreement by notice, and upon such notice V. T. should be at liberty to draw out the said sum of £2,000. V. T. duly paid the £2,000 into the bank. In consequence of the failure of a client to pay a sum of money due from him, S. M. was “hammered” upon the Stock Exchange, and his affairs were placed in the hands of the official assignee of the Stock Exchange. Without giving S. M. any notice under the agreement, V. T. presented a petition in bankruptcy against S. M., alleging that S. M. “was indebted to him in the sum of £2,000 lent by him” to S. M., pursuant to the agreement, and that the act of bankruptcy was that S. M. on the 3rd July gave notice to V. T. that “he had suspended payment of his debts.”

**HELD**—that V. T. was not a creditor on the 3rd July for the sum of £2,000, either then payable or payable on a certain future time, within sect. 6, sub-s. 1 (b) of the Bankruptcy Act, 1883, and that on the 3rd July V. T.’s only remedy was in damages for breach of the agreement.

IN RE MILLER, [1901] 1 Q. B. 51; 70 L. J. Q. B. [1; 49 W. R. 65; 83 L. T. 545, 17 T. L. R. 9; 8 Manson, 1—C. A.

119. *Petitioning Creditor—Receiver of Partnership Assets—Receiver appointed in Partnership Action—Assignment to Receiver of a Judgment Debt—Leave to Receiver to Issue Execution—Right to present Bankruptcy Petition—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6.*—Upon the dissolution of a partnership all debts were assigned to L. for collection, and he obtained a judgment against M. in respect of one of such debts. A receiver was subsequently appointed by the Chancery Division in a partnership action; the receiver so appointed took an assignment of the judgment debt from L., and obtained leave to issue execution.

**Petition—Continued.**

HELD—that the receiver was entitled to present a bankruptcy petition in respect of the debt.

*In re Sacker* (1888), 22 Q. B. D. 179, 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204—C.A.) discussed and explained.

IN RE MACOUN, [1904] 2 K. B. 700; 73 [L. J. K. B. 892; 91 L. T. 276, 11 Manson, 264; 53 W. R. 197—C.A.

120. *Petitioning Creditor's Debt—Secured Creditor—Estimate of Security—Under-value—Amending Estimate—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 6, 7.]—A secured creditor presented a petition and estimated his security as leaving £51 of his debt unsecured. It was suggested by the debtor that the security was undervalued, and that, if it were properly valued, the unsecured debt would not be sufficient to support a petition.

HELD—that, unless it can be said that an estimate is sham and unsubstantial, the Court ought not to inquire into its correctness.

When the petitioning creditor comes in to prove, he will be bound by his estimate, at any rate in the absence of proof of mistake; and

*Quære*, whether, even if he proves mistake, he can be allowed to amend his estimate.

*Ex parte Taylor, In re Lacey* (1888) 13 Q. B. D. 128; 1 Manson, 113—Div. Ct.; and *In re Vautin, Ex parte Saffery* ([1899] 2 Q. B. 549; 68 L. J. Q. B. 971; 48 W. R. 96—Wright, J.) No. 30, *supra*, discussed.

IN RE BUTTON, EX PARTE VOSS, [1905] 1 K. B. [602; 74 L. J. K. B. 403; 53 W. R. 437; 92 L. T. 250; 12 Manson, 111—C. A.

121. *Petitioning Creditor's Debt—Stock Exchange "Hammering"—Creditor Receiving Dividend from Official Assignee—Cessio Bonorum—Presenting Petition for Balance of Debt*—On the failure of a broker on the Stock Exchange, a firm of jobbers claimed, and received, a dividend in the liquidation of his estate by the official assignee. They also obtained a judgment for the balance of their debt after deducting dividends received, and presented a bankruptcy petition.

HELD—that there was a good petitioning creditor's debt, and that the Stock Exchange *cessio bonorum* did not constitute an accord and satisfaction, or operate as a release of debts.

Decision of C. A. ([1903] 1 K. B. 216; 72 L. J. K. B. 106; 87 L. T. 721; 19 T. L. R. 88; 10 Manson, 9) affirmed.

MENDLSOHN V. RATCLIFF AND ANOTHER (No. 2), [1904] A. C. 456; 73 L. J. K. B. 1027; 91 L. T. 204; 20 T. L. R. 670; 53 W. R. 240; 10 Com. Cas. 14—H. L. (E.)

122. *Proof of Alleged Facts—Evidence—Entries in Debtor's Books—Calling Debtor him-*

*self as a Witness—Admissibility.*—The acts of bankruptcy alleged were, that the debtor had made fraudulent conveyances, gifts, deliveries or transfers of specified parts of his property, and that he had made conveyances or transfers of specified sums of money which would be void as fraudulent preferences in the event of his being adjudged bankrupt on the petition. In order to prove the alleged acts of bankruptcy the petitioning creditors relied (*inter alia*) upon entries in the debtor's books.

HELD—that the debtor's books could be used as evidence in support of the petition; that the debtor himself could be called as a witness, and that the presentation of a bankruptcy petition against a man is not now in the nature of a criminal proceeding since the debtor can petition against himself.

IN RE X. Y., EX PARTE HAES, [1902] 1 K. B. 98; [71 L. J. K. B. 102, 50 W. R. 182; 85 L. T. 564; 18 T. L. R. 66; 9 Manson, 5—C. A.

123. *Refusal to make Receiving Order—"Sufficient Cause"—Petitioner's Antecedent Conduct—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 7, sub-s. 3.]—By sect. 7, sub-s. 3, of the Bankruptcy Act, 1883, "If the Court . . . is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

In July, 1899, the debtor proposed to pay his creditors a composition of 10s. in the pound. Gill, one of the petitioning creditors, refused to accept the composition unless the debtor gave him a promissory note for the balance of his debt. The composition fell through, and in August, 1900, Gill and Sutcliffe presented a joint petition against the debtor.

Upon the hearing of the petition, the Registrar held that the conduct of Gill with reference to the proposed composition constituted "sufficient cause" why no order ought to be made, and dismissed the petition.

HELD—that there was "sufficient cause" for dismissing the petition, and that a receiving order must not be made.

Decision of the Divisional Court (49 W. R. 141; 83 L. T. 487) reversed.

IN RE SHAW, EX PARTE GILL AND SUTCLIFFE, [(1901) 49 W. R. 264; 83 L. T. 754—C. A.

124. *Withdrawal of by Consent on Terms—Extortion—Second Petition based on Substituted Debt—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 7, sub-s. 7.]—Although it is true that in bankruptcy the Court is entitled, under sect. 7, sub-s. 3, of the Bankruptcy Act, 1883, to look behind the judgment on which a petition is based, and, in cases where it appears that the judgment was obtained under circumstances which constitute *de facto* extortion, to refuse to make any receiving order; yet the mere fact that a petitioning creditor has withdrawn some previous petition on the terms



*Petition—Continued.*

that he was to receive from the debtor a sum larger than his principal, interest, and costs does not itself amount to any such *de facto* extortion.

Per Webster, M.R.—The Court ought not to give its leave, under sect. 7, sub-s. 7, of the Bankruptcy Act, 1883, to the withdrawal of a creditor's petition by consent until it has first been thoroughly satisfied as to the facts under, and the conditions on, which such petition is being withdrawn.

IN RE BEBRO, EX PARTE G. GIBBONS, [1900] 2 Q. B. 316; 69 L. J. Q. B. 618; 48 W. R. 560, 82 L. T. 773, 7 Manson, 285—C. A.

125 "*Within a year has ordinarily resided in England*"—*Debtor in England for Purposes of Litigation—Staying at various Hotels—Excursions to the Continent—Question of Fact—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, 1 (d).*—In January, 1900, the debtor came from South America to England for the purposes of some protracted litigation, and, with the exception of short trips to the Continent and three months spent in a voyage to South America and back, he lived at various hotels in London until May, 1901, when a bankruptcy petition was presented against him.

HELD—that there was ample evidence to support the Registrar's finding of fact that the debtor had ordinarily resided in England within a year before the presentation of the petition.

IN RE CHARLES BRIGHT, EX PARTE CHARLES BRIGHT, (1903) 51 W. R. 342; 19 T. L. R. 203—C. A.

## XIV. PRACTICE.

And see PRACTICE AND PROCEDURE, 327.

126 *Adjudication—Disapproval of Scheme of Arrangement—Immediate Adjudication.*—Where the Court disapproves a debtor's proposed scheme of arrangement, it is only in very exceptional cases that it will make an immediate adjudication of bankruptcy.

IN RE FLEW, EX PARTE FLEW, [1905] 1 K B [278, 74 L. J. K. B. 280, 53 W. R. 438; 92 L. T. 333; 12 Manson, 1—C. A.

127. *Adjudication—Notice to Debtor of intended Application—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1)—Bankruptcy Rules, 27, 28, 190—192 A.*—When a receiving order has been made and the creditors have resolved that the debtor be adjudicated bankrupt, the Court has jurisdiction, without previous notice to him, to adjudicate him a bankrupt on the application of the official receiver.

At the same time notice of the intention to apply should, as a general rule, be given to the debtor.

IN RE PONSFORD, EX PARTE PONSFORD, [1904] 2 [K. B. 704; 73 L. J. K. B. 913; 91 L. T. 82; 91 L. T. 510; 11 Manson, 342; 53 W. R. 120—Div. Ct.

128. *Appeal—Costs—Security for—Costs of Application to dispense with Security—Bankruptcy Rules, 1886, r. 131.*—The deposit of £20 which an intending appellant is required by rule 131 of the Bankruptcy Rules, 1886 to lodge in the High Court as security for the costs of his appeal may be applied to satisfy the costs of an unsuccessful application to diminish or dispense with such security as well as to the costs of the actual appeal.

IN RE CHILD, EX PARTE CHILD, (1901) 49 W. R. [447, 84 L. T. 326—Wright, J.

129. *Appeal—Costs—Security—Dispensing with—Bankruptcy Rule 131.*—Where there is no respondent to an appeal the Court may dispense with the security required by Rule 131, e.g., where a debtor appeals against the Registrar's refusal to allow him to examine a witness.

RE GARREARD, [1905] 92 L. T. 779—Div. Ct.

130. *Appeal—Evidence on—Judge's Note—Right to Use Shorthand-writer's Transcript to Supplement Vital Omissions—Order LVIII., r. 11.*

On the hearing of an appeal, the judge's note may by special order be supplemented on vital points by a transcript of a shorthand-writer's note, but the whole of the shorthand-writer's note ought not to be referred to.

RE SPEARGE, EX PARTE THE OFFICIAL RECEIVER, (1898) 77 L. T. 808; 4 Manson, 335—Div. Ct.

131 *Appeal—Stay of Proceedings—Service of Notice of Appeal—Person "directly affected by the Appeal"—Rules of Supreme Court, 1883, Order 58, r. 2—Bankruptcy Rules, 1886, r. 134.*—After a receiving order had been made against a debtor, the proceedings thereon were upon the application of the debtor, stayed by the Registrar with a view to an arrangement being made by which the creditors would be paid in full. The petitioning creditor and a large majority of the creditors supported the application. None of the creditors had proved their debts. The Official Receiver appealed against the order staying the proceedings.

HELD—that the notice of appeal must be served on the petitioning creditor as a person "directly affected by the appeal" within Order 58, r. 2, but not upon the other creditors.

IN RE A DEBTOR, [1901] 2 K. B. 354; 70 [L. J. K. B. 699; 84 L. T. 666; 17 T. L. R. 536; 8 Manson, 247—C. A.

132. *Arrest of Debtor—Bond Given in Order to Obtain Release—Forfeiture of Bond—Proceeds of Bond—Who Entitled to—Form of Bond—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 25.*—Neither the Bankruptcy Act nor the rules made thereunder, prescribe the form of bond to be given by

**Practice—Continued.**

a debtor and his surety in order to obtain the release of the debtor, when the latter has been arrested under sect. 25 of the Bankruptcy Act, 1883, for failing to attend his examination.

A form of bond has now been settled and approved, and in future the bond is to be given to the Senior Registrar in Bankruptcy for the time being. If the bond is put in suit, the proceeds will in the ordinary course go to the bankrupt's estate; but, in an exceptional case, the Registrar may refer to the Judge as to the application of the money.

IN RE GORDON, IN RE SALMOND, [1903] 2 K. B. [164; 72 L. J. K. B. 587; 89 L. T. 25; 10 Manson, 253—Wright, J.

133. *Attachment—Default made by a Person acting in a Fiduciary Capacity in paying a sum in his Possession under his Control—Arrest—Release from Prison by Mistake—Second Order for Attachment—Re-arrest—“One Year’s” Imprisonment—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, sub-s. 3.]*—On February 12th, 1902, upon motion by the plaintiff, Swinfen Eady, J., made an order which, after stating that it had appeared to the satisfaction of the Court that the default of a firm in payment of a sum of money was “a default made by a trustee or person acting in a fiduciary capacity, and ordered to pay a sum in his possession or under his control” within the meaning of sect. 4, sub-s. 3, of the Debtors Act, 1869, gave the plaintiff leave to issue a writ or writs of attachment against M. H. and H. V., the partners of the defendant firm, for their contempt. Writs were issued, and M. H. and H. V. were arrested and lodged in Holloway Prison. On the receipt of two orders made by two different judges, the governor of Holloway Prison, misapprehending the effect of such orders, released both M. H. and H. V.

HELD—that orders under sect. 4 of the Debtors Act, 1869, were in the nature of punishment; that fraudulent offences of this sort can only be punished once, and that there could be no second writ of attachment issued in respect of the same offence.

Per Mathew, L.J.—The judge had power to order a re-arrest under the original order for a writ of attachment inasmuch as the debtor had not undergone his punishment for the offence offered to the Court, and that if such order were made, the period of imprisonment should end with the twelve months from the date of the original imprisonment.

CHURCH’S TRUSTEES v. HIBBARD, [1902] 2 Ch. [784; 87 L. T. 412; 72 L. J. Ch. 46; 51 W. R. 293—C. A.

134. *Attachment—Trustee Ordered to Pay Money “in his Possession or under his Control”—Actual Possession or Control—Constructive Receipt—Debtors Act, 1869 (32 & 33*

*Vict. c. 62), s. 4 (3)—Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1.]*—In order to bring a case for attachment within the third exception of the Debtors Act, 1869, which is in these terms: “Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control,” it must be proved that the money ordered to be paid into Court is or has been in the actual possession or control of the person sought to be committed. Mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough.

IN RE FEWSTER; HERDMAN v. FEWSTER, [1901] 1 [Ch. 447; 70 L. J. Ch. 254; 84 L. T. 45; 17 T. L. R. 205—Joyce, J.

135. *Committal of Special Manager for Failing to File Accounts—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 12, 102, sub-s. 5—Bankruptcy Rules, 1886 & 1890, r. 344.]*—The Court has jurisdiction, upon the application of the Board of Trade, to order a special manager to comply with an order to file accounts, and, if it think fit, to order his committal for failure to do so.

RE JONES, (1907) 52 Sol. Jo. 116—Phillimore, J.

136. *Consolidating Proceedings—Death of One Partner—Administration in Bankruptcy—Subsequent Bankruptcy of Surviving Partner—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 106, 108, 112, 125.]*—One of two partners died insolvent, and his estate was ordered to be administered in bankruptcy, upon the other partner becoming insolvent.

HELD—that there was power to consolidate the proceedings in the two matters.

IN RE GREAVES, EX PARTE OFFICIAL RECEIVER, [1904] 2 K. B. 493; 73 L. J. K. B. 975; 52 W. R. 633; 20 T. L. R. 564; 11 Manson, 270 —Bigham, J.

137. *Costs of Stranger—Taxation—Power of Board of Trade to Review—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 73, sub-s. 3—Bankruptcy Rules, 1886 & 1890, r. 124.]*—By rule 124 of the Bankruptcy Rules, 1886 and 1890, it is provided that “when any bill of costs, charges, fees or disbursements of any solicitor, manager, accountant, auctioneer, broker, or other person has been taxed by a Registrar of a county court, the Board of Trade may require the taxation to be reviewed by a Bankruptcy Taxing Master of the High Court.”

HELD—that this rule applies merely to the costs of persons employed by the trustee in bankruptcy, and has no application to persons litigating with him outside the bankruptcy.

HUNT IN RE, BOARD OF TRADE EX PARTE, (1898) [1 Q. B. 287; 67 L. J. Q. B. 247; 4 Manson, 315; 46 W. R. 384—Wright, J.

138. *Costs—Set-off—Application to set aside Bankruptcy Notice—Petition—Set-off*

*Practice—Continued.*

of Costs.]—Costs which form part of a petitioning creditor's debt cannot be set off against costs due from the creditor to the debtor.

Costs payable by a debtor on failing to set aside a bankruptcy notice can be set off against costs due to him on the ultimate dismissal of the creditor's petition.

IN RE S, EX PARTE PEAK HILL GOLDFIELD, LD.,  
[1907] 2 K. B. 896; 76 L. J. K. B. 1144—  
—Bigham, J.

139. *Enforcing Attendance of Witness for Private Examination—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 27, 142—*Bankruptcy Rules, 1886 & 1890—Rules* 62, 66, 71, 92—*Forms* 149, 152, 164, 165.]—A summons to secure a witness's attendance under sect. 27 of the Bankruptcy Act, 1883, may be served by registered post.

A "reasonable sum" for conduct money must be sent at the same time in cash or postal orders.

The form of warrant for arrest of a witness should be altered so as to admit of his detention in prison for a reasonable time pending the examination.

IN RE WEINBURG, (1907) 96 L. T. 790—  
[Bigham, J.]

140. *Examination of Bankrupt as to Accounts of any Matter he may have previously given*]—Upon the hearing of a motion by the Official Receiver, as trustee in the bankruptcy, for a declaration that a certain agreement between the bankrupt and the respondent was void,

Held—that either party was entitled to get from the bankrupt any account he has given of the matter.

IN RE CUNNINGHAM, EX PARTE THE OFFICIAL  
[RECEIVER v. CUNNINGHAM, (1899) 80 L. T.  
503, 6 Manson, 199—Wright, J.]

141. *Examination of Bankrupt—Reopening—Composition—Acceptance after Public Examination concluded—Bankruptcy Acts, 1883* (46 & 47 Vict. c. 52), ss. 23 (1), 104 (1), and 1890 (53 & 54 Vict. c. 71), s. 3.]—Where the creditors of a debtor, who has been adjudged bankrupt and whose public examination has been concluded, accept a proposal for a composition or scheme of arrangement, the Court is not bound to reopen the public examination of the bankrupt before approving the proposal. The Court has power to reopen the examination under sect. 104, sub-s. 1, of the Bankruptcy Act, 1883, but will only do so in cases where there appears to be good reason for making further investigation into the bankrupt's affairs.

IN RE HENCKE, (1906) 22 T. L. R. 338—  
[Registrar.]

142. *Examination of Person in a Place "out of England"—Witness Abroad—Jurisdiction—Bankruptcy Act, 1883* (46 & 47 Vict.

c. 52), ss. 27, 168—*Bankruptcy Rules, 1886, r. 66*]—Although the words "or in any other place out of England" in sub-s. 6 of sect. 27 of the Bankruptcy Act, 1883, are *prima facie* wide enough to include a place not within the British dominions, yet they must be construed as limited to places within the jurisdiction of the British Crown. The Court therefore has no power to make an order appointing a special examiner for the purpose of taking the examination and cross-examination of a person at Zurich in Switzerland. Nor can it be made in the official form that the person should be examined if he think fit to submit.

IN RE DRUCKER (No. 2), EX PARTE BASDEN,  
[1902] 2 K. B. 210; 71 L. J. K. B. 668; 50  
W. R. 592, 86 L. T. 692; 9 Manson, 241—  
Wright, J.]

143. *Pledge of Share Certificates with Bankrupt—Disappearance of Pledgor—Power of Sale by Trustee in Bankruptcy—Directions as to Advertisements.*]—Where certain share certificates had been pledged with a firm which afterwards became bankrupt, and the pledgor had disappeared without repaying the loan, the trustee in bankruptcy was given permission to sell the shares after advertising for the pledgor as directed by the Court.

IN RE HARRISON AND INGRAM, EX PARTE WHIN-  
[NEY, (1906) 54 W. R. 203; 14 Manson, 132—  
Bigham, J.]

144. *Security for Costs—Applicant resident Abroad—Discretion of Court.*]—The jurisdiction to require security for costs from an applicant resident abroad will only be exercised in cases where there is good reason for so doing.

RE PILLING, EX PARTE CHAPMAN, (1906) 94 L. T.  
[682—Bigham, J.]

## XV. PRIORITIES.

And see COMPANIES, 387, 388.

145. *Priorities—"Actual Expenses Incurred in Realising Assets"—"Taxed Costs of Petitioning Creditor"—Ground for Varying Priorities—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 57—*Bankruptcy Rules, 1886, rr. 125, 183.*]—By Bankruptcy Rule 125, the assets remaining after payment of the actual expenses incurred in realising any of the assets of the debtor shall, subject to any order of the Court, be liable to the following payments in the following order:—(1) the taxed costs of the petitioning creditor; (2) the trustee's necessary disbursements other than the actual expenses of realisation; (3) the costs of any person properly employed by the trustee.

Held—the "actual expenses" of realising the assets include only the actual costs of a sale, and not the costs of the trustee's solicitor.

The "taxed costs of the petitioning creditor" include his costs of a rehearing and of appeals.

**Priorities—Continued.**

HELD ALSO—that under the circumstances there was no ground for varying the order, and preferring the trustee's solicitor to the petitioning creditor.

IN RE BRIGHT, EX PARTE WINGFIELD AND BLEW, [1903] 1 K. B. 735; 72 L. J. K. B. 287; 10 Manson, 31—Wright, J.

146. *Crown Debt — Postmaster-General — Rent of Telephone Wire.*—N. rented from the Postmaster-General a telephone wire, and the agreement provided that if N. became bankrupt the Postmaster-General might determine the agreement and recover forthwith as liquidated damages a sum equal to the rent from the date of such determination to the date on which the agreement would otherwise have expired. In N.'s bankruptcy,

HELD—that the Postmaster-General's claim for such liquidated damages was a preferential Crown debt.

IN RE NIBLOCK, [1907] 2 I. R. 559—K. B. D.

147. *General Bond to Secure Future Advances—Subsequent Bond—Date of Advances—Priority.*—Upon an issue as to a preferential claim in an insolvency liquidation,

HELD—that, though a general bond given to secure future advances is prior in date of execution and of registration to another bond, preference is to be determined by the date of the debts and not of the securities, and a security earlier in point of date, but under which no advance has been made, must give place to one later in point of date but given for an actual advance made before an advance has been made under the earlier security.

Decision of the Supreme Court of the Cape of Good Hope (16 Cape Times L. R. 85) affirmed.

THE STANDARD BANK OF SOUTH AFRICA, LD. v. [HEYDENRYCH, [1907] A. C. 336; 76 L. J. P. C. 73; 97 L. T. 148; 23 T. L. R. 679—P. C.

148. *"Salary of Clerk or Servant"—Commission payable to Commercial Traveller—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (b).*—A commercial traveller was employed at a salary of £2 per week, and a commission by way of salary of 3½ per cent. upon all business done by him. At the date of his employer's bankruptcy the £2 per week had been paid to him in full, but a sum of about £25 was due for commission earned within the preceding four months.

HELD—that the commission was part of the "salary" payable in respect of his services within sect. 1, sub-s. 1 (b), of the Preferential Payments in Bankruptcy Act, 1888, and must be paid in priority to the ordinary debts.

IN RE KLEIN, EX PARTE GOODWIN, (1906) 22 [T. L. R. 664—Bigham, J.

149. *"Salary of Clerk or servant"—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (b); and 1897 (60 & 61 Vict. c. 19), ss. 2, 3*—The duties of the secretary of a particular company were to attend the directors' meetings, attend to the correspondence and callers, and keep the minute book. He was also registrar to another company, where his hours of attendance were from 10 to 4. He accordingly employed a clerk to perform his duties as secretary of the first-mentioned company, the clerk's hours of attendance being from 10 to 5, and the secretary called at the office and remained for a time in the middle of the day, and he attended meetings of directors on any occasion when wanted.

HELD—that he was not a "clerk or servant" of the first-mentioned company within the meaning of sect 1, sub-s. 1 (b), of the Preferential Payments in Bankruptcy Act, 1888, as he did not himself perform the services for the company, but provided a clerk to perform the services.

CAIRNEY v. BACK, [1906] 2 K. B. 746; 75 [L. J. K. B. 1014; 22 T. L. R. 776; 96 L. T. 111; 14 Manson, 58—Walton, J.

**XVI. PROOF OF DEBTS.**

150. *After Scheme Accepted—Objection by Debtor—Refusal of Official Receiver to interfere—Bankruptcy Rule 215.*—No order allowing a debtor, on giving such an indemnity as the Court should think fit, to be empowered in the name of the Official Receiver to reject certain proofs and to take such other proceedings as might be necessary to expunge or reduce additional proofs, after a scheme has been accepted, can be made. The proper course is for the debtor to apply by motion against such creditors to expunge their proofs.

RE CALVERT, EX PARTE THE DEBTOR, (1899) 80 [L. T. 268, 6 Manson, 209—Wright, J.

See also No. 154.

151. *Amendment—Omission to value Security—Inadvertence—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), schedule 1, r. 10.*—A secured creditor of a bankrupt stated in his proof that he had a security for his debt, but, acting on wrong information that he had received, he stated that his security was worthless.

HELD—by Smith and Chitty, L.JJ. (Collins, L.J., doubting)—that there had not been on the part of the creditor an "omission to value his security" within rule 10 of schedule 1 of the Bankruptcy Act, 1883.

HELD, ALSO—by Smith, Chitty, and Collins, L.JJ.—that, whether or not there had been an "omission to value," it had not arisen from "inadvertence" within the rule.

RE PIERS, EX PARTE PIERS, [1898] 1 Q. B. 627; [67 L. J. Q. B. 519; 78 L. T. 314; 5 Manson, 97; 14 T. L. R. 300; 46 W. R. 475—C. A.

**Proof of Debts—Continued.**

152. *Amendment—Omission to Value Security—Inadvertence—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *Sch. I., r. 10, Sch. II., rr. 13, 14.*—In a shareholder's bankruptcy a company presented a proof, which was accepted, for unpaid calls, and stated therein that they held no security.

Subsequently the company altered its articles so as to give it a lien for these calls on fully-paid shares, a number of which the bankrupt's trustee still held.

HELD—that the company had not omitted to value their security through any "inadvertence," and could not be allowed to amend their proof, but had surrendered their security to the trustees.

IN RE ROWE, EX PARTE WEST COAST GOLD FIELDS, LD., [1904] 2 K. B. 489; 73 L. J. K. B. 852; 52 W. R. 608; 91 L. T. 101; 11 Manson, 272—Bigham, J.

153. *Application to expunge—Claim by the Crown to Dividends on the Proof of an extinct Corporation—Bona Vacantia—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *Sched. II., r. 23, 25.*—A corporation was admitted to proof in a bankruptcy, and subsequently became extinct, having been dissolved by order of the Court under the Companies Acts. Some years after such dissolution a fund became available for the payment of further dividends in bankruptcy.

HELD—that the dividends due to such corporation in respect of its proof passed to the Crown as *bona vacantia*.

IN RE HIGGINSON AND DEAN, EX PARTE THE ATTORNEY-GENERAL, [1899] 1 Q. B. 325; 68 L. J. Q. B. 198; 47 W. R. 285; 79 L. T. 673, 15 T. L. R. 135; 5 Manson, 289—Div. Ct.

154. *Application to expunge—Service of Notice of Motion—Creditors out of Jurisdiction.*—An order was made allowing the bankrupt to apply by motion against certain creditors to expunge their proofs. Leave granted to serve the creditors in Edinburgh by registered post, and to serve the solicitors in London who lodged the proofs of those in Western Australia.

IN RE CALVERT, EX PARTE CALVERT, [1899] 80 [L. T. 499; 6 Manson, 216—Wright, J.  
See also No. 150.

155. *Assignment of Debt—Placing Proof by Assignee of Debt on File—Practice—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *ss. 58, 63.*—Where there has been an assignment of a debt for which a proof has been filed in bankruptcy, the practice in future will be for the assignee, after the Official Receiver or trustee has examined into the validity of the assignment and satisfied himself upon that point, to apply to the Court to give leave to the Official Receiver or trustee to place a proof by the assignee on the file in substitution for the proof of the assignor.

IN RE ILIFF, [1902] 51 W. R. 80; 18 T. L. R. [819—Div. Ct.

156. *Author and Publisher—Copyright Sold to Publisher on Royalties—Publisher Bankrupt—Trustee Carrying on Business—Author's Claim to Royalties.*—A publisher agreed with an author to purchase from him the copyright in a book, and to pay him certain royalties upon the sale of the book. The publisher having become bankrupt, the trustee in bankruptcy continued to carry on the business and sold copies of the book. The author claimed that the trustee was bound to pay him the royalties upon the sale of the book.

HELD—that the author was not entitled to the royalties in full, but could only claim in respect of damages for breach of contract to pay the royalties.

IN RE GRANT RICHARDS, EX PARTE WARWICK [DEEPIING, [1907] 2 K. B. 33; 76 L. J. K. B. 643; 96 L. T. 712; 23 T. L. R. 388; 14 Manson, 88—Bigham, J.

157. *Bankrupt Trustee—Unauthorised Investment—New Trustees Realising some "Salvage"—Right to Prove for Whole Amount of Invested Moneys—Valuation of "Salvage"—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *s. 168, and Sched. II. rr. 9—16.*—A bankrupt trustee was found to have invested trust funds to the amount of £5,500 upon unauthorised security, viz., a contributory mortgage. The mortgagor having commenced an action to set aside the mortgage on the ground of fraud, the newly-appointed trustees, without consulting the trustee in bankruptcy, compromised the action on the terms of their receiving £500, and a further sum of £1,500 in certain events. They claimed nevertheless to prove against the bankrupt's estate for the whole £5,500.

HELD—that the new trustees had adopted the unauthorised investment; and that they must assess the value of their compromise, and only prove for the difference between that sum and £5,500, as being the measure of damages sustained by reason of the improper investment.

IN RE SALMON ((1889) 42 C. D. 351; 38 W. R. 150, 62 L. T. 270) approved.

IN RE LAKE, EX PARTE HOWE TRUSTEES, [1903] 1 [K. B. 439, 72 L. J. K. B. 213; 51 W. R. 496, 88 L. T. 31—Wright, J.

158. *Bills of Exchange—Secured Creditors—Consolidation of Debts and Securities—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), *s. 55.*—The holder of four dishonoured bills of exchange sent in a proof, in the liquidation of the estate of a firm which had indorsed each bill, for the aggregate amount of the four bills with noting expenses. The trustee in the liquidation had different rights of indemnity in respect of the four bills. In respect of two of the bills the holder had received more than 20s. in the pound upon his proofs against the various parties to the said bills, but the total amount received by him was considerably

**Proof of Debts—Continued.**

less than the aggregate amount claimed in respect of the four bills.

**HELD** (affirming *Romer, J.* ([1898] 2 Ch. 413; 67 L. J. Ch. 534; 46 W. R. 627, 5 Manson, 216))—that the holder could not be allowed to retain the surplus beyond the amount due on either of the two overpaid bills, and attribute it to payment of the amounts due on the other bills.

**IN RE MORRIS; JAMES v. LONDON AND COUNTY** [BANKING Co., [1899] 1 Ch. 485; 68 L. J. Ch. 299, 47 W. R. 324; 80 L. T. 37; 6 Manson, 178—C.A.

**159. Contract to take Shares in a Company—Disclaimer by Trustee in Bankruptcy—Proof by Liquidator of Company—Measure of Damages.**—H. agreed to sell to a company certain properties, and to subscribe and pay for in cash so much of the share capital of the company as should not be taken up by the public. N. became bailee under the contract to take up and pay for certain preference and ordinary shares. H. became bankrupt, and his trustee disclaimed the contract. The company went into liquidation, and the liquidator proved against H.'s estate for damages for breach of the contract. The trustee admitted the proof for the difference between the then estimated assets and liabilities of the company.

**HELD**—that the trustee had gone on the right principle, since after the disclaimer of the contract only damages remained.

**IN RE HOOLEY, EX PARTE UNITED ORDNANCE AND** [ENGINEERING Co., [1899] 2 Q. B. 579; 68 L. J. Q. B. 993; 6 Manson, 404—Wright, J.

**160. Damages against Co-respondent in Divorce Court—Bankruptcy of Co-respondent—Provable Debt—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.**—Damages awarded to a petitioner in a divorce suit constitute a debt provable in the bankruptcy of the co-respondent, although no order directing the damages to be paid to the petitioner has been made at the date of the receiving order, but such damages will not support a bankruptcy petition.

*Wood v. Wood and Stanger* (1868), L.R. 1 P. & D. 467; 37 L. J. Mat. Cas. 25; 16 W. R. 568; 18 L. T. (n.s.) 110 followed.

**IN RE O'GORMAN, EX PARTE BALE,** [1899] 2 Q.B. [62; 68 L. J. Q. B. 650; 47 W. R. 543; 80 L. T. 501; 6 Manson, 204—Wright, J.

**161. Damages for Breach of Contract—Damages in Tort—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37.**—S. stored goods, a quantity of household furniture, with the bankrupt H., and then borrowed £20 from him. H. subsequently sold the goods. S. brought an action against H., alleging breach of contract and claiming only for detinue and conversion, but making no claim for damages for breach of contract. S.

obtained judgment for £300 and costs against H. on 12th March, 1901. On 30th January, 1902, a receiving order was made, and this was followed by an order of adjudication on 18th February.

**HELD**—that S. ought to be allowed to prove in the bankruptcy of H. for damages for breach of contract if she abandoned the judgment in the action, and gave an undertaking to stay all further proceedings under it; and that the trustee in bankruptcy would have a lien on any dividends declared on that proof for his costs.

Decision of *Wright, J.* ((1902) 86 L. T. 504), reversed.

**IN RE HOPKINS, EX PARTE DE STEDINGK,** (1902) [86 L. T. 676—C. A.

**162. Debt—Gaming Transaction—New Consideration.**—An action was brought against the debtor to recover £800 in respect of betting transactions. The debtor pleaded the Gaming Act, and the action was dismissed. The plaintiff in that action then wrote to the committee of a club of which he and the debtor were members, complaining of the debtor's conduct, and the latter was not re-elected a member. Subsequently it was arranged that the debtor should pay the plaintiff £100, and give him three bills for £100 each in consideration of his withdrawing his letter to the club. A receiving order having been made against the debtor,

**HELD**—that the consideration for the bills was the withdrawal of the letter, and not the gambling debt, and that the plaintiff was entitled to prove in respect thereof.

**IN RE BROWNE, EX PARTE MARTINGELL,** [1904] [1 K. B. 139; 73 L. J. K. B. 446; 52 W. R. 381; 90 L. T. 291, 20 T. L. R. 239; 11 Manson, 148—Buckley, J.

**163. Debt—Interest on—Rate of.**—The old rate of interest on debts has not been altered. Four per cent has always been the rate on a judgment debt, and the same rate is allowable on a debt arising out of a claim by co-surety.

**IN RE HUNT; HARVEY'S CLAIM,** (1902) 2 Ch. 318, [n; 86 L. T. 504—Mathew, L.J., in Lunacy Chambers.

**164. Husband and Wife—Wife Surety for Husband—Payment of Debt by Wife—Right of Exoneration—Money Lent for the Purpose of any Trade or Business—Assets—Onus of Proof—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3.**—A husband applied to his wife to allow the title deeds of her separate real estate to be deposited with his bankers as security for a loan to be made to him, and £1,100 was advanced to him by the bankers on that security. Subsequently she raised a sum of £1,800 on a mortgage of the property. As regards the £1,100 she, out of the £1,800, the proceeds of the mortgage, paid off the bank. As regards the balance of the £1,800, she

**Proof of Debts—Continued.**

received £100 thereof herself. The remaining £600 came to the hands of the husband without the wife being made aware that it was to be used for the purpose of his business. After the husband's death an order was made to administer his estate in bankruptcy.

**HELD**—that (1) as regards the £1,100 the wife stood in the position of a surety or quasi surety to the bankers for her husband's debt; (2) on the payment off of the £1,000 she had a right to be treated as having the bank's security, and a right to prove for the same and interest against her husband's estate; (3) as to the £600, there was no *prima facie* case that it was wanted for the purpose of her husband's business, and she was not bound to prove that it was not so advanced; she could, therefore, also prove for the £600, as sect. 3 of the Married Women's Property Act, 1882, did not apply.

*In re Genese* ((1885) 16 Q. B. D. 700, 55 L. J. Q. B. 118; 34 W. R. 79; 2 Morr. 283—Cave, J.) explained.

**IN RE CRONMIRE, EX PARTE CRONMIRE**, [1901] 1 Q. B. 480; 70 L. J. K. B. 310; 84 L. T. 342, 8 Manson, 140—C. A.

**165. Income Tax—Inland Revenue—Inquiry by Court of Bankruptcy into Assessment—Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 52, 111, 113, 118]**—The Court of Bankruptcy has no power to inquire into the validity of an assessment by Commissioners of Income Tax.

**IN RE CALVERT, EX PARTE CALVERT**, (No. 3), [1899] 2 Q. B. 145; 68 L. J. Q. B. 761; 47 W. R. 523; 80 L. T. 504, 6 Manson, 256—Wright, J.

**166 Loan—Realization of Securities.**—The appellants lent money on securities to a firm which subsequently failed. Having realized the securities, they nevertheless sought to recover judgment for the whole indebtedness, so that they might obtain a larger dividend in the bankruptcy.

**HELD**—that they could not do so.

**MOLSON'S BANK v. COOPER AND SMITH**, (1898) 14 [T. L. R. 276—P. C.

**167. Loan by Wife to Husband**—"For the purpose of any trade or business carried on by him or otherwise"—**Proof of Debt—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3.**—By sect. 3 of the Married Women's Property Act, 1882, "any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise" is to be treated as assets of the husband's estate in case of his bankruptcy, and her claims are to be postponed to all those of his other creditors.

**HELD**—that this section does not apply to all loans whatsoever by a wife to her husband, and, therefore, where a wife lent

money to her husband, but not for the purposes of the business carried on by him, she was entitled to prove in competition with his other creditors.

**RE CLARK, EX PARTE SCHULZE**, [1898] 2 Q. B. [330; 67 L. J. Q. B. 759; 78 L. T. 735; 5 Manson, 201, 14 T. L. R. 462; 46 W. R. 678—C. A.

**168. Moneylenders Act, 1900—Relief to Debtor—Construction—"Harsh and Unconscionable"—Judgment not Conclusive**—63 & 64 Vict. c. 51, s. 1.]—The Moneylenders Act, 1900, was not intended to be merely declaratory of the existing law. It enables a Court to reopen a transaction on the ground of excessive interest or charges, if the transaction is "harsh and unconscionable, or is otherwise such that a Court of Equity would give relief."

Upon the true construction of these words it is not necessary that the transaction should be of such a nature that a Court of Equity would give relief: it is sufficient, if it be "harsh and unconscionable," these words not being limited in any way by the succeeding clause.

The Bankruptcy Court can give relief under sect. 1 (3), even though the debtor has allowed judgment to go against him without asking for relief in the action.

*Wilton v. Osborn* ([1901] 1 K. B. 110; 70 L. J. K. B. 507; 84 L. T. 694; 17 T. L. R. 431—Ridley, J.) overruled.

See MONEY, 15

**IN RE A DEBTOR, EX PARTE THE DEBTOR**, [1903] 1 K. B. 705, 72 L. J. K. B. 382; 51 W. R. 370; 88 L. T. 401; 19 T. L. R. 288; 10 Manson, 130—C. A.

**169. Notice of Rejection of Proof—Service at Last Known Place of Address—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 142.]**—Where a trustee knows that a creditor whose proof he desires to reject has gone abroad, but does not know of his address abroad, he may send notice of rejection of proof by post to the last known address of the creditor in England.

**RE FOLLIKE**, (1907) 52 Sol. Jo. 13—

[Phillimore, J.

**170. Rent—Disclaimer—Lease—Apportionment.]**—Upon the disclaimer by the assignees of a bankrupt of his interest in a lease, the lessor is entitled to prove in the bankruptcy for an apportioned part of the rent which has accrued due between the last gale day and the date of adjudication.

**IN RE LEEKS**, [1902] 2 Ir. R. 339—C. A.

**171. Reputed Ownership—Loss of Goods—Claim by Real Owner to Prove—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; s. 44, sub-s. 2 (iii.).]**—Where goods are in the possession of a bankrupt at the commencement of his bankruptcy with the consent of the true owner under such circumstances that they pass to the trustee in bankruptcy as property divisible among the creditors

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under the doctrine of "reputed ownership," the true owner is entitled to prove against the estate of the bankrupt in respect of the loss of the goods caused thereby.

Decision of Bigham, J. ([1907] 1 K. B. 397; 76 L. J. K. B. 319, 96 L. T. 124, 23 T. L. R. 256; 14 Manson, 17) reversed.

IN RE BUTTON, EX PARTE HAVISIDE, [1907] 2 [K. B. 180; 76 L. J. K. B. 833; 97 L. T. 71; 23 T. L. R. 422; 14 Manson, 180—C. A.]

172. *Secured Creditor — Debt Secured by Mortgage—Bills given by way of Collateral Security—Proof of Debt—Scheduling Bills—Bankruptcy Rules, 1886-1890, r. 219, Form 72*—A creditor, whose debt is secured by a mortgage on his debtor's property and to whom bills of exchange have been given by way of collateral security, must, when he seeks to prove his debtor's bankruptcy or the covenant for payment contained in the mortgage deed, specify in his proof particulars of such bills, these being securities within Form 72 of the Bankruptcy Rules 1886-1890.

IN RE RUTHEEN, EX PARTE KIDD [1898], 5 Manson, [227—Wright, J.]

173. *Secured Creditor—Fluctuating Value of Securities—Proof for purpose of Voting on Composition only—Motion to get rid of Proof—Conditional withdrawal—Leave to amend Proof—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 13.*—A company applied for leave to withdraw their amended proof made for the purposes of voting on a proposed composition only, on the ground that the liability of the debtor had been largely reduced in consequence of certain obligations under the contracts between them having run off, and that their securities had greatly increased in value. The company were not willing absolutely and finally to abandon their proof. There was a motion pending to get rid of their proof.

HELD—that a conditional withdrawal of the proof, as distinguished from an absolute withdrawal of it, ought not to be allowed, whilst there was a motion pending to get rid of the proof, but leave might be given to the company to amend their proof.

IN RE CLARK, EX PARTE BUENOS AYRES AND [PACIFIC RAILWAY CO., [1901] 1 Q. B. 655; 70 L. J. Q. B. 259; 49 W. R. 528; 84 L. T. 208; 8 Manson, 136—Wright, J.]

174. *Secured Creditor—Mortgages—Misrepresentation by Mortgagor that Property Mortgaged was his Wife's—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, ss. 39, 168, Sched. II., r. 9.*—As security for an advance, C. represented to the intending mortgagees that the Yacht tavern belonged to his wife as her separate property. The Yacht tavern was mortgaged to secure the advance, C. joining in the mortgage deed. C. became bankrupt, and his trustee in bankruptcy obtained an order declaring that C.'s wife was

trustee or nominee for the bankrupt, and that the Yacht tavern formed part of the bankrupt's estate. The mortgagees claimed a dividend upon the whole of their debt without giving credit for the amount realised by the sale of the Yacht tavern.

HELD—the mortgagees conceded the whole point when they claimed to be secured creditors, and that they could only prove for the balance of their debt after deducting the net amount realised by the sale of the security.

• *In re Collie, Ex parte Manchester and County Bank* ((1876) 3 Ch. D. 481; 45 L. J. Bank. 149; 24 W. R. 1035; 35 L. T. (N.S.) 23—C. A.)

IN RE COOKSEY, EX PARTE PORTAL & Co., (1901) [83 L. T. 435—Wright, J.]

175. *Secured Creditor — Sequestration Order—Effect of—Administration Action—Defendant Ordered to Pay into Court a Debt due from him to the Estate—Non-compliance—Sequestration—Payment of Proceeds into Court to "Account of Sequestrators"—Bankruptcy of Defendant—Title of Trustee to Sum in Court—Jurisdiction of Bankruptcy Court — Secured Creditors — Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 45.*—The effect of a sequestration is not to convert the property seized into the property of the creditor.

Nor does the mere seizure give the creditor a charge on the property seized so as to make him a "secured creditor" within the meaning of the Bankruptcy Act.

An executor, who at the date of the death of his testatrix was indebted to her, was made defendant to an action in the Chancery Division brought by his co-executors for the administration of her estate. An order was made that the defendant should pay into Court to the credit of the action the amount which had been found due from him. He failed to obey the order, and on the application of the plaintiffs a writ of sequestration was issued against him, and his bankers were ordered to pay into Court to the credit of the action, "the sequestrators' account," the balance standing in their books to his credit. This payment was accordingly made on August 6th, and the same day a receiving order in bankruptcy was made against the defendant upon a creditor's petition presented on the previous July 13th. He was afterwards adjudicated a bankrupt.

HELD—that the plaintiffs in the administration action were not secured creditors, and that the trustee in bankruptcy was entitled to the money in Court; and that although the administration was proceeding in the Chancery Division the Bankruptcy Court could order payment out to the trustee.

• *Semble*—the position would have been otherwise if the money had been ordered to be paid to the "general credit of the action."



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*In re Hastings* ([1892] 61 L. J. Q. B. 654; 67 L. T. 234; 9 Morr. 234—Div. Ct.) followed  
Decision of Wright, J. (51 W. R. 432; 88 L. T. 476) affirmed.

*IN RE H. E. POLLARD, EX PARTE S. R. POLLARD,*  
[1903] 2 K. B. 41; 72 L. J. K. B. 509; 51 W. R. 483, 88 L. T. 652; 10 Manson, 152  
—C. A.

176. *Secured Creditor—Subsequent increase in Value of Security—Amending Proof—“At any time”*—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *Sched. II, r. 13*—M., a secured creditor of a bankrupt, valued his security at one-half of his debt, and his proof for the balance was admitted. The bankrupt had lodged a scheme for the payment of 10s. in the £ to his unsecured creditors, and alleged that M. was fully secured. The other creditors had accepted the scheme, but it fell through because M. refused to withdraw his proof, and the estate only paid 1s. in the £.

Eight years later M.'s security increased greatly in value owing to the death of a woman entitled to a jointure, and M. applied for leave to revalue his security and to admit himself fully secured.

HELD—that he had acted in good faith and must be allowed to amend on repaying the dividend of 1s. in the £ received by him on his proof, together with interest at 4 per cent. and the costs of the application.

*IN RE FANSHAW, EX PARTE LE MARCHANT,*  
[1905] 1 K. B. 170; 74 L. J. K. B. 153; 53 W. R. 222; 92 L. T. 32; 12 Manson, 7—  
Bigham, J.

177. *Solicitor's Bill of Costs — Amount agreed by Client—Account Stated—Payment—Power of Trustee to Reopen—Solicitors Act, 1843* (6 & 7 Vict. c. 73), *ss. 37, 41—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *Sched. II., r. 22*.—On four occasions a solicitor rendered to his client draft bills of costs and a cash account, and on each occasion in the result a sum was stated to be due to the solicitor for costs, and the client wrote at the foot of the account, “I agree this account.” On each occasion the amount stated to be due to the solicitor was carried forward into the next account. On the third occasion the client executed a mortgage of substantially the whole of his property in favour of the solicitor, whereby he covenanted to pay to the solicitor the amount due upon the account stated and that might become due in the future for business transacted. The client having become bankrupt (more than a year after the mortgage), the solicitor sent in a proof for the amount stated as being due to him on the last account. The trustee required the solicitor to supply him with particulars as to the dates and items of the agreed sums for costs mentioned in the accounts, which the solicitor refused to do. The trustee thereupon rejected the proof.

HELD—that, though as between the client and the solicitor the delivery of a signed bill might have been waived and the accounts stated might have amounted to payment, and (there being no special circumstances) the client could not have demanded delivery of a signed bill for the purposes of taxation, yet the trustee, on behalf of the creditors, was entitled to go behind the accounts, and to require satisfactory evidence that the debt on which the proof was founded was a real debt and that, until the solicitor complied with that requirement, the proof was properly rejected.

*In re Turner (or Boyle)* ((1854) 24 L. J. Ch. 71; 5 D. M. & G. 540) discussed and explained.

Decision of Bigham, J. ([1907] 1 K. B. 155; 76 L. J. K. B. 142; 95 L. T. 840; 23 T. L. R. 97; 14 Manson, 11) affirmed.

*IN RE VAN LAUN, EX PARTE CHATTERTON,* [1907] 2 K. B. 23; 76 L. J. K. B. 644; 97 L. T. 69; 23 T. L. R. 381; 14 Manson, 91—C. A.

178. *Voluntary Payment by Stranger—Right to Prove for Full Amount of Debt.*—A creditor, in proving for his debt, need not give credit for a voluntary payment made to him by the bankrupt's partner, in consideration of the fact that the creditor has lost money by the acts of the bankrupt, for which the partner disclaims any legal liability.

Decision of Buckley, J. (52 W. R. 336; 90 L. T. 290), affirmed.

*IN RE ROWE, EX PARTE DERENBURG & Co.,* [1904] 2 K. B. 483; 73 L. J. K. B. 594; 52 W. R. 628; 91 L. T. 220; 11 Manson, 130—C. A.

179. *Withdrawal — Moneylender — Jurisdiction to Reopen Transaction—Moneylenders Act, 1900* (63 & 64 Vict. c. 51), *s. 1, sub-s. 3—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), *Sched. I., r. 12*.—Where a proof is lodged by a creditor merely for voting purposes and has never been made use of either for voting or for claiming a dividend, it may be withdrawn by the creditor.

A proof was lodged by a moneylender, stating the value of a security which he held against his debt, and the proof was admitted for the purpose of voting at the first meeting of creditors. The creditor did not vote upon it, and he wrote to the trustee in bankruptcy that he intended to revalue it. The trustee thereupon wrote to the creditor requiring him, pursuant to Rule 12 of Schedule I. to the Bankruptcy Act, 1883, to give up the security upon being paid the value and 20 per cent. extra. The creditor in reply wrote that he withdrew the proof. The trustee thereupon gave notice of motion to the Bankruptcy Court for an order that the creditor should deliver up the security upon being paid the above value and 20 per cent. extra, and that an account should be taken under the Moneylenders Act, 1900. The creditor then gave notice of motion for leave to amend his proof. The trustee's motion came on first, and the Court

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held that, as the creditor had withdrawn his proof there was no proof before the Court, and therefore it had no jurisdiction to direct an account to be taken under the Moneylenders Act, 1900. The creditor then abandoned his motion.

**HELD**—that the creditor had a right to withdraw the proof, and that there being no proof before the Court, there was no jurisdiction to order an account to be taken under the Moneylenders Act, 1900; and that the fact that the creditor gave notice of motion to amend the proof did not confer jurisdiction, the motion being withdrawn.

**IN RE ATTREE, EX PARTE WARD**, [1907] 2 K. B. 868; 23 T. L. R. 734—Div. Ct.

**XVII. PROPERTY OF BANKRUPT.****(a) Generally.**

**180. Ascertained or Unascertained Property—Bulk—Bills of Lading handed over as Security—Sale—Delivery Order—Appropriation.**—A. and B. had lent money to M., a flour merchant, to whom sacks of flour of a certain brand had been consigned from America. Before the sacks were landed M. gave to A. as security a bill of lading (blank indorsed) for a number of sacks; all the sacks were then landed and stored in the ship's name in a neutral store, where they were indistinguishably mixed with other similar sacks belonging to M. M. then gave to B. also a bill of lading for some of the sacks recently landed.

M. sold certain of the sacks to C., who paid therefor, and received a delivery order addressed to the storekeeper. The latter gave to C. a transfer note and entered the transaction in his books, but the sacks so sold had not been identified or set aside.

Upon M. becoming bankrupt,

**HELD**—that A. and B. were entitled as against his trustee to the number of sacks mentioned in their bills of lading, but that C. could not make good his claim.

**HAYMAN & SON v. M'LINTOCK**, [1907] S. C. 936—[Ct. of Sess]

**181. Assignment after Act of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.**—A debtor, after an act of bankruptcy and the presentation of a bankruptcy petition, but before the date of the receiving order made thereon, assigned to his creditor a sum of money, which was payable to him by a third person, as security for the debt, and gave notice of the assignment. The creditor took the assignment *bonâ fide* and without notice of the act of bankruptcy or the bankruptcy petition.

**HELD**—that the assignment was valid under sect. 49 of the Bankruptcy Act, 1883.

**In re Badham** ((1893) 69 L. T. 356; 10 Mor. 252—Vaughan-Williams, J.) distinguished.

**IN RE DUNKLEY & SON, EX PARTE WALLER**, [1905]

[2 K. B. 683; 74 L. J. K. B. 963; 93 L. T. 248; 21 T. L. R. 707; 54 W. R. 171; 12 Manson, 364—Bigham, J.]

**182. Assignment of Business for Benefit of Creditors—Creditor of Assignee of Trust Estate—Assignee's Right of Lien—Bankruptcy of Assignee—Right of Assignee's Trustee to Trust Estate as against Assignee's Creditor—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.**—S., a trader, called a meeting of his creditors, and there was an arrangement by which M. became assignee of the trading estate of S. on trust to carry on the business, and out of the profits of the business to pay certain dividends to the creditors, and upon further trust to stand possessed of the property after the payment of those dividends for the insolvent trader. In the course of the carrying on of the business by M., J. sold to M. certain goods, and thus became a creditor of M. He obtained judgment against M., and seized in execution the goods in question, which formed part of the trading estate M. became bankrupt and absconded, and the question arose between the execution creditor and M.'s trustee in bankruptcy as to the ownership of the goods. In an interpleader issue,

**HELD**—that M. had a lien or right of indemnity over the assets of the trust estate, and that such equitable lien passed to M.'s trustee in bankruptcy; that J., through M.'s trustee, had also a right to a satisfaction of that lien; but that M.'s trustee had a right to the goods in question as against the execution creditor; and that sect. 44 of the Bankruptcy Act, 1883, did not prevent the lien or right of indemnity from passing to M.'s trustee.

Decision of Divisional Court ([1901] 1 Q. B. 108; 70 L. J. Q. B. 53; 49 W. R. 495; 83 L. T. 506; 8 Manson, 14) affirmed.

**JENNINGS v. MATHER**, 70 L. J. 1032; 50 W. R. [52; 85 L. T. 396; 18 T. L. R. 6; [1902] 1 K. B. 1; 8 Manson, 14, 329—C. A.]

**183. Bill of Sale—Apparent Possession—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.**—A woman being indebted to a friend, and having no property but her furniture, transferred the furniture in satisfaction of the loan, and carried out the transaction by documents which were found in fact to constitute an absolute bill of sale. Subsequently the Sheriff seized the goods in execution, and was actually in possession when the woman filed her own petition. The trustee in bankruptcy claimed the furniture, and sought to set aside the bill of sale as void for want of registration.

**HELD**—that the bill of sale could not be avoided, because at the date when the bankrupt filed her petition the goods were not in her possession or apparent possession, but in the possession of the Sheriff.

**In re Bremner, Ex parte Saffery** ([1881] 16

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Ch D. 669; 44 L. T. 324; 29 W. R. 740—C. A.) followed.

IN RE EALES, EX PARTE STEELE, (1906) 54 W. R. [202—Div. Ct.

184. *Bill of Sale—Hiring and Purchase Agreement—Bankruptcy of Grantor—Non-Registration—Title to Goods.*—M., a publican, being in want of money to complete the purchase of an hotel, applied to the defendants for a loan of £2,000. They refused to lend on a fourth mortgage of the hotel, and M. refused to give them a bill of sale. It was therefore arranged that the defendants should buy the furniture in the hotel from the vendor for £2,000 instead of M., and should let the furniture to M. under a hiring and purchase agreement. M. subsequently became bankrupt, and the furniture was claimed by the trustee in bankruptcy.

Held—that the defendants had purchased the furniture as trustees for Mellor, who was the real owner, and that they had no title to the goods except under the hiring and purchase agreement, which was void for want of registration as a bill of sale.

*Beckett v. Tower Assets Co.* ([1891] 1 Q. B. 638; 60 L. J. Q. B. 493; 55 J. P. 438, 39 W. R. 439, 64 L. T. 497—C. A.) followed.

MELLOR'S TRUSTEE v. MAAS & Co., (1901) 50 [W. R. 111; 85 L. T. 490; 18 T. L. R. 40; [1902] 1 K. B. 137; 71 L. J. K. B. 26; 8 Manson, 341—Wright, J.

185. *Dealings by Bankrupt with his Property—Sale of his Business to a Company—Issue of Debentures—Sale Set Aside—Right of Debenture Holders—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.*—S., a debtor, bought on credit large quantities of goods, and also agreed to purchase for £4,000 a genuine business, of a similar nature to his own, from M. He then sold to N. as trustee for a new company, to be formed, his business, stock-in-trade, book debts, &c., and the benefit of his contract with M. Two nominees of the debtor were the first directors of the company, and they allotted (at the request of the debtor, or of N. as his agent) £3,000 debentures to M. in discharge of the purchase price, £3,000 to N. for "commission," £700 to B., £1,500 to L., and the remaining debentures and virtually the whole of the share capital to the debtor.

At the time the debtor owed trade debts amounting to £13,000, which were left unprovided for; and the sale by him to the company was set aside as a fraudulent act of bankruptcy on the application of his trustee.

The question now arose as to whether the debenture holders had a charge on the bankrupt's business in the hands of his trustee.

Held—that M. must be taken as having received his debentures from S., and was protected by sect. 49 of the Bankruptcy Act, 1883: that N., L., and B. all took their

debentures with knowledge of the facts, and were not protected, and that therefore *bona fide* purchasers from them for value were also not protected.

RE SLOBODINSKY, EX PARTE MOORE, [1903] 2 [K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190, 19 T. L. R. 651; 52 W. R. 156; 10 Manson, 341—Wright, J.

186. *Deposit—Member of Inn of Court.*—The £50 deposited by a member of Grays Inn on his entrance as a student does not vest in his trustee in bankruptcy, but may be retained by the society so long as there is any possibility of a liability for sums due and to become due to them under the orders of the Inn from the bankrupt.

IN RE AHMED, EX PARTE OFFICIAL RECEIVER [1901] W. N. 106—Wright, J.

187. *Determinable Life Interest—"Would become vested in some other Person or Persons"—Act of Bankruptcy—Adjudication—Title to Dividend Payable after Adjudication—Apportionment—Relation back—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 43, 44, 54.*—By his will J. G., who died in 1853, gave a share of his residue upon trust to permit H. G. to receive the income until he should do or omit to do, or should suffer to be done any act whereby the same, if payable to himself, would become vested in some other person or persons, and, on the determination of the interest so given to H. G. upon other trusts. A bankruptcy notice which was served on H. G. expired on the 8th July, 1900, without his having complied with it; on the 12th July a petition was presented; on the 17th August a receiving order was made; on the 1st October he was adjudicated a bankrupt. Dividends on the fund in question were payable on the 5th July and the 5th October. The question arose as to who was entitled to the dividend payable on 5th October. Neither party disputed that the income was to be treated as accruing *de die in diem*, or that the proportionate amounts attributable to July 6th, 7th and 8th were payable to H. G. and therefore to the Official Receiver.

Held—that the remainder of the dividend and all future dividends during the life of H. G. would be applicable by the trustees of the will as provided by the will, since it was the act of H. G. in failing on July 8th to comply with the bankruptcy notice vested the dividend in some other person or persons, and not the act of the Court in adjudicating him a bankrupt, but his act to which it related back.

MONTEFIORE v. GUEDALLA, [1901] 1 Ch. 435; 70 [L. J. Ch. 180; 49 W. R. 268; 83 L. T. 735; 8 Manson, 126—Buckley, J.

188. *Execution—Completion of Execution—Sale of Goods by Debtor to Execution Creditor—Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), s. 45, and 1890 (53 & 54 Vict. c. 71), s. 11.*—On July 22nd the goods of a

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judgment debtor were seized in execution at two places. On July 27th the sheriff was authorised to and did withdraw from one of the places, and on the next day the debtor sold to the execution creditor for £27 some goods which were at the place from which the sheriff had withdrawn, and which had been seized. On July 29th the debtor sold to the execution creditor other goods for £21 which were at the same place, but which had not been seized, and on the same day a settlement was made under which credit was given to the debtor for £58, then in the hands of the sheriff, and for the price of the goods sold as above, and the debtor paid the balance of the levy direct to the execution creditor in cash, and the sheriff withdrew. The sheriff held the £58 for fourteen days, and on August 14th, not having received notice of any act of bankruptcy, paid it over to the execution creditor. On August 20th a receiving order was made on the debtor's petition.

**HELD**—that the execution had been completed before the date of the receiving order, and that therefore the cash paid to the execution creditor and the goods sold to him by the debtor did not form part of the debtor's estate.

*In re Pollock and Rendle* (1902) 87 L. T. 238; 18 T. L. R. 794—Div. Ct. No. 190 *infra*) discussed.

*In re Ford* ([1900] 1 Q. B. 264; 69 L. J. Q. B. 74; 48 W. R. 173; 11 L. T. 648; 7 Manson, 14—Div. Ct. No. 191 *infra*) applied.

**IN RE JENKINS, EX PARTE THE TRUSTEE, (1904)**  
[90 L. T. 65; 20 T. L. R. 187—Div. Ct.]

**189. Execution—Sale of Mortgaged Premises by Sheriff—Proceeds of Sale—Subsequent Bankruptcy of Mortgagor—Service of Notice on Sheriff—Lodgment of Proceeds of Sale in Court—Application for Payment out by Mortgagee—Right of Assignees.**—A bankrupt, before his adjudication, was in possession of certain houses and premises subject to an equitable mortgage. The equitable mortgagee sued for the debt thereby secured, and having recovered judgment issued execution, and the premises were sold by the sheriff for a sum less than the amount of the debt. The existence of the equitable mortgage was not referred to either in the sheriff's auction bill or the conditions of sale. On the following day the purchaser lodged the proceeds of the sale with the sheriff. The adjudication took place four days afterwards, and the sheriff, being served with notice by the assignees, lodged the money in Court. The equitable mortgagee having filed a charge to have it declared that he was entitled, as equitable mortgagee, to have the money paid out to him:

**HELD**—that the equitable mortgagee was not entitled to have the money paid out to

him, which he had recovered not as mortgagee, but in the capacity of an unsecured creditor.

**IN RE KEANE, [1899] 2 I. R. 798—Q. B.**  
[(Banky.).

**190. Execution—Seizure by Sheriff—Incomplete Execution—Money Paid by Judgment Debtor direct to Execution Creditor—Withdrawal of Sheriff—Right of Trustee in Bankruptcy to Money—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11**—The goods of a judgment debtor were seized by the sheriff in execution of a judgment obtained by the execution creditor. Before sale the judgment debtor paid the amount due to the execution creditor direct, who thereupon directed the sheriff to withdraw. Seven days afterwards a receiving order was made against the judgment debtor, and he was adjudicated bankrupt. The trustee in bankruptcy claimed payment from the execution creditor of the money so paid to him as being part of the bankrupt's estate.

**HELD**—that, as the execution had not been completed by seizure and sale within sect. 45 of the Bankruptcy Act, 1883, and as the payment was made within fourteen days before the receiving order within sect. 11 of the Bankruptcy Act, 1890, the trustee was entitled to the money.

**IN RE POLLOCK AND RENDLE, EX PARTE WILSON**  
[AND MATHIESON, LD., (1902) 87 L. T. 238;  
18 T. L. R. 794—Div. Ct.]

**180. Execution—Sale of Mortgaged Pre-  
cision on Part Payment of Judgment Debt—  
Subsequent Receiving Order—Non-Completion  
of Execution—Benefit of Execution—  
Bankruptcy Act, 1883 (46 & 47 Vict. c. 52),  
s. 45, sub-s. 1.]**—A creditor put in execution against a debtor, and withdrew from possession on receiving £40 in part payment of his debt and an undertaking to pay the remainder by instalments. A receiving order was made against the debtor before the remainder of the debt had been paid.

**HELD**—that the creditor, not having completed the execution by seizure and sale, was not entitled to retain the £40 as against the trustee in bankruptcy.

**IN RE FORD, EX PARTE OFFICIAL RECEIVER,**  
[1900] 1 Q. B. 265; 69 L. J. Q. B. 74; 48  
W. R. 173; 81 L. T. 648; 7 Manson, 14—  
Div. Ct.]

**192. Goods obtained by Fraud—Disaffirming Contract of Sale—Title of Trustee.**—In February, 1904, the debtor bought goods on credit from various tradesmen, and on April 20th one of the tradesmen brought an action to recover the price. On April 22nd the debtor absconded, and the tradesmen then discovered that the goods had been obtained by fraud. They accordingly, with the leave of the landlord, broke into the debtor's house where the goods were, and took away such of their goods as they could

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find. On May 20th a receiving order was made against the debtor, and he was adjudged bankrupt. The trustee in bankruptcy claimed the goods from the tradesmen.

HELD—that the goods, having been obtained by fraud, the tradesmen had a right to disaffirm the sale, though they had notice of an act of bankruptcy; and that, as they did so within a reasonable time, the trustee was not entitled to the goods, he having no better title than the bankrupt.

IN RE EASTGATE, EX PARTE WARD, [1905] 1 K. B. 465; 74 L. J. K. B. 324; 53 W. R. 432; 92 L. T. 207, 21 T. L. R. 198; 12 Manson, 11—Bigham, J.

193. *Lease—Covenants to Pay Rent and Indemnify—Chose in Action—Assignment—Bankruptcy—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 20, 44, 50, 56, 57, 168.]—The plaintiff, the original lessee under a burdensome lease, assigned the lease to A., and A. subsequently assigned to B. Each assignment contained covenants by the assignee with the assignor to pay the rent and perform the covenants and indemnify the assignor. B. having died, his executors assigned the lease of a man of straw. The lessor applied to the plaintiff to pay the rent, which he was compelled to do. A. had meanwhile become bankrupt, and the plaintiff tendered a proof for the rent he had paid and the estimated amount of future rent and dilapidations for which he might become liable under the covenants in the lease.

Thereupon, a compromise was agreed to between the plaintiff and A.'s trustee in bankruptcy, whereby the trustee by deed assigned to the plaintiff the benefit of the covenants to pay rent and indemnify A. contained in the assignment from A. to B., and the plaintiff thereby withdrew his proof, and further released and discharged A.'s estate and the trustee from all claims and demands under or in respect of the covenants by A. with the plaintiff.

HELD—(1) that the rights vested in A.'s trustee were assignable, having regard to sects. 20, 44, 50 (5), 56, 57, and 168 of the Bankruptcy Act, 1883; and (2) that the true effect of the release contained in the deed, although couched in general terms, was that it did not extend to all A.'s estate, including the asset assigned to the plaintiff; but that the estate released must exclude that asset.

Decision of North, J., affirmed.

RE PERKINS; POYSER v. BRYFUS, [1898] 2 Ch. 183; 67 L. J. Ch. 454; 73 L. T. 666; 5 Manson, 193; 14 T. L. R. 464, 46 W. R. 595—C. A.

194. *Life Policy—Equitable Deposit for Value—Incumbrancer for Value—Notice—Trustee in Bankruptcy—Priority.*—W.

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deposited a policy of assurance on his own life with his wife as security for advances made by her to him. No notice of this equitable charge was given to the assurance society. A receiving order was made against W., and adjudication followed. The Official Receiver gave notice of the receiving order to the assurance society. The trustee in bankruptcy claimed, as against the wife, to be entitled to the policy as part of the property of the bankrupt free from incumbrances.

HELD—that as the trustee in bankruptcy was not an incumbrancer for value and under the bankruptcy laws he was a statutory assignee, the policy vested in him subject to all equities existing at the date of the commencement of the bankruptcy; and that he could only have the policy on payment to the wife of what was due to her under the security.

IN RE WALLIS, EX PARTE JENK., [1902] 1 K. B. 719; 71 L. J. K. B. 465, 50 W. R. 430; 86 L. T. 237; 18 T. L. R. 414, 9 Manson, 136—Wright, J.

196. *Life Policy—Payment of Premiums by Bankrupt's Wife—Repayment of Moneys to Wife—Duty of Trustee to Act Equitably.*—The principle laid down in *Ex parte James* (L. R. 9 Ch. 609) and *Ex parte Simmonds* (16 Q. B. D. 308), that a trustee in bankruptcy, being an officer of the Court, cannot be allowed to retain money on behalf of creditors where it is contrary to fair dealing for him to do so, is not confined to cases of payment of money under a mistake of law, but is of general application. Therefore, where a wife both before and after the bankruptcy of her husband paid the premiums upon a mortgaged policy of insurance upon her husband's life, and this fact came to the knowledge of the then trustee, and the wife afterwards continued to pay the premiums, it was held that the trustee's successor would not be allowed to retain the surplus of the policy moneys payable on the death of the bankrupt without repaying to the wife the amount of the premiums paid by her for the purpose of keeping up the policy.

Decision of Bigham, J. (76 L. J. K. B. 49; 95 L. T. 808; 13 Manson, 350) affirmed.

IN RE TYLER, EX PARTE OFFICIAL RECEIVER, [1907] 1 K. B. 865; 76 L. J. K. B. 541; 97 L. T. 30; 23 T. L. R. 328; 14 Manson, 73—C. A.

197. *Marriage Settlement—Conveyance of all the Husband's Property—Act of Bankruptcy—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (b); s. 49.]—By an antenuptial marriage settlement, the husband conveyed all his property, giving his wife an immediate life interest. The wife did not know that the conveyance included all the husband's property. Within three months thereof a petition in bankruptcy was pre-

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sented against the husband for having failed to comply with a bankruptcy notice, and he was adjudicated bankrupt thereon.

**HELD**—that, assuming that the settlement was an act of bankruptcy, as it was made for valuable consideration, and the wife had no notice of the act of bankruptcy, the settlement was protected by sect. 49 of the Bankruptcy Act, 1883.

*Shears v. Goddard* ([1896] 1 Q. B. 406; 65 L. J. Q. B. 344; 44 W. R. 402; 74 L. T. 128; 12 T. L. R. 234, 3 Manson, 24—C. A.) followed.

*BULLOCK v. ARDEN AND OTHERS*, 17 T. L. R. [285—C. A.]

**198 Money lent by Debtor's Solicitor to Debtor for Purpose of obtaining Dismissal of Petition—Payment of same by Debtor's Solicitor to Petitioning Creditor's Solicitor—Subsequent Adjudication—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.]**—A banking company were creditors of a debtor for £1,000 and presented a bankruptcy petition against him. Before the day for hearing the petition the solicitors of the debtor offered to pay £300 to obtain a compromise and the dismissal of the petition, and added "we shall have to find the money." The offer was accepted in the belief that the £300 so to be provided was not the debtor's money; and accordingly the petition was dismissed. On the previous day the debtor had executed a charge on certain of his property in favour of his solicitors to secure £328 then due to them for costs, and £300 stated to be then advanced by them to him; and it was this sum of £300 which was afterwards paid by their own cheque to the solicitor for the bank; and they repaid themselves out of moneys of the debtor that shortly afterwards came into their hands. Under those circumstances the trustee in the subsequent bankruptcy of the debtor claimed that the bank should refund this £300 as part of the property of the bankrupt received by them with notice of an available act of bankruptcy.

**HELD**—that the £300 never came into the debtor's hands at all; that it never was intended to come into his hands; that the £300 was never free, and never became part of the general assets of the debtor at all; that it was to be applied for the discharge *pro tanto* of the claim of the bank; and that the trustee's claim failed.

*Re Snyder* ((1891) 8 Morr. 127) not followed.

On appeal (affirming decision of Wright, J.), [1902] 2 K. B. 55; 71 L. J. K. B. 686; 50 W. R. 543; 9 Manson, 237.

**HELD**—that the £300 was impressed with a trust that it should be applied in paying the bank.

*In re Rogers* ((1891) 8 Morr. 243—C. A.) followed.

*IN RE DRUCKER* (No. 1), *EX PARTE BASDEN*, [1902] 2 K. B. 237; 71 L. J. K. B. 686; 86 L. T. 785—C. A.]

**199. Money paid after act of Bankruptcy—Subsequent Adjudication—Trustee's Title—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49 (c), (d).]**—Money paid away by a debtor after an act of bankruptcy committed within three months before the presentation of a bankruptcy petition against him can be recovered by his trustee in bankruptcy in the same way as goods transferred by him or their proceeds can be recovered. A debtor, after he had committed an act of bankruptcy, paid to the defendant, who had no notice of the act of bankruptcy, a sum of money in respect of a bet which the defendant had won from him, and he also deposited a sum of money as security against other bets which he had made with the defendant. The bets were lost. A receiving order having been made against him founded on the act of bankruptcy, and an adjudication following:—

**HELD**—that the defendant was not protected by sect. 49 (c), (d), of the Bankruptcy Act, 1883, and the trustee was entitled to the money.

Decision of Wright, J. (17 T. L. R. 37), affirmed.

*WARD v. FRY*, (1901) 50 W. R. 72; 85 L. T. [394; 18 T. L. R. 2—C. A.]

**200. Money paid to Banker for Remittance to a Third Person—Trust—Right to Follow.]**—The bankrupts were bankers carrying on business in London and India. Two sums of money were paid to them in London to be remitted through their Bombay branch to a third person about to proceed to India. Neither the person who paid the money nor the person to whom it was to be remitted were customers of the bankrupts.

The receiving order was made before the arrival at Bombay of the person to whom the money was to be remitted.

**HELD**—(1) that no trust was constituted, and that the person who paid the money had no right to be paid in full in priority to the other creditors. (2) That the ordinary relationship of debtor and creditors was established between the bankrupts and the person to whom the money was to have been remitted.

*RE WATSON & CO., EX PARTE LLOYD*, (1905) 91 [L. T. 655—Bigham, J.]

**201. Mortgage of Ship after Act of Bankruptcy—Protection of bona fide Transaction without Notice—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 43, 44, 49.]**—The owner of a steamship on the 7th July, 1897, committed an act of bankruptcy, in respect of which he was subsequently adjudicated a bankrupt. On the 1st September, 1897, he mortgaged her to the plaintiff, and on the 2nd September the mortgage was duly registered. At the date of the mortgage the mortgagee had no notice of any act of bankruptcy committed by the mortgagor. The vessel remained in the possession of the mortgagor

**Property of Bankrupt—Continued.**

up to the date of the receiving order, viz., 23rd November, 1897.

**HELD**—that the mortgagee was entitled to claim the protection of sec. 49 of the Bankruptcy Act, 1883.

*Lyon v. Weldon* (1824) 2 Bing, 334, 3 L. J. (o.s.) C. P. 27) followed.

**THE RUBY**, (1901) 83 L. T. 438; 9 Asp. M. C. [146—Barnes, J.

**202 Mortgage after Adjudication—Land in Middlesex—Registration—Title of Official Receiver—"Deed or Conveyance"—Middlesex Registration Act (7 Anne, c. 20), s. 1—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20, 54, sub-s 4, 121.**—An order of the Court adjudging a debtor bankrupt and an order directing his estate to be summarily administered were respectively made under sects 20 and 121 of the Bankruptcy Act, 1883, by which the Official Receiver became his trustee in bankruptcy. Subsequently to those orders the bankrupt mortgaged property in Middlesex to which he was entitled at the date of his bankruptcy. The mortgagee registered his mortgage under the Middlesex Registration Act (7 Anne, c. 20). The Official Receiver never registered his title.

**HELD**—that the order which vested the bankrupt's property in the Official Receiver was not a "conveyance" within the meaning of the Middlesex Registration Act capable of registration; and that, therefore, the title of the Official Receiver was not postponed to that of the subsequent mortgagee from the bankrupt.

Dictum of Lord Cairns in *Credland v. Potter* (L. R. 10 Ch. App. 8, at p. 12) distinguished.

Decision of *Kekewich, J.* (1898) 67 L. J. Ch. 327; 78 L. T. 417; 5 Manson, 116; 46 W. R. 457) reversed.

**RE CALCOTT'S AND ELVIN'S CONTRACT**, [1898] 2 [Ch. 460; 67 L. J. Ch. 553; 78 L. T. 826; 5 Manson, 208; 46 W. R. 673—C. A.

**203. Payment under Mistake of Law—Duty of Trustee**—The debtor was the owner of fishing boats, which he mortgaged as security for an advance. The debtor got into difficulties, and the mortgagees, who had taken possession of the boats under their mortgage, desiring to help him, told him that if he could arrange with his creditors to accept a composition of 4s. in the £ they would find the money. At his request the mortgagees wrote to the creditors offering the composition, which the great majority accepted, and the mortgagees, knowing that an act of bankruptcy had been committed, paid to the debtor the amount of the composition for those creditors who had accepted, and the creditors were paid the amount and gave discharges.

Subsequently the debtor was adjudicated bankrupt upon the act of bankruptcy in

question. The debtor had no assets beyond the fishing boats, and these were sold by the mortgagees under their mortgage, and realised more than sufficient to pay the mortgage debt. The mortgagees claimed to retain the balance in respect of the sums advanced by them to pay the composition. The Divisional Court, affirming the decision of a County Court Judge, were of opinion that it was right that the trustee, as an officer of the Court, should allow the mortgagees, who had made a mistake of law, to retain this sum, and they refused to order them to pay it over to the trustee. Upon appeal:

**HELD**—that it was not contrary to honesty for the trustee to insist upon the payment by the mortgagees of this sum to him, and that therefore no case had been made out for the application of the rule in *Ex parte James* (L. R. 9 Ch. 609).

Decision of *Div. Ct.* (95 L. T. 889; 23 T. L. R. 136) reversed.

**IN RE HALL, EX PARTE OFFICIAL RECEIVER**, [1907]

[1 K. B. 875; 76 L. J. K. B. 546; 97 L. T. 33; 23 T. L. R. 327; 14 Manson, 82—C. A.

**204. Payment to an Accountant for Preparation of Statement of Accounts with a Knowledge of an Act of Bankruptcy—Title of Trustee**—Where an accountant, who had prepared a statement of accounts and sent to the creditors a notice which amounted to an act of bankruptcy, had received payment for his services:

**HELD**—that the transaction was not protected within the exception of *Re Sinclair, Ex parte Payne* (15 Q. B. D. 616), and that the money so paid was recoverable by the trustee in the bankruptcy.

**RE WHITE, EX PARTE WARD AND AFFORD**, (1898) [78 L. T. 25; 5 Manson, 17—Wright, J.

**207. Payment under Garnishee Order nisi—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.**—A judgment debtor being owed a sum of money, the judgment creditor served a garnishee order nisi upon the person who owed the money, and that person at once paid the money to the judgment creditor, and the garnishee order was never made absolute. Subsequently the judgment debtor was adjudicated bankrupt upon an act of bankruptcy committed before the judgment was obtained. The trustee in bankruptcy applied for an order that the garnishee should pay him the amount of the debt which had already been paid to the judgment creditor.

**HELD**—that, as the garnishee had paid the debt without being compelled to do so by any process of law, he must pay it to the trustee, the latter's title relating back to the time before the payment was made.

**IN RE WEBSTER, EX PARTE OFFICIAL RECEIVER**, [1907] 1 K. B. 623; 76 L. J. K. B. 380;

96 L. T. 322; 23 T. L. R. 275; 14 Manson, 20—Div. Ct.

**Property of Bankrupt—Continued.**

208. *Pending Action—Payment into Court—Bankruptcy of Defendant—Secured Creditor—Title of Trustee—Decision of “the Event”*—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 168—*R. S. C. Ord. 14, r. 6.*—An order was made under *R. S. C. Ord. 14*, “That the plaintiffs be at liberty to sign final judgment for the claim indorsed on the writ and costs to be levied, unless the sum of £1,000 be paid into Court.” The money was paid into Court. The defendant delivered a defence, and filed his own petition in bankruptcy, on which a receiving order was made, and adjudication followed. The trustee in the bankruptcy claimed the £1,000.

HELD—that the plaintiffs were entitled for the present to the benefit of the security, that the order must be treated as an order that the right to the money when paid into Court shall abide the event, and that the money must remain in Court until “the event” was decided by the trial of the action, if that was to be tried, or by adjudication upon a proof in the bankruptcy.

IN RE FORD, EX PARTE THE TRUSTEE, [1900] 2 Q. B. 211; 69 L. J. Q. B. 690; 48 W. R. 688; 82 L. T. 625; 16 T. L. R. 399; 7 Manson, 281—Wright, J.

209. *Pension—Bankruptcy Act, 1883, s. 53, sub-sect. 2—Alimony.*—A husband, against whom an order for payment of alimony had been made, became bankrupt. He had formerly been employed in India by the Government, but had retired on a pension of £347 a year payable monthly. An application was made by his trustee under sect. 53, sub-sect. 2 of the *Bankruptcy Act, 1883*, for payment of part of his pension. The Court directed the sum of £100 a year to be paid to the trustee out of the debtor's pension, £50 of which was, by agreement between the trustee and wife, to be applied for her benefit, and the other £50 for the several creditors of the bankrupt.

IN RE SIE WILLIAM YOUNG, EX PARTE HAYDON, [1898] 5 Manson, 85—C. A.

210. *Pledge of Chattels by Debtors—Redemption by Pledgee with Notice of Act of Bankruptcy—Relation Back of Trustee's Title—Conversion—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 49.—L. & L., in co-partnership as cab proprietors and jobmasters, on September 14th, 1900, pledged with W. a number of vehicles on a memorandum of deposit as security for a loan of about £430 then made to them to be repaid with interest on October 26th following; and on September 27th they pledged more vehicles with W. in a similar way for a loan of £120 to be repaid with interest on the following November 11th. On October 6th, 1900, the sheriff sold the goods of L. & L. under a *fi. fa.* issued by a judgment creditor for a large amount. On October 26th G. in collusion with L. & L. on a written authority from L. & L. that

he had purchased the vehicles pledged on September 14th, paid W.—who knew of the act of bankruptcy of October 6th—the amount due on this pledge and took delivery of the vehicles. On November 11th G. again came to W. with a similar authority as to the vehicles pledged on September 27th, and arranged with W. to extend the date of redemption to December 11th and then to January 11th, 1901, when he paid off W.—who knew of the receiving order of January 9th—and took delivery of the vehicles.

On November 28th, 1900, a bankruptcy petition was presented against L. & L., on which a receiving order was made on January 9th, 1901, and adjudication followed. The title of the trustee in bankruptcy related back to the act of bankruptcy committed by the debtors on the previous October 6th, and he claimed from W. the vehicles comprised in the two pledges, or their value, less the loans.

HELD—that the trustee took the debtors' interest in the vehicles subject to the contract by which W., as pledgee, was under the duty to re-deliver the vehicles when he was paid on the date named for redemption, and he had a right to discharge himself of that liability under the contract; and that W. was guilty of no conversion, although he was not protected by sect. 49 of the *Bankruptcy Act, 1883*.

IN RE LAWFORD AND LAWRENCE, EX PARTE THE [TRUSTEE, [1902] 2 K. B. 445; 71 L. J. K. B. 786; 50 W. R. 592; 86 L. T. 693; 9 Manson, 254—Wright, J.

And see No. 213.

211. *Relation back of Trustee's Title—Payment made to Trustee of Creditor's Debt—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 43, 49.—The defendant, who was indebted to a tradesman for work done, paid the amount to the trustee under a deed by which the tradesman had assigned all his property to the trustee on trust for his creditors. Within three months of the execution of the deed a bankruptcy petition, founded on the execution of the deed as an act of bankruptcy, was presented against the tradesman, and he was adjudicated bankrupt. The trustee in the bankruptcy claimed the amount of the debt from the defendant.

HELD—(1) that, as the defendant had notice of the act of bankruptcy when he paid the amount to the trustee under the deed, the payment was not good as against the trustee in bankruptcy, who was entitled to recover the amount from the defendant; and (2) that the trustee's right was not prejudiced by his having accepted from the trustee under the deed a sum of money not proved to have included the defendant's debt.

Decision of Div. Ct. ([1905] 2 K. B. 528; 74 L. J. K. B. 785; 54 W. R. 30; 93 L. T. 511; 21 T. L. R. 610, 12 Manson, 244) affirmed.

DAVIS v. PETRIE, [1906] 2 K. B. 786; 75 L. J. [K. B. 992; 95 L. T. 239; 22 T. L. R. 771; 13 Manson, 344—C. A.



**Property of Bankrupt—Continued.**

212. *Right of Action—Action for Trespass and Conversion—Damages for Personal Annoyance—Divisibility of Action—Cause of Action remaining vested in Bankrupt—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54, 168.*—The plaintiff brought an action for trespass and conversion of the plaintiff's goods, and damages were claimed in addition for the personal annoyance caused thereby to the plaintiff. After the cause was entered for trial the plaintiff became bankrupt. It was admitted that the damage to the land and goods were merely nominal, and if substantial damages could be recovered at all, it would be for the annoyance and personal inconvenience caused to the bankrupt.

HELD—that the primary personal injury to the bankrupt was the principal and essential cause of action; and that the cause of action remained vested in the bankrupt, and did not pass to his trustee in bankruptcy.

ROSE v. BUCKETT, [1901] 2 K. B. 449; 70 L. J. [K. B. 736; 50 W. R. 8, 84 L. T. 670, 17 T. L. R. 544; 8 Manson, 259—C. A.]

213—*Securities Held by Bank for Advance—Act of Bankruptcy—Handing over Securities—Power of Debtor to Tender Money to Redeem Securities—Bankruptcy Act, 1883 (43 & 47 Vict., c. 52), ss. 43, 49.*—A debtor who has committed an act of bankruptcy cannot within three months after the act of bankruptcy, collect debts due to him from, and give a valid discharge for them to, a person who has notice of the act of bankruptcy; but this does not affect the obligation of a person who owes money to the debtor, and therefore the debtor is allowed to sue for the debt, and the proper course for the Court to pursue is not to allow the money to be paid to the debtor, but to direct the money to be kept in Court until the expiration of three months from the act of bankruptcy so as to see whether bankruptcy will supervene. So, too, a secured creditor is not entitled, without the sanction of the Court, to receive payment of the debt from the debtor for the purpose of redeeming the securities.

A bank made an advance to a member of the Stock Exchange upon certain securities. The member was declared a defaulter on the Stock Exchange, and the official assignee thereof proceeded to collect his assets. The bank were requested to hand over the securities on being tendered the amount due thereon, but they refused to do so upon the ground that, as the official assignee was assignee of all the member's property, an act of bankruptcy had been committed within three months of which the bank had notice, and that therefore they would not be protected under sect. 49 of the Bankruptcy Act, 1883. In an action against the bank by the member and the official assignee:—

HELD—that, by reason of the act of bank-

ruptcy, the member was disqualified from making a tender of the money due to the bank, and it was not open to the bank to accept the money and that the proper course was to direct the bank to deliver up the securities to the official assignee upon payment by him of the amount due, he undertaking to hold them until it was ascertained whether bankruptcy would supervene within the three months, otherwise the action would stand over until the period of three months had expired.

*In re Lawford and Lawrence* ([1902] 2 K. B. 445; 71 L. J. K. B. 786; 50 W. R. 592; 86 L. T. 693; 9 Manson, 254—Wright, J. No. 210, *supra*) not followed.

Decision of Buckley, J. (94 L. T. 812, 22 T. L. R. 581) reversed.

PONSFORD BAKER & Co. v. UNION OF LONDON [AND SMITH'S BANK, [1906] 2 Ch. 444; 75 L. J. Ch. 724, 95 L. T. 333, 22 T. L. R. 812, 13 Manson, 321—C. A.]

214 *Settlement of Settlor's own Property—Settlor's own Interest Determinable on Bankruptcy—First Bankruptcy—Settlement partially Set Aside—Second Bankruptcy—Effect of the Settlement.*—In 1893 a bachelor settled property, giving himself a life interest determinable on bankruptcy, in which event the trustees were to apply the income at their absolute discretion in maintaining him, or his children (if any), there being an ultimate trust for certain relatives.

In 1900 the settlor became bankrupt, and the settlement was set aside so far as was necessary to pay his debts.

In 1902 he again became bankrupt, but the trustee failed to get the settlement set aside, it being found that the bankrupt was in 1893 in a position to pay his debts without having recourse to the settled property. Thereupon the trustee claimed that the bankrupt's life interest under the settlement vested in him.

HELD—that the life interest was forfeited and determined by the first bankruptcy, and therefore could not vest in the trustee of the second bankruptcy.

IN RE JOHNSON JOHNSON, EX PARTE MATTHEWS [AND WILKINSON, [1904] 1 K. B. 134; 73 L. J. K. B. 220; 52 W. R. 304; 90 L. T. 61; 11 Manson, 14—Div. Ct.]

215. *Solicitor acting for Bankrupt—Verbal Contract for Lump Sum for Costs—Retaining Costs after the Receiving Order.*—A client took a cheque of £163 odd he had received to his solicitor, to whom he was indebted in a small account for costs, and informed him of his financial position. It was arranged that he should file his petition, and a verbal agreement was entered into by which it was agreed that the solicitor should deduct a lump sum of £40 from the cheque in payment of the costs due and retain the balance of the £40 as his agreed costs for acting for the bankrupt in the bankruptcy. A receiving order was made.

**Property of Bankrupt—Continued.**

**HELD**—that the solicitor could not retain costs incurred after the receiving order.

IN RE MANDER, EX PARTE OFFICIAL RECEIVER v. [DAVIS, (1902) 86 L. T. 234—Wright, J.]

**216. Stockbroker—Balance due to Client for Differences—Surplus after Payment of Stock Exchange Creditors—Claim by Trustee in Bankruptcy to Balance.**—The defendant was customer to a broker on the Stock Exchange, and was running a speculative account through him. On December 28 there was a balance due to the defendant on the accounts of differences. Two days afterwards the broker was officially declared a defaulter, and the official assignee of the Stock Exchange, in accordance with the rules of the same, closed all the broker's contracts then open on the Stock Exchange, including those in which the defendant was interested, and, after receipt and payment of all amounts owing by or to members of the Stock Exchange, there remained a surplus. Subsequently the broker was adjudicated a bankrupt, and the plaintiff was appointed trustee in the bankruptcy. The defendant claimed the balance due to him out of the surplus in the hands of the official assignee.

**HELD**—that as the balance of one fortnightly account was carried on to the next account, there was a running account, the balance of which was to be paid or received by the defendant as the case might be, i.e., a debtor and creditor account. The broker was not a trustee in respect of each item. The trustee in bankruptcy was entitled to the surplus in the hands of the official assignee, and the defendant must prove in the bankruptcy in respect of the balance due to him.

Judgment of Phillimore, J. ([1899] 2 Q. B. 555; 68 L. J. Q. B. 975; 48 W. R. 95; 83 L. T. 68; 6 Manson, 385) affirmed.

KING v. HUTTON, [1900] 2 Q. B. 504; 69 L. J. [Q. B. 786; 83 L. T. 68—C. A.]

**217. Stockbroker—Defaulter—Surplus in Hands of Official Assignee of Stock Exchange—Differences due to and from Customers—Title of Trustee in Bankruptcy.**—On December 29, 1898, B. W., being then a broker on the Stock Exchange, absconded, owing large outside liabilities. On December 30, 1898, he was officially declared a defaulter on the Exchange, and thereupon the official assignee of the Exchange, in accordance with the rules of the Exchange, closed all B. W.'s transactions on the Exchange that day (which happened to be pay day), and received and paid all sums due to or from B. W. on that day, with the result that a surplus of about £650 remained in the hands of the official assignee. Amongst the sums so received by the official assignee was a sum of £1,262 15s. 2d. due by Messrs. D. & Co., jobbers on the Exchange, to B. W., and a sum of £117 15s. 2d., representing cheques sent

by outside clients to B. W. to him on December 30 to pay for certain transactions on the Exchange. In January, 1899, B. W. was adjudicated a bankrupt, and under the bankruptcy laws the title of his trustee in bankruptcy related back to the previous December 20. Upon B. W.'s default, the official assignee of the Stock Exchange made up accounts in the usual way between D. & Co. and B. W., and between B. W. and a jobber M. In the account so made up between D. & Co. and B. W. the provisional or "making-up" price, which is always adopted as the common denominator for convenience of brokers and jobbers in the circulation and adjustment of the "tickets," was such that D. & Co. had to account. D & Co. had to account for about £137 more than B. W. had to pay H., an outside client.

**HELD**—that the sum of £137 was a purely artificial fund, temporarily created for a special and temporary purpose, and not shown to be in any sense the property of the bankrupt or of any of his clients, and that the trustee's claim failed as to this, but that if it should turn out that the bankrupt was entitled to receive any portion of this amount from other jobbers on the settlement of his accounts with them respectively the trustee's claim would be against them.

A sum of £818 15s., part of the £1,262 15s. 2d., was supposed to have become due to one G., an outside client of B. W.'s, upon transactions similar to those in H.'s case, but not then claimed by him.

**HELD**—that G. must be taken to have agreed that the differences should be settled in the way usual on the Stock Exchange on speculative transactions, and to have agreed to take payment, not out of a specific fund resulting from a particular transaction with a particular jobber for the sale of a particular parcel of stock, but out of a balance resulting from the aggregate of his transactions through B. W. with various jobbers for the end of December account. He must be taken, therefore, to have authorised B. W. to receive and pay money for him, and to set off losses to one jobber against gains from another, and to have agreed to be merely a creditor of B. W. for the general balance, if any, in his own favour, and not even a creditor for the gain upon a particular bargain, if on the whole account the balance should be against him. The trustee, therefore, was entitled to the £818 15s. in the first instance, and it was he who must give effect to any charge which might be found to attach to it, and that there must be an order against the official assignee for the £818 15s., as it is the practice of the Court to look in the first instance to the person into whose hands the fund is traced, unless he has paid it away in ignorance of the bankruptcy.

King v. Hutton ([1899] 2 Q. B. 555) (*supra*) followed.

IN RE WOODD, EX PARTE KING, (1900) 82 L. T. [504, 16 T. L. R. 294—Wright, J.]

**Property of Bankrupt—Continued.**

218. *Testamentary Power of Appointment—Appointment by Will to Executor—Subsequent Bankruptcy of Appointor—No Order of Discharge—Creditors Subsequent to Receiving Order—Property Divisible among Creditors—Retainer—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 9, 44.]—G., who under a settlement had a general testamentary power to appoint a fund of £2,000, by his will in 1892 appointed it to his executor E. In 1900 G. was adjudicated bankrupt, and E. proved in this bankruptcy for £1,131. G. died in 1904 having never received his discharge, and having incurred debts since the date of the receiving order amounting to £170.

HELD—that the duty of dividing the appointed fund devolved upon the executor, and that only creditors subsequent to the receiving order had a right to participate.

*Quære*, whether in such a case an executor could set up a right of retainer in respect of a debt due from the bankrupt to him.

IN RE GUEDALLA, *LEE v. THE TRUSTEE*, [1905] 2 [Ch. 331; 54 W. R. 77; 75 L. J. Ch. 52, 94 L. T. 94; 12 Manson, 392—Warrington, J.

219. *Trading under Assumed Name—Purchasing and Mortgaging Freehold Land—Second Receiving Order—Assets—Rights of Trustee and Mortgagees—Order—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 53.]—A receiving order was in 1896 made against a builder, who was subsequently adjudicated a bankrupt, and the Official Receiver became trustee. He failed to surrender, and no information was obtainable about his affairs, nor were there any apparent assets. About 1898 the bankrupt started in business in another place as a builder under an assumed name. He purchased freehold land in his assumed name, and mortgaged it. A second receiving order was made. The assets consisted of the equities of redemption and chattels, which realised £113. On motion by the mortgagees:—

HELD—that the order would be that “on the Registrar being satisfied that the debts of the bankrupt provable in the first bankruptcy are paid in full, the sum of £113 being applied, so far as it will go, for that purpose, and that all costs and expenses of the bankruptcy, including the costs of the motion, are paid, the bankruptcy shall be annulled, and the order will direct that the mortgaged property shall vest in the mortgagees, subject to such other equity of redemption as may subsist therein.”

RE ADIE, *EX PARTE RUSHFORTH*, (1901) 84 L. T. [508—Wright, J.

220. *Wife's Separate Property—Loan to Husband for the Purpose of his Business—“Money or other Estate”—Furniture—Bankruptcy of Husband—Assets of Husband—Married Women's Property Act, 1882* (45 and 46 Vict. c. 75), s. 3.]—A married woman

lent to her husband for the purpose of his business as hotel-keeper certain furniture to which she was entitled as her separate property. On the husband's bankruptcy his assignees claimed the furniture as his assets.

HELD—that the furniture was to be treated as assets of the husband.

In sect. 3 of the Married Women's Property Act, 1882, the words “other estate” are not to be read as meaning only property *ejusdem generis* with that indicated by the preceding words “any money.”

IN RE DONALDSON, [1902] 2 Ir. R. 310—C. A.

**(b) Order and Disposition.**

221. *Bill of Sale—Trade Goods—Order and Disposition of the Bankrupt with Consent and Permission of the true Owner—Bills of Sale Act, 1878, Amendment Act, 1882* (45 & 46 Vict. c. 43), s. 7—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 44.]—The construction of the Bankruptcy Act, 1883, s. 44, is unaffected by the Bills of Sale Act, 1882, and the possession by the bankrupt of goods used in trade, which he has assigned by a bill of sale, under circumstances such as to raise a reputation of ownership, is a possession by the bankrupt with the consent and permission of the true owner.

RE GINGER, *EX PARTE LONDON AND UNIVERSAL [BANK, LD.]*, [1897] 2 Q. B. 461; 66 L. J. Q. B. 777; 76 L. T. 808; 4 Manson, 149; 44 W. R. 144—Div. Ct.

222. *Debt, Assignment of, by Bankrupt—Notice of Assignment—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 43, 44, 49.]—An English banking company forwarded on the 3rd March a letter signed by D. requesting a company carrying on business at Athens, who had purchased a cargo of coal from D., to hand bills of exchange to the English banking company on their demand, and in the letter enclosing the said letter they said, “We shall be glad if you will post direct to us the four bills with the enclosed instructions.” D. committed an act of bankruptcy on the 3rd March, before giving the said letter to the English banking company, who had no notice thereof till afterwards.

HELD—that the letters constituted a sufficient notice of the assignment of the debt; and that the posting of the notice before the English banking company received a notice of the act of bankruptcy was sufficient to prevent the debt from remaining in the order or disposition of the bankrupt.

IN RE DIXON, *EX PARTE THE TRUSTEE*, (1901) [83 L. T. 433—Wright, J.

223. *Debts Due or Growing Due to Bankrupt—Deposit of Unaccepted Bills drawn on Debtor by Bankrupt—Custom of Trade—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), sub-s. iii.]—A firm of general shippers at Manchester were in the habit of consigning

**Property of Bankrupt—Continued.**

and selling goods to Spanish customers upon terms that, unless the goods had been previously paid for, the Spanish customers, on the expiration of three months from the date of the invoice, should accept drafts at three months to be drawn upon them by the shippers. The shippers borrowed money from London bankers upon the terms that, on dispatching goods to Spanish customers, they should deposit with the bankers a six months' bill of the amount of the invoice drawn on the Spanish customer, together with a copy of the invoice and duplicate bill of lading; and that they should, on the expiration of three months from the date of the invoice, further give the bankers a three months' bill on the Spanish customer, which was to be presented by the bankers to the Spanish customer for acceptance. When the three months' bill was met the bankers were to return to the shippers the unaccepted six months' bill. After borrowing money on these terms the shippers became bankrupt. The six months' bills were not presented for acceptance, nor did the bankers give to the Spanish customers any notice of their transactions with the bankrupts.

HELD—that the debts owing from the Spanish customers were in the order or disposition of the bankrupts in their trade or business by the consent of the true owners under such circumstances that they were divisible among the bankrupts' creditors under sect. 44, sub-sect. iii. of the Bankruptcy Act, 1883.

RE GOETZ, JONAS & Co., EX PARTE THE [TRUSTEE, [1898], 1 Q. B. 787; 67 L. J. Q. B. 577; 78 L. T. 399; 5 Manson, 76; 14 T. L. R. 327; 46 W. R. 469—C. A.

**224 Shares—Deposit by Owner with Bank—Notice of Act of Bankruptcy—Subsequent Adjudication—Irish Bankruptcy and Insolvent Act, 1857 (20 & 21 Vict. c. 60), s. 313.]—**Where an owner of shares in certain companies deposited the scrip with a bank to secure an advance, without any memorandum in writing or duly executed transfer, and the bank, before adjudication, served notice of such assignment on the companies, with knowledge, however, of an act of bankruptcy committed by the owner,

HELD—that where the certificates contained a proviso that they must be produced on registration of the transfer, such shares were not in the order and disposition of the bankrupt; but that where the certificates contained no such proviso, the shares were in the order and disposition of the bankrupt, the notice of transfer not having been served upon the companies by the bank before becoming aware of the act of bankruptcy.

*Colonial Bank v. Whinney* (1886) 11 App. Cas. 426; 56 L. J. Ch. 43; 34 W. R. 705; 55 L. T. 362; 3 M. B. R. 207) followed.

IN RE BUTLER, [1900] 2 Ir. R. 153—Boyd, J.

**225. Farming Stock—Custom—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44, sub-s. 2 (iii.).]**—There being a well-known custom that stock is taken in for agistment on a farm, sect 44, sub-sect 2 (iii.), of the Bankruptcy Act, 1883, does not apply so as to bring the stock of another person which is on the farm within the order and disposition of the bankrupt with the consent of the true owner, even though in fact there is no agistment agreement.

*Ex parte Turquand, In re Parkers* (1885), 14 Q. B. D. 636; 51 L. J. Q. B. 242; 53 L. T. 579, 33 W. R. 437—C. A.) applied.

IN RE JAMES, EX PARTE THE SWANSEA MERCANTILE BANK, LD., (1907) 24 T. L. R. 15—C. A.

**226. Partnership—Dissolution—Assignment of Book Debts—Equitable Assignment of Debt—Notice of Assignment—Possession with Consent of True Owner—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.]—**C. and S. carried on business in partnership. The firm lent money to R. The firm dissolved partnership, and the whole of the assets, including the book debts, were assigned to C., who was to pay S. one-fifth of the loan to R. C. became bankrupt, and his trustee subsequently received from R. a sum in settlement of the loan. S. gave no notice of his interest to R.

HELD—that although there was a valid equitable assignment to S. of one-fifth of the loan, S. was the "true owner" of one-fifth within sect. 44 of the Bankruptcy Act, 1883, but that C. was in possession of the whole debt with the consent of S. at the commencement of the bankruptcy, and S. could not recover from the trustee.

RE CROUCH, EX PARTE SMITH, (1901) 93 L. T. 746—Wright, J.

**227. Reputed Ownership—Bill of Sale—Consent of True Owner.]—**Where a person is in possession of certain chattels, of which he has executed a bill of sale, and is subsequently adjudicated a bankrupt, before making any default in payment of the sum thereby secured, such chattels are to be deemed to be in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of sect. 313 of the Irish Bankrupt and Insolvent Act, 1857.

*In re Ginger, Ex parte the London and Universal Bank* ([1897] 2 Q. B. 461; 66 L. J. Q. B. 777; 46 W. R. 144; 76 L. T. 808; 5 Manson, 149—Div. Ct.), followed.

IN RE HAYES, [1899] 2 Ir. R. 206—Q. B.

**228. Reputed Ownership—Building Agreement—Materials and Plant Deemed to be "Annexed to the Freehold"—Mortgage of Building Agreement—Power to Mortgagee to Enter and Complete if Builder "Become Bankrupt"—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.]—**W. entered into a building agreement with the freeholder of certain plots of land. There was a clause in the

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agreement which "annexed to the freehold" unconditionally all materials and plant brought on to the premises. W. assigned this agreement to A. H. as security for repayment to A. H. with interest of moneys then advanced and to be advanced by A. H. to W. This deed provided that if W. should make default in payment or should "become bankrupt" then A. H. might enter and complete the buildings. A receiving order was made against W., and A. H. with the consent of the freeholder entered and completed some of the unfinished houses, using the plant and materials for that purpose. The trustee in bankruptcy disclaimed the building agreement and claimed the loose plant and materials which at the date of the receiving order were on the premises.

**HELD**—that the words "become bankrupt" should be construed strictly, and, therefore no right to enter under the mortgage had arisen; that the freeholder was the true owner of the materials and plant in a general sense, but that he consented to their remaining in the possession of the builder as if the builder were the true owner; that the assent given at the time of making the building agreement operated as an assent for the purpose of the doctrine of reputed ownership; and that the plant and materials which were loose at the date of the act of bankruptcy belonged to the trustee in bankruptcy.

*In re Ginger* ([1897] 2 Q. B. 461; 66 L. J. Q. B. 777; 46 W. R. 144; 76 L. T. 808; 4 Manson, 149—Div. Ct.) followed.

*IN RE WEIBKING, EX PARTE WARD*, [1902] 1 K. B. 713; 71 L. J. K. B. 389; 50 W. R. 460; 86 L. T. 24, 455; 9 Manson, 131—Wright, J.

**229. Reputed Ownership—Building Contract—Plant and Materials "considered to be property of" Building Owners—Forfeiture by Contractor of Plant and Materials to Building Owners—Bankruptcy of Contractors—Protected Transaction—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.**—A firm of builders contracted to erect for a school board certain school buildings. Clause 10 of the contract provided that "all plant, work, and materials brought to and left upon the ground by the contractor . . . shall be considered to be the property of the board, and the same shall not on any account whatever be removed or taken away by the contractor or by any other person without the express licence in writing of the architect, but the board shall not be in any way answerable for any loss or damage which may happen to or in respect of any such plant, work, or materials, either by the same being lost, stolen, or injured by weather or otherwise." Clause 20 of the contract provided that in the event of the builders or their trustee neglecting to proceed with the work for seven days after receiving notice in writing to do so all plant and materials on the premises should be

forfeited to the board. On Feb. 16th, 1900, the builders filed their petition in bankruptcy. On Feb. 22nd, 1900, the school board, in pursuance of Clause 20 of the contract, gave the debtors and the Official Receiver in bankruptcy notice to proceed with the works. On March 1st the debtors were adjudged bankrupt; on March 2nd C. was appointed trustee of the debtors' estate. The trustee claimed the plant and materials upon the premises as being in the order and disposition of the debtors by the consent of the board as the true owners under such circumstances as to make the debtors the reputed owners.

**HELD**—that the school board were not the "true owners," within sect. 44 of the Bankruptcy Act, 1883, of the plant and materials upon the premises at the time of the bankruptcy, that the board had a contractual right to have the goods remain on the land; that the possession of the builders was an ambiguous one which they could not make use of to remove the goods from the premises; that the board merely consented that the goods should remain on the land for the purpose of using them in the building; that the goods were not in the reputed ownership of the debtors; that the trustee took them subject to their being forfeited under Clause 20 to the board; and that that contingency happened and transferred the property to the board.

*IN RE KEEN AND KEEN, EX PARTE COLLINS*, [1902] 1 K. B. 555; 71 L. J. K. B. 487; 50 W. R. 334; 86 L. T. 235; 9 Manson, 145—Div. Ct.

**230. Reputed Ownership—Goods used by Bankrupt "in his Trade or Business"—Mantle-stands—Consent of True Owner—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45 (iii.).**—Goods "in the possession, order or disposition of the bankrupt in his trade or business," which pass, by virtue of sect. 44 of the Bankruptcy Act, 1883, to the trustee in bankruptcy, may be used for purposes connected with the bankrupt's trade or business.

Stands or models used, with the knowledge and acquiescence of the true owner, in the business of a mantle-dealer, who became bankrupt, were accordingly held to be goods in the bankrupt's possession in his trade or business, and, there being no proof of a custom to the effect that stands not belonging to the trader were used in the business, passed to the bankrupt's trustee.

*SHARMAN v. MASON*, [1899] 2 Q. B. 679; 69 L. J. Q. B. 3; 48 W. R. 142; 81 L. T. 485; 16 T. L. R. 11—7 Manson, 19—Div. Ct. (and see No. 232, *infra*).

**231 Reputed Ownership—Licensed Victualler—Mortgagees in Possession—Bill of Sale—Goods in Possession, Order, or Disposition of Debtor in his Trade or Business—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.**—A bankrupt was a licensed victualler

**Property of Bankrupt—Continued.**

and the lessee of three public-houses; the licence of one of these houses was in his name, while the licences of the other two were held by other persons for him. The three public-houses were mortgaged to a firm of brewers who, on the 31st October, 1900, served the bankrupt with a writ in respect of his debt to them, on which judgment was entered. On the 3rd November, 1900, the bankrupt executed a bill of sale. On the 8th March, 1900, the sheriff entered upon the three houses under a writ of *fi. fa.*, and seized all the stock-in-trade and chattels excepting such as were included in the bill of sale. Upon the same day the mortgagees appointed three persons as managers of the respective public-houses. On the 9th November the sheriff sold the goods comprised in the bill of sale by private contract. On the 30th November a receiving order was made against the bankrupt. There was no default under the bill of sale.

**HELD**—that as far as the goods in the bill of sale consisted of goods used in the trade or business, they were, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the consent or permission of the true owner, under such circumstances that he was the true owner thereof and that they were vested in the trustee, and were within the provisions of the Bankruptcy Act, 1883, s. 44 (iii).

RE ELLIOTT, EX PARTE THE TRUSTEE, (1901) 84 [L. T. 325—Wright, J.]

232. *Samples sent to show to Customers—Consent of Owner—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 44.]—In order that goods may be in the order and disposition of a bankrupt with the consent of the true owner so as to pass to the trustee in bankruptcy, the real owner must have consented to a state of things, from which (had he considered the matter) he must have known that the inference of ownership by the bankrupt must arise.

A firm of foreign bankers, shipping and commission agents had in their possession at the date of their bankruptcy certain silver and plated articles, the property of A. & Co., silversmiths and electroplaters.

The articles were sent as samples to be exhibited in cases in the bankrupt's office, and a list of the trade prices was sent with them; they could not be sold below these prices.

**HELD**—not to be within the "order and disposition" of the bankrupts.

*Sharman v. Mason* ([1899] 2 Q. B. 679; 69 L. J. Q. B. 3; 48 W. R. 142; 81 L. T. 485—Div. Ct. No. 230 *supra*) explained.

IN RE WATSON & Co., EX PARTE ATKIN BROS., [1904] 2 K. B. 753; 73 L. J. K. B. 854; 20 T. L. R. 727; 11 Manson, 256; 91 L. T. 709—C. A.

**(c) Undischarged Bankrupt—after acquired property.**

233. *Assignment of Chose in Action after Discharge—Knowledge by Assignee of Trustee's Ignorance—"Dealing with the Bankrupt bonâ fide and for Value"—Law of the Colony of Victoria.*—Under the law of the Colony of Victoria (Australia) the term "insolvent" is equivalent to "bankrupt" in English law. E. became an insolvent in the said Colony in April, 1892. In March, 1893, E. became entitled under the will of his father, who died domiciled in England on the 4th of that month, to a legacy and share of residue together amounting to about £900.

On the 30th Sept., 1893 E. obtained his discharge. By deed of the 25th June, 1895, E. assigned to the plaintiffs all his share and interest under the said will in consideration of £900. The assignee in the insolvency was not aware, and was not informed, as to E. having become entitled to the said interest under his father's will, and accordingly had not, prior to the date of the assignment to the plaintiffs, intervened to claim the benefit of such interest. At the date of the said assignment the plaintiffs knew that the assignee in the insolvency was not aware that E. had become entitled to the interest under his father's will. The trustees of the will knowing of E.'s insolvency declined to pay over the amount of his share and interest under the will to the plaintiffs, who thereupon brought this action against the said trustees for a declaration that the plaintiffs were entitled to the share and interest of E. under his father's will. The assignee in the insolvency was afterwards by order added as a defendant, and contended that the money representing the said share and interest should be paid over to him. The learned judge found as a fact upon expert evidence that there was no material difference between the phraseology of the Victorian Insolvency Act of 1890 and the English Bankruptcy Act of 1883 so far as concerned the matters to be dealt with in the present case, and that although not in the strict sense binding the decisions of the Courts of Appeal in England were regarded with the highest respect in the courts of the Colonies, and that substantially those decisions were looked at in matters turning upon the construction of similar statutes, as giving the law which, should the precise point arise, the courts in the Australian Colonies would act upon.

**HELD**—that the dealing of the plaintiffs with E. had been "*bonâ fide and for value*" within the meaning of the rule laid down in *Cohen v. Mitchell* (25 Q. B. D. 262), and that the assignment to the plaintiffs was therefore valid against the assignee in E.'s insolvency, and that the plaintiffs were consequently entitled to the declaration they claimed.

HUNT v FRIPP, [1898] 1 Ch. 675; 67 L. J. Ch. [377; 77 L. T. 516; 5 Manson, 105; 46 W. R. 125—Byrne, J.]

**Property of Bankrupt—Continued.**

**234 Bequest by an Original Creditor—Executor's right to retain Debt—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 54.]—**Section 54 of the Bankruptcy Act, 1869, applies to liquidating debtors.

*Ex parte Williams* (1875 L. R. 20 Eq. 743; 44 L. J. Bk. 122) followed.

In 1882 P. filed a petition under the Bankruptcy Act, 1869, for liquidation of his affairs by arrangement. His father, to whom he owed £1,183, sold some property over which he held a bill of sale, but did not prove for the balance of his debt. The liquidation was closed, but the creditors refused to grant P. his discharge. In 1903 his father died, leaving him a share of residue.

**HELD**—that the balance of the debt was still subsisting, and that the executors could call upon P. to bring it into account, together with interest thereon at 4 per cent. from the expiration of three years from the close of the liquidation.

IN RE POWELL, *POWELL v. POWELL* (1904) 20 [T. L. R. 374; 11 Manson, 22—Eady, J.

**235. Payment by Executors of Legacy to Bankrupt—No Intervention by Assignees—Liability of Executors.]—**Where a person became entitled to a legacy after he had been adjudicated a bankrupt, and before he had obtained his discharge, such legacy was paid to him by the testator's executors, acting *bonâ fide*, without notice of his bankruptcy, and before any intervention on the part of the assignees in bankruptcy, to assert title to the legacy for the benefit of the creditors of the bankrupt.

**HELD** by the Court of Appeal (reversing the decision of Boyd, J.)—that the executors were not liable to the assignees for the amount of the legacy, under sect. 267 of the Irish Bankrupt and Insolvent Act, 1857.

*Herbert v. Sayer* (1844) 5 Q. B. 965; 2 D. & L. 49; 13 L. J. Q. B. 209; 8 Jur. 812) applied.

IN RE BALL, [1899] 2 Ir. R. 313—Q. B. 322 [—C. A.

**236 Personal Earnings—Billiards—Wagering Contract—Stakes—Interpleader—Payment into Court—Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18—Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 53.]—**The defendant was a discharged bankrupt and a professional card player. The plaintiff was his trustee in bankruptcy. The defendant and D. agreed to play a match at billiards for £100 a-side, and each party deposited that sum with stakeholders. The defendant won the match. Both the plaintiff and the defendant claimed the money. The stakeholders interpleaded, and the money was paid into Court, and an issue directed to determine whether the plaintiff or the defendant was entitled to the money.

**HELD**—that the £100 deposited by the bankrupt belonged to his trustee in bankruptcy,

the plaintiff; that D. setting up no claim to the £100 deposited by him, it also belonged to the plaintiff.

Order of Phillimore, J. ([1899] 2 Q. B. 560; 68 L. J. Q. B. 998; 81 L. T. 522, 15 T. L. R. 523; 6 Manson, 397), varied.

SHOOLBRED *v.* ROBERTS, [1900] 2 Q. B. 497; 69 [L. J. Q. B. 800; 83 L. T. 37; 16 T. L. R. 486—C. A.

**237. Personal Earnings—Charge on Fund—Personal Promise to Pay—Assignment not Perfected by Notice—Intervention of Trustee—Stop Order—Title of Trustee—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50, sub-s. 5.]—**T., an undischarged bankrupt, who had prior to his bankruptcy been a wine merchant, while not a professional public-house broker, had since his bankruptcy habitually endeavoured to earn money by introducing buyers to vendors of public-houses, introduced to R. a purchaser for R.'s public-house, and on the 20th April, 1897, obtained a judgment against R. for £258 commission. On the 6th May, 1897, the trustee in the bankruptcy gave notice to T. and R. claiming the money for the estate, and on the 7th May obtained a stop-order. The trustee was subsequently informed of two claims by C. and V. against this fund. C.'s claim was based on a letter by T. promising C. one-half the commission earned by T. on the sale by T. of public-houses introduced by C. to T. V.'s claim arose out of a written assignment by T. of his claim against R. executed two days prior to the trial of T.'s action against R. Neither C. nor V. had given notice of assignment to R., but R. in the course of the action became informed of C.'s claim.

**HELD**—(1) that commission so earned was in the nature of earnings from a trade or business, and not in the nature of mere personal labour or personal skill, and passed to the trustee. (2) That C.'s claim was not a charge or assignment on the particular fund, but a mere personal contract to pay money in certain events. (3) That V. not having perfected his assignment by notice, the trustee by obtaining a stop-order had perfected his title.

MERCER *v.* VANS COLINA, (1898) 67 L. J. Q. B. [421, 78 L. T. 21; 4 Manson, 363—Wright, J.

**238 Personal Earnings—Property Vesting in Trustee—Exception of Personal Earnings Limited to what is Necessary for the Support of the Bankrupt, his Wife and Family—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.]—**After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family.

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Personal earnings beyond the amount required for this purpose vest in the trustee under sect. 44 of the Bankruptcy Act, 1883.

*In re Graydon* ([1896] 1 Q. B. 417; 65 L. J. Q. B. 328, 44 W. R. 495, 74 L. T. 175; 3 Manson, 5—Vaughan Williams, J.) followed.

IN RE ROBERTS, [1900] 1 Q. B. 122; 69 L. J. Q. B. 19, 45 W. R. 132; 81 L. T. 467, 16 T. L. R. 29; 7 Manson, 5—C. A.

239. *Real Property—Bonâ-fide Purchaser for Value—Property Vesting in Trustee—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 44, 54.]—The rule laid down in *Cohen v. Mitchell*, that, until the trustee intervenes, all transactions with respect to after-acquired property entered into by a bankrupt with any person dealing with him *bonâ fide* and for value, whether with or without notice of the bankruptcy, are valid against the trustee in bankruptcy, does not apply to real estate. Therefore a conveyance by an undischarged bankrupt of real property to a purchaser *bonâ fide* and for value is invalid against the trustee.

An undischarged bankrupt, nine years after his adjudication, bought freehold property, which he mortgaged; subsequently he sold the equity of redemption to the plaintiffs, who knew nothing of his bankruptcy, and who spent large sums of money in building houses on the property.

HELD—that as against a purchaser from the trustee in the bankruptcy the plaintiff had no title.

*Cohen v. Mitchell* ((1890) 25 Q. B. D. 262; 59 L. J. Ch. 409; 38 W. R. 551; 63 L. T. 206) considered.

*In re New Land Development Co. v. Gray* ([1892] 2 Ch. 138; 61 L. J. Ch. 323; 40 W. R. 295, 551; 66 L. T. 404—Chitty, J.) and *Bird v. Philpott* ([1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 7 Manson, 251—Farwell, J. No. 242, *infra*) followed.

LONDON AND COUNTY CONTRACTS, LD. *v.* TAL-  
[LACK, (1903) 51 W. R. 408; 19 T. L. R. 156—  
Kekewich, J.]

240. *Realty—Legal or Equitable Estate—Mortgage—Intervention by Trustee—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 44, 54, 168.]—An undischarged bankrupt, who, after his bankruptcy, has acquired either a legal or equitable interest in real property, cannot, before his trustee intervenes, make a good title even to a *bonâ fide* purchaser for value without notice.

The rule laid down in *In re New Land Development Association v. Gray* ([1892] 2 Ch. 138; 51 L. J. Ch. 323; 40 W. R. 295; 66 L. T. 404—Chitty, J.) applied to an equitable interest in realty.

The rule laid down in *Cohen v. Mitchell* ((1890) 25 Q. B. D. 262; 59 L. J. Q. B. 377; 54 J. P. 804; 38 W. R. 588; 93 L. T. 153—C. A.) applies only to personal estate, including leaseholds.

After P.'s bankruptcy, and while he was still undischarged, freehold property was conveyed to a person, who was in fact trustee for P.; this person was said to have granted a lease of the property to P., who mortgaged it by sub-demise to the defendant, but the Court held that the genuineness of the lessor's signature to the lease was not proved. The Trustee in Bankruptcy had not intervened at the date of the mortgage, and the defendant acted therein *bonâ fide*.

HELD—that the trustee's title was superior to that of the defendant.

OFFICIAL RECEIVER (or PRESTON'S TRUSTEE) *v.*  
[COOKE, [1906] 2 Ch. 661; 75 L. J. Ch. 757;  
13 Manson, 337—Neville, J.]

241. *Solicitor's Bill of Costs—Assignee for Value—Notice by Trustee—Priority—Out-of-pocket Expenses—General Declaration.*—A trustee, as general assignee of the bankrupt's property, can, by giving proper notice to the holder of the fund or by a stop-order, where a stop-order is necessary, perfect his title as against other assignees. So that where a solicitor, an undischarged bankrupt, assigned for value the amount of his taxed bill of costs for the petitioning creditors of a company in liquidation, his trustee in bankruptcy gave notice, before the assignee, to the liquidator of the company, claiming the amount of the taxed bill as part of the after-acquired property of the bankrupt.

HELD—that the trustee was entitled to the amount in priority to the assignee, but not to a general declaration. *Mercer v. Vans Colina* ((1897) 67 L. J. Q. B. 424; 78 L. T. 21; 4 Manson, 363) followed. In such a case the bankrupt's out-of-pocket expenses will, if properly vouched, be allowed to him out of the amount.

IN RE BEALL, EX PARTE OFFICIAL RECEIVER,  
[1899] 1 Q. B. 688; 68 L. J. Q. B. 462; 80  
L. T. 267; 6 Manson, 163—Wright, J.]

242. *Surplus Assets—Agreement for Charge—Second Bankruptcy—Rights of Successive Trustees—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 20, 40, sub-s. 5, ss. 44, 50, 54, 65, 168.]—A trustee in bankruptcy takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy, and that bankruptcy only, payment of principal and interest, and all the costs of the bankruptcy. Subject to that, he is a trustee for the bankrupt of the surplus. He, as a trustee, is in a better position than an ordinary trustee to the extent that the bankrupt has not the ordinary right of a *cestui que trust* to intervene until the surplus has been ascertained to exist, and all the creditors and interest and costs have been paid.

*In re Leadbitter* ((1878) 10 Ch. D. 388; 48 L. J. Ch. 242; 27 W. R. 267; 39 L. T. 286—C. A.) and *Ex parte Sheffield, In re Austin* ((1879) 10 Ch. D. 434; 27 W. R. 622; 40 L. T. 15—C. A.), explained.



**Property of Bankrupt—Continued.**

Subject to the bankrupt's non-interference with the administration and with the management of the trustee during the bankruptcy in the due course of the execution of his duty he can demand the surplus, and he has a right to the surplus—a right which he can dispose of by will or deed or otherwise during the pendency of the first bankruptcy—if there are more than one—even before the surplus is ascertained, although such disposition will, of course, be ineffectual, unless in the event there prove to be a surplus upon which it can operate. The trustee in the second bankruptcy has no claim to any part of the surplus which the bankrupt has effectually dealt with. He can only take the property of the bankrupt at the time of the second receiving order. What that property is depends on what the bankrupt has done with it between the date of the first order and the date of the second order, and if and so far as the bankrupt has effectually dealt with it, then it is not property of the bankrupt which can pass to the trustees in the second bankruptcy.

A bankrupt never obtained his discharge or disclosed that he was an undischarged bankrupt. The plaintiff, who acted as his solicitor, advanced money to him in respect of three different sets of property. The bankrupt bought these three sets at a sale by auction. The plaintiff at his request paid the deposit and took up the contract, and retained it, and paid the balance of the purchase-money, and received and retained the conveyance to the bankrupt, who was afterwards adjudicated a bankrupt a second time.

**HELD**—that the solicitor made the advance with the intention of taking the benefit of the conveyance when it was obtained, to the extent of his charge, and it was not displaced by the subsequent conveyance to the bankrupt.

*Meux v. Smith* ((1843) 11 Sim. 410; 12 L. J. Ch. 209; 7 Jur. (o.s.) 821) followed.

*BIRD v. PHILPOTT*, [1900] 1 Ch. 822; 69 L. J. [Ch. 487; 82 L. T. 110, 16 T. L. R. 173, 7 Manson, 251—Farwell, J.

**243 Undischarged Bankrupt allowed by Trustee to Trade—Subsequent Assets and Liabilities—Second Bankruptcy—Title of Trustee.**—Where a bankrupt is allowed by the trustee in bankruptcy or by his creditors to continue trading, and to incur fresh liabilities and to acquire assets, and the bankrupt is adjudicated bankrupt a second time, the trustee cannot claim those assets as against the subsequent creditors.

*IN RE BURR*, *EX PARTE PANNELL*, (1901) 84 L. T. [327; 17 T. L. R. 361—Wright, J.

**244. Policy of Insurance—Death of Bankrupt—Payment of Policy Moneys to Next-of-Kin—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), s. 44.]—A bankrupt, after his bankruptcy, insured his life, and died intestate without having obtained his discharge. One

of his next-of-kin took out letters of administration, received the policy moneys, and distributed them among the next-of-kin, none of whom knew of the bankruptcy. The trustee in the bankruptcy did not know of the policy moneys until after they were distributed, when he applied to each of the next-of-kin to pay over to him the amount received.

**HELD**—that, as the next-of-kin gave no value for the money received, each of them must pay the amount received by him to the trustee, but that the administrator was not as such personally liable.

*Herbert v. Sayer* ((1844), 5 Q. B. 965) and *Cohen v. Mitchell* ((1890), 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551—C. A.) applied

*In re Ball* ([1899] 2 Ir. R. 313) distinguished.

A person, even with notice of a bankruptcy, may deal honestly and for value with a bankrupt before the trustee intervenes.

*Dictum of Byrne, J.*, in *Hunt v. Frupp* ([1898], 1 Ch. 675; 67 L. J. Ch. 377; 46 W. R. 125, 77 L. T. 576; 5 Manson, 105, No. 233, *supra*) approved.

*IN RE BENNETT*, *EX PARTE OFFICIAL RECEIVER*, [1907] 1 K. B. 149; 76 L. J. K. B. 134; 95 L. T. 887; 23 T. L. R. 99; 14 Manson, 6—Bigham, J.

**245. Wrongful Dismissal of Bankrupt after Bankruptcy—Contract of Employment made before Bankruptcy—Action for Damages by Bankrupt—Non-Intervention of Trustee in Action—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), s. 44.]—The plaintiff was employed by the defendants as their traveller for a period of five years from April 17th, 1899, at a salary, to be paid weekly, and commission, to be paid monthly, on all orders procured by him for them. Early in the month of June, 1901, the plaintiff was adjudicated bankrupt. Subsequently the defendants dismissed him from their employment, and he thereupon brought his action for wrongful dismissal, being then an undischarged bankrupt. The jury gave a verdict for the plaintiff, damages £100.

**HELD** (affirming Phillimore, J.)—that the cause of action could be sued upon by the bankrupt, subject to the right of his trustee to intervene; and that the plaintiff was entitled to judgment.

*Decision of Phillimore, J.* ([1902], 2 K. B. 397; 71 L. J. K. B. 800; 87 L. T. 364) affirmed.

*Beckham v. Drake* ((1849), 2 H. L. C. 579) followed.

*BAILEY v. THURSTON & Co.*, [1903] 1 K. B. 137; [72 L. J. K. B. 36; 51 W. R. 162; 88 L. T. 43; 19 T. L. R. 75; 10 Manson, 1—C. A.

**XVIII. RECEIVING ORDER.**

*See also EXECUTION.*

**246. Committal for Non-payment of Rates—Legal Process—Punitive Order—Release of Debtor from Prison—Distress for Rates Act,**

**Receiving Order—Continued.**

1849 (12 & 13 Vict. c. 14), s. 2—*Debtors' Act*, 1869 (32 & 33 Vict. c. 62), s. 4, sub-s. 2—*Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), s. 10, sub-s. 2]—A warrant of commitment in default of distress was issued by a magistrate in the usual form under the Distress for Rates Act, 1849, sect. 2, directing that E. should be imprisoned in Holloway Prison for one month "unless the said sum of £174 16s. 4½d." together with the costs, "shall be sooner paid." The warrant was executed on July 1st, when E. was imprisoned at Holloway. On July 2nd he presented a bankruptcy petition, and on the same day a receiving order was made against him on that petition. On July 4th he applied to the Registrar in Bankruptcy for an order that he should be released from prison under sects 9 and 10 of the Bankruptcy Act, 1883, on the ground that the receiving order had been made. The Registrar dismissed the application.

**HELD**—that the getting of the receiving order did not entitle the debtor to ask for relief under sects. 9 and 10, notwithstanding the fact that at any time during the imprisonment he could have got rid of the imprisonment by payment of the debt, as the committal was of a punitive character, and not merely a legal process to compel payment.

**IN RE EDGCOMBE, EX PARTE EDGCOMBE**, [1902] 2 [K. B. 403; 71 L. J. K. B. 722; 50 W. R. 678; 87 L. T. 108; 18 T. L. R. 734; 9 Manson, 227—C. A.

**247. Discretion of Court—No Assets Likely Ever to be Available.**—Where there are no assets and no probability of any becoming available, the Court has a discretion to refuse to make a receiving order if, in its opinion, the proceedings are of an oppressive character.

**RE SOMERS, EX PARTE UNION CREDIT BANK, LD.**, [1898] 4 Manson, 227—Div. Ct.

**248. Married Woman—Non-trader—Presentation of Petition before Marriage—Receiving Order made after Marriage—Jurisdiction—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5, sect. 13—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 152.]**—A bankruptcy petition was presented against a debtor, who was then a spinster. The hearing of the petition was adjourned, and in the interval the debtor got married. The debtor was not carrying on a trade separately from her husband.

**HELD**—that, in consequence of her marriage, a receiving order could not be made against the debtor.

**RE A DEBTOR, EX PARTE A DEBTOR**, [1898] 2 [Q. B. 576; 67 L. J. Q. B. 820; 78 L. T. 824; 5 Manson, 122; 14 T. L. R. 508; 46 W. R. 675—C. A.

**249. Rescission — Debt Extinguished.** — A judgment in the House of Lords having ex-

tinguished the debt of the petitioning creditor, their Lordships directed the receiving order to be set aside.

**IN RE BEAUCHAMP; BEAUCHAMP v. BEAUCHAMP**, ([1904] 1 K. B. 572; 73 L. J. K. B. 311; 90 L. T. 594; 20 T. L. R. 269, 11 Manson, 5—C. A.), (1905) 21 T. L. R. 410—H. L. (E)

**250. Rescission — Petitions Presented in Order to Evade Committal Orders—Abuse of Process of Court.**—Where a debtor is in the habit of filing bankruptcy petitions, so that the bankruptcy law is really being made use of in order to assist him in his frauds on his creditors, and to enable him to get credit, while he all along has the intention of getting rid of his liabilities by filing his own petition, such a state of things is an abuse of the process of the Court. A debtor was in the habit of filing his petition in order to defeat orders of committal made against him on judgment summonses.

**HELD**—the receiving order must be rescinded.

*Ex parte Painter, In re Painter* ([1895] 1 Q. B. 85; 64 L. J. Q. B. 22; 43 W. R. 144; 71 L. T. 581; 1 Manson, 499; 15 R. 16—Div. Ct.) distinguished.

**IN RE BETTS, EX PARTE OFFICIAL RECEIVER**, [1901] 2 K. B. 39; 70 L. J. K. B. 511; 49 W. R. 447; 84 L. T. 427; 17 T. L. R. 383; 8 Manson, 227—Div. Ct.

**251. Rescission before Public Examination of Debtor—Composition with Creditors—Jurisdiction of Court—Discretion—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3, ss. 6.]**—After a receiving order had been made against a debtor on his own petition, he made an arrangement with all his creditors under which they were paid a composition for the debts due to them, and they released the debtor from his debts and withdrew their proofs in the bankruptcy. The debtor thereupon applied to the Registrar that the receiving order should be rescinded.

**HELD**—by Smith and Collins, L.JJ. (Rigby, L.J., dissenting), that the Registrar had jurisdiction in the exercise of his discretion to rescind the receiving order, though the debtor had not been publicly examined; and that, as all the circumstances of the case had been brought before the Registrar, the Court would not interfere with his decision that the receiving order should be rescinded.

**RE IZOD, EX PARTE THE OFFICIAL RECEIVER**, [1898] 1 Q. B. 241; 67 L. J. Q. B. 111; 77 L. T. 640; 4 Manson, 343; 14 T. L. R. 115; 46 W. R. 304—C. A.

**252. "Sufficient cause" for not making—Antecedent Threat—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7, sub-s. 3.]**—A debtor, who had assigned the whole of his property to a trustee for the benefit of his creditors, called a meeting of his creditors, who agreed to accept an offer by the debtor and his

**Receiving Order—Continued.**

relatives to pay 10s. in the £. Subsequently, the debtor informed them that he could not arrange to carry out the composition of 10s., but that his relatives offered to purchase his estate for a sum sufficient to pay 7s. 6d. in the £. The majority of the creditors accepted this; but one creditor wrote threatening to present a bankruptcy petition unless he received an immediate cash payment of 7s. 6d. in the £ and bills for 2s. 6d. endorsed by a relative of the debtor. These terms were declined, and a bankruptcy petition was presented by the creditor in question.

**HELD**—that, as the petitioning creditor had endeavoured to obtain a secret advantage over the other creditors, with a threat, if the debtor did not concede it, to present a bankruptcy petition, there was "sufficient cause" for declining to make a receiving order within sect 7, sub-sect. 3 of the Bankruptcy Act, 1883.

*In re Shaw* ((1901), 83 L. T. 754; 49 W. R. 264—C. A.) followed.

Decision of the Div. Ct. (53 W. R. 223; 91 L. T. 664, 21 T. L. R. 2) affirmed.

*IN RE GOLDBERG*, (1905) 21 T. L. R. 139—C. A.

**253. When made—No Order drawn up—Nothing done under it—No subsequent Proceedings against Debtor—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 103 (5).]**—A receiving order is made when it is pronounced, although the order may not be drawn up and nothing has been done under the order. Such an order must be got rid of before proceedings against the debtor can be taken as if it did not exist. A receiving order cannot be abandoned by a creditor, as it enures for the benefit of others.

*Re Manning* ((1885), 30 Ch. D. 480, 55 L. J. Ch. 613; 34 W. R. 111; 54 L. T. 33) followed.

*BLOUNT v. WHITELEY*, (1899) 79 L. T. 635; 6 [Manson, 48—C. A.

**XIX. SCHEME OF ARRANGEMENT.**

**254. Approval by Court—Offence by Debtor—Misdemeanour—"Special Reasons"—Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), s. 31; and 1890 (53 & 54 Vict. c. 71), s. 3, sub-ss. 7, 8, 9, ss. 8, sub-s. 2.]**—Upon an application for the approval of a scheme of arrangement, where the debtor is charged in the Official Receiver's report with having committed a misdemeanour, the Bankruptcy Court will itself try the charge; for the words "has committed any misdemeanour" in sect. 8, sub-sect. 2, of the Bankruptcy Act, 1890, do not mean that the debtor has been tried and convicted. The Court, however, will only be satisfied of the truth of the charge by evidence which would satisfy a Criminal Court.

Thus, where the Official Receiver reported that the bankrupt had obtained credit without disclosing that he was an undischarged

bankrupt, but the bankrupt swore that the persons giving him credit knew of that fact, and none of them were called to contradict the statement,

**HELD**—that the charge was not proved, and the scheme might be approved.

**HELD ALSO**—that there were "special reasons," within the meaning of sect. 8 (2) of the Bankruptcy Act, 1890, for approving this scheme, in view of the litigation which it was to terminate.

*IN RE PEEL*, (1903) 19 T. L. R. 207—  
[Registrar

**255. Approval of Court—Speculative Scheme—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (9).]**—Although, when creditors of a bankrupt approve a scheme of arrangement proposed by him, the Court will hesitate to refuse its sanction, yet unless satisfied that reasonable security is offered for the payment of 7s. 6d. in the £, and that the scheme is really for the benefit of the creditors, the Court ought to decline to sanction it.

A bankrupt, whose business had been reported on as "rash and hazardous" proposed a scheme whereby all his property should vest in a trustee and be administered by him as in bankruptcy: fees, costs, and preferential debts to be paid at once, and the estate to be realised gradually until 20s. in the £ should be paid to all creditors.

**HELD**—upon the facts, that the scheme did not provide reasonable security for the payment of 7s. 6d. in the £, and that it ought not to be approved by the Court.

*IN RE FLEW, EX PARTE FLEW*, [1905] 1 K. B. 278; [74 L. J. K. B. 280; 53 W. R. 438; 92 L. T. 333; 12 Manson, 1—C. A.

*And see No. 260, infra.*

**256. Assent of Petitioning Creditor—Delay in Presenting Petition—Aquiesscence.]**—A creditor who, knowing that the debtor has executed a deed of assignment, unduly delays—for two months—the presentation of a petition will be taken to have assented to the deed.

The mere sending of a representative to a meeting of creditors, who takes no part in the proceedings, does not bind the creditor who sends him to any course that may be agreed upon at such a meeting.

*IN RE CARE, EX PARTE JACOBS*, (1902) 50 W. R. [836; 85 L. T. 552—Div. Ct.

**257. Assent of Petitioning Creditor—Delay in Presenting Petition—Aquiesscence.]**—A creditor's solicitor attended, on November 4th, the meeting of creditors called by the debtor, when a resolution was passed approving a deed of assignment. The solicitor did not assent to the resolution, and said he must consult his client. On November 30th the creditor wrote to the debtor and reserved his rights to take proceedings in bankruptcy. On January 28th the creditor's solicitor wrote and informed the

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debtor that a bankruptcy petition had been filed on January 25th.

**HELD**—that at no time did the creditor acquiesce in the trust deed.

*In re Carr, Ex parte Jacobs* ([1901] 50 W. R. 336; 85 L. T. 552—Div. Ct., *supra*), explained.

*IN RE DAY, EX PARTE HAMMOND*, (1902) 50 W. R. [448; 86 L. T. 238; 18 T. L. R. 442—Div. Ct.

258. *Body of Creditors Releasing their Debts Conditionally—Refusal of Court to Approve—Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 3.]—If a debtor obtains releases of their debts from a large number of his creditors upon terms not disclosed, and then endeavours to make a composition with the remaining minority, the Court will refuse to sanction his scheme, especially if the releases are conditional upon the scheme being approved. A scheme for a composition with the debtor's creditors should be brought before the Court as a whole, and considered by the Court as a whole.

According to a debtor's statement claims amounting to about £13,000 had been released, and he proposed to pay immediately a composition of 7s. 6d. in respect of the remaining £7,000. The release proved to be conditional upon the Court sanctioning the scheme, and did not disclose the circumstances under which some of the creditors agreed to it.

**HELD**—that under the circumstances the Court ought not to approve the scheme.

*In re E. A. B.* ([1902] 1 K. B. 457; 71 L. J. K. B. 356; 50 W. R. 229; 85 L. T. 772; 9 Manson, 105—C. A., No. 269, *infra*) distinguished.

Comments on *In re E. A. B.* in *In re Baines* 86 L. T. 691—Div. Ct., No. 271, *infra*) disapproved

*IN RE PILLING*, [1903] 2 K. B. 50; 72 [L. J. K. B. 392; 51 W. R. 465; 88 L. T. 667; 19 T. L. R. 388; 10 Manson, 142—C. A.

259. *Cessio Bonorum*—"All the Property" of a Bankrupt—Fund in Court—Stop Order—Default of Paymaster-General—Court of Chancery (*Funds*) Act, 1872 (35 & 36 Vict. c. 44), s. 5.]—"All the property" of a bankrupt was by an agreement, confirmed by an order of the Court, vested in a company and the bankruptcy annulled. The agreement contained a list of the bankrupt's properties, which did not, however, include a fund in Court to which the bankrupt, unknown to any of the parties to the agreement or their solicitors, was then absolutely entitled. The late bankrupt subsequently obtained an order of the Court for payment out to him of the fund upon affidavits that he had not incumbered. No stop order was ever obtained against the fund.

**HELD**—that the agreement operated as a complete *cessio bonorum* of the bankrupt, and that he was liable to pay the amount of the fund to the company.

Decision of Kekewich, J. ([1901] 1 Ch. 460; 70 L. J. Ch. 270; 49 W. R. 341; 84 L. T. 107; 17 T. L. R. 196), affirmed.

*BATH v. BATH*, (1902) 71 L. J. Ch. 500; 50 W. R. [535; 86 L. T. 435; 18 T. L. R. 560—C. A.

260. *Conditional Withdrawal of Claims—Approval of Court—Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 3 (9).]—*In re Pilling* ([1903] 2 K. B. 50; 72 L. J. K. B. 392; 51 W. R. 465; 88 L. T. 667; 19 T. L. R. 388; 10 Manson, 142—C. A.) is not to be taken as deciding that the Court will never, under any circumstances, approve a scheme of arrangement which provides for the conditional withdrawal of certain claims.

*IN RE FLEW, EX PARTE FLEW*, [1905] 1 K. B. [278; 74 L. J. K. B. 280; 53 W. R. 438; 92 L. T. 333; 12 Manson, 1—C. A. And see No. 255, *supra*.

261. "Debts Provable"—*Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 3, sub-s. 9.]—"Debts provable" in sect. 3, sub-s. 9, of the Bankruptcy Act, 1890, means debts provable when the scheme of arrangement comes before the Court for approval.

*IN RE ASHMEAD-BARTLETT*, (1902) 18 T. L. R. [213—C. A. And see No. 270, *infra*.

262. *Interest Exceeding 5 per cent. per annum—The Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 23—*Not to be Construed Retrospectively*.]—The Bankruptcy Act, 1890, sect. 23, is not retrospective, and does not apply to a scheme approved by the Court prior to the passing of the Act, so as to preclude the creditor from receiving a dividend on the whole amount of his proof, although in arriving at the amount of his proof interest had been calculated at a rate exceeding 5 per cent. per annum.

Sect. 31 of the Bankruptcy Act, 1890, does not have the effect of making the provisions of the Act of 1890 operative as from 1883.

*Semble*, sect. 23 would apply where the original contract was made before the passing or commencement of the Act, if the scheme was adopted and approved after the commencement of the Act.

*RE ATHLUMNEY (LORD), EX PARTE WILSON*, [1898] 2 Q. B. 547; 67 L. J. Q. B. 935; 79 L. T. 303; 47 W. R. 144—Wright, J.

263. *Provable Debts Carrying Interest at a Rate Exceeding 5 per cent.—Exclusion of s. 23 of the Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 23.]—A scheme of arrangement was approved by the Court, under which the bankrupt's friends provided a sum of money, and it was agreed that "a dividend shall be paid to each of the creditors on the amount of the debts of each of the creditors provable . . ." Some of the debts carried interest exceeding the rate of 5 per cent. allowed by sect. 23 of the Bankruptcy Act, 1890.

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**HELD**—that it was competent for a debtor with the consent of his creditors and the Court, to exclude the operation of sect. 23, and that the particular deed of arrangement did exclude it, and that the creditors in question were entitled to a dividend on the whole amounts proved for by them in respect both of principal and of interest.

**IN RE NEPEAN, EX PARTE RAMCHUND, [1903] 1 [K. B. 794, 72 L. J. K. B. 407, 51 W. R. 559; 88 L. T. 477; 10 Manson, 156—Wright, J.]**

**264. Releases by Creditors—Approval of Court—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3**—A debtor lodged a proposal for paying his creditors 20s. in the £ by two instalments of 15s. and 5s. each, the first instalment to be secured by the deposit of a sufficient sum with the Official Receiver before the application for the Court's approval. The proposal was accepted by all the creditors. In consequence of the assets realising less than was expected, the debtor was unable to lodge with the Official Receiver sufficient to pay the first instalment to all the creditors, and thereupon three of the creditors withdrew their proofs and released their debts for the purpose of allowing the proposal to be carried through. The sum deposited with the Official Receiver was sufficient to pay the first instalment on the remaining debts. The Court refused to approve the proposal upon the ground that its terms as to the deposit of the first instalment had not been complied with, there being no reference to the releases of debts in the proposal as accepted by the creditors.

**IN RE AVON, (1905) 21 T. L. R. 693—Registrar.**

**265. Remuneration of Trustee—Assets Realised by Official Receiver—Assets Realised by Trustee—Fund provided by Bankrupt's Father—"Amount Realized by Trustee"—Resolution of Creditors—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72 (1)—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (1).**—By sect. 72 (1) of the Bankruptcy Act, 1883, "Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) . . . shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised . . . and the other part on the amount distributed in dividend;" and by sect. 15 of the Bankruptcy Act, 1890, it is enacted that "The part of the trustee's remuneration to be payable in pursuance of sect. 72 of the principal Act on the amount realised shall be payable only on the amount realised by the trustee."

**HELD**—that the object of the enactment is to distinguish between assets realised by the trustee and assets realised by the official receiver. Where, therefore, the trustee was appointed after the adjudication in bankruptcy, and he realised a small portion of the estate on which he was entitled to com-

mission, but the composition was paid out of a fund provided by the bankrupt's father, whereby the trustee was saved the trouble of realising the estate, the trustee was not entitled to be paid commission on the £5,200 paid in by the father as a sum coming within the words "amount realised by the trustee."

**HELD ALSO**—that creditors have no power to pass resolutions outside the language of the sections so as to enlarge the scope of the Act.

**IN RE CHRISTIE, EX PARTE CHRISTIE, [1900] 1 Q. B. 5, 69 L. J. Q. B. 31; 48 W. R. 94; 81 L. T. 528; 7 Manson, 1—Wright, J.]**

**266 Remuneration of Trustee—Fund provided by Stranger to secure Composition—Payment thereout of fixed sum to Trustee—"Amount Realized by Trustee"—Resolution of Creditors—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72 (1).**—A stranger to the bankruptcy agreed to pay to the trustee £7,600, to be applied as to £6,000 in payment of a composition to the creditors, and as to £1,500 in payment of the remuneration of the trustee and the costs, and the creditors passed a resolution accepting the scheme, and also resolved "that upon the approval of the Court of this composition the bankruptcy shall be annulled by order of the Court."

**HELD**—that the words "amount realized by the trustee" in sect. 72, sub-s. 1, of the Bankruptcy Act, 1883, did not apply to the £7,500 found by the bankrupt's friend for the purposes of the composition or scheme, and that the creditors had power to pass the resolution fixing the trustee's remuneration and the costs as above.

**Ex parte Christie ([1900] 1 Q. B. 5; 69 L. J. Q. B. 31; 48 W. R. 94; 81 L. T. 528; 7 Manson, 1—Wright, J., supra) followed.**

**HELD ALSO**—that the resolution must be amended by substituting the words "the trustee shall apply to the Court that the bankruptcy be annulled," for the words "the bankruptcy shall be annulled by order of the Court," as annulment was entirely a matter for the Court.

**IN RE EARL OF ROSSLYN, (1902) 18 T. L. R. [76—Registrar.]**

**267. Scheme Conditional on Annulment—Discretion of Court—Interests of Creditors as Against Interests of Commercial Morality—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 23, 32.**—A bankrupt who has got his discharge cannot obtain an annulment of his bankruptcy as a matter of course, merely because he is able to purchase the consent of his creditors. A bankrupt's discharge had been suspended, upon a report of the Official Receiver alleging misconduct, for two years and a half. At the expiration of this period he offered to pay a further dividend of 7s. 11d. (making in all 10s.) in the £, provided he could obtain an annulment of his bankruptcy. The creditors approved

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the scheme, by resolution, and an application was made for the approval of the Court.

**HELD**—that in such cases the Court must consider, not only the interests of the creditors, but also the conduct of the debtor, and the interests of the public and of commercial morality; and that under the circumstances the application could not be granted.

Decision of the Registrar (19 T. L. R. 218) affirmed.

**IN RE BEER, EX PARTE BEER**, [1903] 1 K. B. 628; [72 L. J. K. B. 366; 51 W. R. 422; 88 L. T. 334; 19 T. L. R. 319; 10 Manson, 136—C. A.

**268. Withdrawal by Creditors of their Debts—Declaration of Trust in their favour by Third Party—Knowledge of Debtor—Debts Provable—Conduct of Debtor justifying Refusal of Scheme by Court—“Rash and hazardous Speculation”—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3, sub-ss. 7, 8, 9, and 10.]**—A scheme of arrangement was approved by all the unsecured creditors of a debtor, except two, whose claims were of comparatively small amount. It appeared that exception was taken by certain creditors to a declaration of trust executed by the debtor's brother in favour of W.'s executors and F.'s executors, two creditors who withdrew their claims, whereupon those two creditors at once offered, if required by the Court, to give up all benefits under that declaration of trust. It was said that the effect of giving the declaration of trust was to place the two withdrawing creditors in a better position than the other creditors.

**HELD**—that as the arrangement was not a bargain made by the debtor, or a bargain made on his behalf with his knowledge, but was a bargain made by a third person without any knowledge whatever on the part of the debtor, the objection failed.

**HELD ALSO**—that sect. 3, sub-s. 9 of the Bankruptcy Act, 1890, which in its latter part provides that “unless it [the proposal] provides reasonable security for payment on all the unsecured debts against the debtor's estate,” applies only to the debts which still continue provable at the moment when the scheme comes up for approval.

There is no rule that any misconduct will justify the Court in refusing to sanction a scheme; the misconduct must have been such as would make it against public policy to sanction the scheme; that is, the misconduct must have been of a gross character; rash and hazardous speculation is not of itself sufficient misconduct.

**IN RE E. A. B.**, [1902] 1 K. B. 457; 71 L. J. K. [B. 356; 50 W. R. 229; 85 L. T. 772; 9 Manson 105—C. A.

**269. Withdrawal by Creditors of their Debts—“General Body of Creditors”—Assets not equal to 10s. in the Pound—Debtor's Conduct—Number of Creditors withdrawing and Amount of their Claims—Family Creditors**

*withdrawing—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3, sub-ss. 8, 9.]*—A scheme provided, in effect, for security being given for the payment of 7s. 6d. in the pound to the creditors not withdrawing or releasing their claims, and for the vesting of the debtor's estate (if any) in a trustee, with a view to the payment (*inter alia*) of dividends in excess of 7s. 6d. in the pound, should the realization so permit. The assets were not of a value equal to 10s. in the pound on the amount of unsecured liabilities. The withdrawing creditors did not vote at the meeting at which the scheme was accepted. The debtor had contributed to his failure by rash and hazardous speculations.

**HELD**—that the scheme was brought within sub-s. 8 of sect. 3 of the Bankruptcy Act, 1890, by the fact that the assets were not equal to 10s. in the pound on the amount of unsecured liabilities; that the debtor's conduct did not require a refusal of the approval of the scheme; that the withdrawals were not an abuse of the process of the Court, as the withdrawing creditors were comparatively few, the claim of one of them, the debtor's brother, being for no less than £42,000, and the other creditors withdrawing appeared to be family creditors; and that the scheme might be approved.

**IN RE ASHMEAD-BARTLETT**, (1902) 18 T. L. R. [68—Registrar.

*And see No. 261, supra.*

**270. Withdrawal by some Creditors of their Debts—Release to them by Deeds Delivered as Escrows, pending Approval by Court—Remaining Creditors to be Paid 7s. 6d. in the Pound—Security—Votes of Released Creditors—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3, sub-ss. 2, 9.]**—A debtor filed a scheme of arrangement under which creditors for about £4,926 were to release their debts, and the remainder were to be paid 7s. 6d. in the pound. The creditors who had agreed to release their debts had executed deeds of release re-delivered as escrows, to take effect on the approval of the scheme by the Court, under which they were to receive 5s. in the pound. The meeting of creditors to consider the scheme was held, and the scheme was carried by the votes of the creditors who had delivered releases of their debts as escrows. It was contended by the Official Receiver and the Board of Trade that the security must extend to the debts released by the deeds delivered as escrows.

**HELD**—that the security itself could not extend to debts which had been released before the approval of the scheme by the Court, where no undue advantage had been given in order to obtain the releases, and therefore that the security need not extend to those who had delivered releases as escrows; that there was no fraud on the creditors; that the acceptance of 7s. 6d. in the pound had been forced on the creditors who had not agreed to execute releases; and that before anything could be done to make the scheme valid, the escrows must be delivered,

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and then the remaining creditors might, if they thought fit, pass the scheme, and the Court then could approve it.

*In re E. A. B.* ([1902] 1 K. B. 457; 71 L. J. K. B. 356; 50 W. R. 229; 85 L. T. 772, 9 Manson, 105—C. A., No. 268, *supra*) applied.

*IN RE BAINES, EX PARTE BOARD OF TRADE*, (1902) [86 L. T. 691—Div. Ct.]

**XX. SET-OFF.**

**271. Lease—Bankruptcy of Tenant—Sheep Stock—Valuation—Set-off of Rent—Repudiation by Trustee.**—The trustee of a bankrupt called on the landlord to take over the sheep stock on the bankrupt farm in terms of the conditions of lease.

**HELD**—that the trustee could not resist the claim of the landlord to set off against the price of the sheep stock the debt due to him under the lease for rent still unpaid, as the trustee cannot successfully insist on stipulations favourable to the interest of the bankrupt estate and repudiate the liability under the lease.

*CRAIG'S TRUSTEE v. LORD MALCOLM*, (1900) [2 F. 541.]

**272. Mutual Dealings—Avoidance of Voluntary Settlement—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 38, 47.**—A bankrupt within two years before his bankruptcy by a voluntary settlement transferred £250 to his wife. The trustee in the husband's bankruptcy obtained an order setting aside the voluntary settlement under sect. 47, sub-sect. 1, of the Bankruptcy Act, 1883, and brought an action against the wife to recover the £250. The wife claimed to set-off, under sect. 38 of the Act, a debt due to her from the bankrupt and secured by a mortgage of certain property, the security being insufficient by more than £250 to repay the debt.

**HELD**—by Vaughan Williams and Buckley, L.J.J., Fletcher Moulton, L.J. dissenting, that, as the settlement was only avoided as against the trustee in the bankruptcy and not as against the husband, there was no debt due from the wife to the husband which could be made available for the purpose of a set-off under sect. 38, and that therefore the wife was not entitled to the set-off claimed.

*LISTER v. HOOSON*, (1907) 24 T. L. R. 162—C. A.

**273. Mutual Credits—Judgment Debt Due to a Company in Liquidation—Cross Claim by Debtor—Liquidator Issuing Bankruptcy Notice—Application to Set Aside—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.**—A company in liquidation obtained a judgment for unpaid calls against a shareholder, who had a larger claim against the company. The liquidator issued a bankruptcy notice; and the debtor applied to set it aside on the ground that, though he could

not plead his cross-claim as a defence to the action for calls, yet, as soon as he should be adjudicated bankrupt, it could be set off against the company's judgment under sect. 38 of the Bankruptcy Act, 1883.

**HELD**—that there is no recognised principle that a bankruptcy notice cannot be issued in respect of a debt, which upon adjudication will be discharged by a set-off; and that the application must be dismissed. There must be an effective set-off existing at the time when the application is made, and not merely an inchoate right of set-off.

*IN RE G. E. B., IN RE A. DEBTOR*, (1903) 72 [L. J. K. B. 712; 51 W. R. 675; 89 L. T. 245, 10 Manson, 243—C. A.]

**274. Mutual Dealings—Lease of Public-house by Brewers—Tied House—Set-off of Money Due to Tenant under Valuation—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.**—Brewers let to the debtor a public-house for a term of six months, and then on from month to month, and the debtor agreed to take all his beer from the brewers. The agreement provided that, in case the tenancy should be determined by either party, all arrears of rent and all moneys whatsoever owing by the debtor to the brewers should be deducted from the valuation for tenant's fixtures and stock-in-trade payable by the incoming tenant and should be paid over to the brewers. The brewers lent the debtor a sum of money to pay the outgoing tenant's valuation, and also supplied him with beer upon credit. About sixteen months after the date of the lease the debtor agreed to give up the house to a new tenant, and a valuation was then made and paid by the incoming tenant to the brewers, who had then notice of an act of bankruptcy on the part of the debtor. Shortly afterwards a receiving order was made against the debtor and he was adjudicated bankrupt. The brewers claimed to retain out of the valuation money in their hands the amount of the debts owing to them by the debtor.

**HELD**—that these were mutual dealings between the brewers and the debtor within sect. 38 of the Bankruptcy Act, 1883, and the brewers were entitled to set-off the debts against the valuation money.

*IN RE RUSHFORTH, EX PARTE HOLMES & SONS*, (1906) 23 T. L. R. 41; 14 Manson 135—Div. Ct.]

**275. Mutual Dealings—Right of Set-off—Receiving Order—Date for taking Account—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.**—D. owed Messrs. M. £86. Messrs. M. became liable under a document described as "Heads of Agreement" to pay D. various sums amounting to about £300, under certain conditions, and whatever was payable to D. was payable under that document. A receiving order was made against D. The trustee objected that Messrs. M. could not set off the £86 against the £300; that they must pay

*Set-off—Continued.*

the £300 in full and be satisfied with a dividend on the debt of £86.

**HELD**—that there were “mutual dealings” between D. and Messrs. M., and the operation of sect. 38 of the Bankruptcy Act, 1883, could not be excluded. The date of the receiving order, and not the date of the commencement of the bankruptcy, is the time for ascertaining what mutual debts, credits and dealings were existing between the debtor and other persons. Messrs. M. were therefore entitled to set off the £86 against the £300.

IN RE DAINTRY, EX PARTE MANT, [1900] 1 Q. B. [546; 69 L. J. Q. B. 207; 82 L. T. 239—C. A.]

**XXI. TRUSTEE.**

**276. Application by Trustee for Directions—Discretion of Court as to Giving—No Obligation—Duty of Trustee to Exercise own Judgment—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 57, 89**—There is no obligation upon the Court to give directions to a trustee who applies under sect. 89 of the Bankruptcy Act, 1883.

Therefore in a complicated question as to compromises, the Court declined to give any directions, holding that the case was one for the trustee to deal with himself, with the assistance of the committee of inspection under sect. 57 (6).

Where the trustee and committee propose to accept a compromise, the *onus* is upon an objector to show that it is an undesirable one.

IN RE PILLING, EX PARTE SALAMAN, [1906] 2 K. B. [644; 75 L. J. K. B. 739; 95 L. T. 362; 13 Manson, 229—Bigham, J.]

**277. Books kept by Trustee—Inspection by Bankrupt—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) s. 80—Bankruptcy Rules, 1886, Rules 285—290, 292.**—The Court will not, except in special circumstances, allow a debtor to inspect the record book kept by the trustee in bankruptcy and in which he has recorded minutes of the proceedings and resolutions at meetings of creditors and of the committee of inspection.

Decision of Bigham, J. ([1904] 2 K. B. 760; 73 L. J. K. B. 963; 53 W. R. 30; 91 L. T. 321; 20 T. L. R. 753; 11 Manson, 268) affirmed.

IN RE SOLOMONS, EX PARTE SOLOMONS, [1904] 2 [K. B. 917; 73 L. J. K. B. 1029; 53 W. R. 49; 21 T. L. R. 48; 91 L. T. 512—C. A.]

**278. Taxation of Trustee's Costs—Conveyancing Business—Sale of Mortgaged Property—“Proceeds of Sale”—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 2—Bankruptcy Rules, 1886, Appendix, Part II. Sub-head VII. (General Regulations), rule 2.**—It is no part of the duty of the bankruptcy taxing Master, when taxing the bill of costs of the solicitor to the trustee in bankruptcy in respect of the sale of mort-

gaged property under rule 2 of the General Regulations in Part II., Sub-head VII., in the Appendix to the Bankruptcy Rules, 1886, to have regard to the fund out of which the bill when taxed will be payable. His duty is to tax the bill in accordance with the General Order under the Solicitors Remuneration Act, 1881, and to state in his allocation that it is to be paid in accordance with rule 2, leaving it to the parties to ascertain the fund, if any, out of which the bill when taxed is to be paid.

*Seem*, in rule 2 the words “proceeds of sale” mean net proceeds after payment of all charges on the fund.

IN RE GARNER, EX PARTE PEDLEY, [1906] 2 K. B. [213; 75 L. J. K. B. 584; 54 W. R. 627; 95 L. T. 60; 22 T. L. R. 597; 13 Manson, 204—Bigham, J.]

**279. Penal Interest against Trustee—Such Interest is Payable to the Bankrupt's Estate—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (6).**—The bankrupt's estate, and not the Treasury, is entitled to any sum payable by a trustee as penal interest under sect. 74 (6) of the Bankruptcy Act, 1883, for improperly retaining moneys.

IN RE SIMS, EX PARTE OFFICIAL RECEIVER, [1907] [2 K. B. 36; 76 L. J. K. B. 849; 96 L. T. 713; 14 Manson, 169—Bigham, J.]

**280. Prosecution of Fraudulent Debtor by Trustee—Authority of Committee of Inspection to order same—Leave of Court—Costs of Prosecution—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-s. 3; ss. 16, 17; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) s. 57, sub-s. 3, s. 166.**—The trustee in bankruptcy with a committee of inspection was authorised by the committee to prosecute the debtor for an offence against the bankruptcy laws, and to employ solicitors for that purpose. The debtor was tried and acquitted, the jury stating, however, that they gave him the benefit of a doubt. The trustee applied for an order that the costs of the prosecution might be taxed and paid out of the estate.

**HELD**—that there was no ground for making the order, as it would saddle the estate with costs which, if the trustee had done his duty and had obtained the leave of the Court under sect. 16 of the Debtors Act, 1869, would have been paid by the Treasury; that under sub-s. 3 of sect. 57 of the Bankruptcy Act, 1883, the committee of inspection had no power to authorise the prosecution of the debtor without the sanction of the Court; and that it was highly undesirable that a trustee should, without obtaining an order of the Court under sect. 16 of the Debtors Act, 1869, be entitled to embark upon a speculative prosecution of the debtor.

IN RE HOWES, EX PARTE WHITE, [1902] 2 K. B. [290; 71 L. J. K. B. 705; 9 Manson, 252—Wright, J.]

**281. Release of—Revocation of Release by**



*Trustee—Continued.*

*Board of Trade—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 82 (3).—By sub-sect. 3 of sect. 82 of the Bankruptcy Act, 1883, the Board of Trade may revoke an order releasing a trustee in bankruptcy "on proof that it was obtained by fraud or by suppression or concealment of any material fact."

**HELD**—that an order of release ought not to be revoked on the ground that it was obtained by "suppression or concealment of any material fact," unless there is such suppression or concealment as has in it some element of fraud or wrongfulness.

*IN RE HARRIS, EX PARTE HASLUCK v. THE [BOARD OF TRADE, [1899] 2 Q. B. 97; 68 L. J. Q. B. 769, 47 W. R. 544, 80 L. T. 499, 6 Manson, 259—Wright, J*

*282. Summary Bankruptcy — Release of Trustee — Future Assets — Appointment of Trustee—Official Receiver—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 82, 121—*Bankruptcy (Discharge and Closure) Act, 1887* (50 & 51 Vict. c. 66), s. 6, sub-s 2.]—When the Official Receiver is acting as trustee under a summary bankruptcy, and has been released on the ground that the whole estate has been got in, so far as he can get it in, and, therefore, that he is entitled to a release under sect. 6 of the Bankruptcy (Discharge and Closure) Act of 1887, then the same consequences follow as under sect. 82 of the Bankruptcy Act, 1883, and he continues to act as trustee for any subsequent purpose of the administration of the debtor's estate. Section 121 of the Bankruptcy Act, 1883, is not intended to apply a different rule to summary bankruptcies, and to extend the powers of the creditors in summary bankruptcies down to a period beyond that at which they are removed by sect. 82 in the case of ordinary bankruptcies.

*IN RE LEACH, EX PARTE BARNES, [1900] 2 Q. B. [649; 69 L. J. Q. B. 931, 49 W. R. 76; 83 L. T. 222—Wright, J*

*283. Vacating Office on Receiving Order being made against him—Rescission of Receiving Order—Restoration to Office—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 85, 86, 87].—By sect. 85 of the Bankruptcy Act, 1883, "if a receiving order is made against a trustee, he shall thereby vacate his office of trustee." A receiving order had been made against a trustee, and soon afterwards rescinded on the ground that it ought never to have been made.

**HELD**—that the receiving order should be treated as if it never had been made, and the trustee deemed not to have vacated his office.

*IN RE NEWMAN, EX PARTE OFFICIAL RECEIVER, [1899] 2 Q. B. 587; 68 L. J. Q. B. 961; 81 L. T. 527; 48 W. R. 94; 6 Manson, 381—Wright, J.*

## XXII. VOLUNTARY ASSIGNMENTS.

*284. Post-nuptial Settlement — Power of Revocation with Trustees' Consent—Trustees Consenting to Partial Revocation on Condition of further Property being Settled—Settlement of such Property—Bankruptcy of Settlor—Whether Second Settlement "Voluntarily"—Whether Trustees "Purchasers for Value"—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 47].—In 1899 A. executed a post-nuptial settlement, under which he took the first life interest. In 1902 he requested the trustees to consent (as the deed gave them power to do) to the settlement being partially revoked in order to raise £1,600. Such consent was given upon condition that A. should bring into settlement the life interest given to him by the deed of 1899, and also further property. Accordingly, by deed dated December, 1902, in consideration of the £1,600 and the consent, he assigned his life interest and the other property to the trustees, and in September, 1903, was adjudicated bankrupt, in respect of debts incurred during that year.

**HELD**—that the trustees were not "purchasers for value" within sect. 47 of the Bankruptcy Act, 1883; that, therefore, the settlement of 1902 was a voluntary settlement, and was void to the amount required to pay the debts in the bankruptcy.

*Hance v. Harding* ((1888) 20 Q. B. D. 732; 57 L. J. Q. B. 403; 36 W. R. 629, 59 L. T. 659—C. A.) followed.

*IN RE PARRY, EX PARTE SALAMAN, [1904] 1 K. B. [129, 73 L. J. K. B. 83; 52 W. R. 256; 89 L. T. 612; 20 T. L. R. 73; 11 Manson, 18—Wright, J.*

*285. Voluntary Settlement — Fluctuating Business—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 47].—A gift of money does not constitute a "settlement" within the meaning of sect. 47 of the Bankruptcy Act, 1883, unless it is the intention of the giver that the money shall be invested in some form which will enable it subsequently to be traced.

*In re Player, Ex parte Harvey* ((1885), 15 Q. B. D. 682; 54 L. J. Q. B. 554, 2 Morr. 261—Div. Ct.), discussed and approved.

Where a father released certain debts and securities due to him from a trading company as a part of the consideration received by the company for the sale of their business to his son, and it appeared that, at the time of the father's subsequent bankruptcy, the stock-in-trade of the business as it came to the son had been entirely altered, with a few trifling exceptions,

**HELD**—that there was no gift to the son with the intention that what was given him should be invested in some form which would enable it subsequently to be traced.

*IN RE PLUMMER, EX PARTE THE TRUSTEE, [1900] 2 Q. B. 790; 69 L. J. Q. B. 936; 48 W. R. 634; 83 L. T. 387—C. A.*

**Voluntary Assignments—Continued.**

286. *Voluntary Settlement—Gift of Jewels and Money—Avoidance of—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 47, sub-s. 3.]—Gifts of personal property made by a bankrupt within two years of his bankruptcy, without restricting the donee's power of alienation, but with intention that the donee shall use or retain the property for an indeterminate time, are voluntary settlements within the meaning of sect. 47 of the Bankruptcy Act, 1883, and void as against the trustee in bankruptcy, but without prejudice to any sale or disposition of the property made by the donee before bankruptcy in good faith and without notice of an available act of bankruptcy. But the donee may have to account for the proceeds of any such sale or disposition remaining in his hands at the commencement of the bankruptcy.

*In re Player* ((1885) 15 Q. B. D. 682; 54 L. J. Q. B. 554, 53 L. T. 865) and *In re Vansittart* ([1893] 1 Q. B. 181, 62 L. J. Q. B. 277; 57 J. P. 132; 41 W. R. 32, 67 L. T. 592, 9 Mor. 280), considered.

*IN RE TANKARD, EX PARTE OFFICIAL RECEIVER v. [HART, [1899] 2 Q. B. 57, 68 L. J. Q. B. 670, 47 W. R. 624; 80 L. T. 500, 15 T. L. R. 332, 6 Manson, 188—Wright, J.*

287. *Voluntary Settlement—Life Policies—Payment of Premiums of Settled Policies within ten years of Bankruptcy—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 47.]—Although circumstances might easily arise in which moneys paid within ten years of bankruptcy for the purpose of effecting a policy of assurance which is taken out and settled within that period might constitute a settlement within the meaning of sect. 47 of the Bankruptcy Act, 1883, yet, where the policy has been taken out and settled at a period more remote than ten years from the date of the settlor's bankruptcy, the premiums subsequently voluntarily paid by the settlor within the said ten years in order to keep alive the policy do not constitute such a settlement.

No proportionate part of the moneys ultimately payable under a policy of assurance is represented by the payment of any particular premium.

Decision of Wright, J. (82 L. T. 623; 16 T. L. R. 370), reversed.

*IN RE HARRISON, EX PARTE WHINNEY, [1900] 2 [Q. B. 710; 69 L. J. Q. B. 942; 49 W. R. 2; 83 L. T. 189; 16 T. L. R. 530—C. A.*

**BARRISTERS.**

*And see* BANKRUPTCY, 187; COUNTY COURTS, 51; CROWN PRACTICE; DEPENDENCIES AND COLONIES, 194.

1. *Authority—Conduct of Action—Compromise of Action—Agreement to Refer—Limitation of Authority—Authority exceeded—Absence of Mistake—Interlocutory Order—Rescission*—Counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement, and notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side. The conduct of the action includes the power to refer the action and the power to compromise the action.

Counsel for the plaintiff, in an action for slander, admitted that, in making a compromise, he acted contrary to the instructions of his client. He said that there was no mistake on his part, that there was in point of fact a limitation of his authority by his client, who had instructed him not to agree to a reference except on the condition that all imputations should be disclaimed by the defendant, but that he, nevertheless, made a compromise without that term, and therefore outside the limits of the authority in fact given to him. The fact that counsel's authority was so limited was not communicated to the other side.

*HELD*—that the compromise could be set aside merely because the authority actually given to counsel was exceeded.

Decision of Lord Alverstone, C.J. (18 T. L. R. 390), reversed by Court of Appeal; and Decision of Court of Appeal ([1902] 1 K. B. 838; 71 L. J. K. B. 536; 50 W. R. 487; 86 L. T. 574; 18 T. L. R. 494) reversed.

*NEALE v. GORDON LENNOX, [1902] A. C. 465; 71 [L. J. K. B. 939; 66 J. P. 757; 87 L. T. 341; 18 T. L. R. 791; 51 W. R. 140—H. L. (E.)*

2. *Costs—Counsel—Non-attending Counsel—Taxation*.]—It has been the uniform practice for forty years in party and party taxation to allow the fees of non-attending counsel, and the Court will not disturb the practice.

*CHARMAN v. BRANDON, (1900) 82 L. T. 369—[Kekewich, J.*

3. *Costs—Counsel—Special Fee—Disallowance*.]—Upon the hearing of a summons in an administration action which had been going on for some years, where all the evidence was by affidavit or documentary, the claimant was obliged to brief a leader from another Court, all the leaders in the particular Court having been retained by other parties in the proceedings. Such leader's fee was ten guineas on the brief and fifty guineas special fee, he being one of those

**BARRATRY.**

*See* CRIMINAL LAW; SHIPPING AND NAVIGATION.

**Barristers—Continued.**

who do not accept a brief in any Court without an additional special fee of fifty guineas

**HELD**—that, as between party and party, there were not any special circumstances sufficient to warrant the allowance on taxation of the special fee, and that the fees charged must be reduced by fifty guineas.

**IN RE PARSON, PARSON v. PARSON**, [1901] 2 Ch. 176, 70 L. J. Ch. 563; 84 L. T. 709; 17 T. L. R. 451—Joyce, J.

**4 Costs—Counsel—Fee for Attending to Hear Judgment**—If judgment is given in the same sittings in which a case is tried, a fee to counsel to attend and hear judgment will not be allowed on taxation.

**IN RE BISS, BISS v. BISS**, [1903] 2 Ch. 40—C. A.

**5. Costs—Counsel—Refresher Fees—Discretion of Taxing Master**—*R. S. C. Ord. 65, r. 27, sub-ss 29, 48.*—A taxing master has discretion under Ord. 65, r. 27 (29), to allow in a proper case refresher fees to counsel exceeding the *maxima* fixed by r. 27 (48).

**STEWART & Co. v. WEBER AND OTHERS**, 19 [T. L. R. 722; 89 L. T. 559—Kennedy, J.

**6. Costs—Counsel—Refreshers—Taxation between Parties—Discretion of Taxing Officer**—*R. S. C., Ord. 65, r. 27 (29) (48).*—In a taxation between party and party, a taxing officer has now, under Ord. 65, r. 27, sub-r. 29 (r. 10 of Jan., 1902), discretion to allow refresher fees to counsel exceeding the *maxima* allowed by sub-r. 48.

*Stewart & Co. v. Weber* ([1903] 19 T. L. R. 722—Kennedy, J., *supra*) followed.

**CAVENDISH v. STRUTT**, [1904] 1 Ch. 524; 73 [L. J. Ch. 247; 52 W. R. 333; 90 L. T. 500; 20 T. L. R. 99—Buckley, J.

**7. Costs—Fees—Costs of Two Counsel—Taxing Master's Discretion.**—Where a taxing master (affirmed by a Judge in Chambers) has refused to allow the costs of two counsel on an appeal, the Court of Appeal refused to interfere. They would, however, have done so had it been shown that the Master and Judge had acted upon some supposed rule, and were wrong in so doing.

**WHEELER v. FRADD** (No. 2), (1898) 14 T. L. R. 440; affirming *Darling, J.*, at Chambers—C. A.

**8 Costs—Counsel—Three Counsel—R. S. C., Ord. 65, rr. 8, 27 (29), (38).**—In considering whether to allow the costs of three counsel the Court will have regard to the length of the documents, the time likely to be occupied by the case, its commercial importance, and the amount at stake.

*Semble*—the last two are not in themselves sufficient grounds unless there is some complication in the case.

The existing rule (made in 1902) has not rendered the old authorities upon the point obsolete.

**PEEL v. LONDON AND NORTH WESTERN RY. Co.** [(No. 2), [1907] 1 Ch. 607; 76 L. J. Ch. 379; 96 L. T. 498—Parker, J.

**9. Costs—Counsel—Three Counsel—Refreshers.**—Where a motion is of a serious character, and involves difficult questions of law, three counsel will be allowed, as between party and party. On a motion to stay an action and refer the matters in dispute to an arbitrator, on the ground that they came within a clause in a contract agreeing to refer the matters between the parties in the settlement of the accounts to arbitration, the Court allowed, as between party and party, three counsel and refresher fees.

**WORKMAN v. BELFAST HARBOUR COMMISSIONERS**, [1899] 2 Ir. R. 619—Q. B.

**10. Costs—Counsel—Three Counsel—R. S. C., Ord. 65 r. 8; App. N., items 81, 82, 166, 172.**—In an action for a declaration that the London School Board could not lawfully expend money on certain purposes an interlocutory injunction was granted; and, on appeal, it was agreed that the hearing of such appeal should be treated as the trial of the action.

The plaintiff was given his costs; and, in the taxation, three items came into dispute:

(1) The costs of attending counsel in Court on the hearing of the appeal.

(2) The costs of instructions for the brief on the motion.

(3) The fee to a third counsel.

**HELD**—as to (1) that where a special motion for an injunction is treated as the trial of the action, attendance in Court on such motion might be treated as attendance upon trial under items 171 or 172, and not 166.

As to (2) that, as no witnesses were in fact called, the Master was right in treating it as a non-witness action, and in disallowing costs in obtaining information, etc., although the action would have been a witness action if it had gone to trial in the ordinary course, and such costs might then have been allowed.

As to (3) that the action was not one in which the costs of three counsel ought to be allowed.

**DYER AND OTHERS v. LONDON SCHOOL BOARD**, [(1903) 19 T. L. R. 413—Eady, J.

**11. Costs—Counsel—Three Counsel at Trial and on Appeal—Discretion.**—In an action against a trade union and the officials of the union, in which a large amount of damages was claimed and which lasted several days, both at the trial and in the Court of Appeal, and in which the defendants were successful, the Court refused to interfere with the discretion exercised by the taxing master, and affirmed by the Judge in chambers, in allowing the officials of the union the costs of only two counsel, both at the trial and in the Court of Appeal. The taxing master

**Barristers—Continued.**

having allowed the union the costs of only two counsel in the Court of Appeal (though the costs of three counsel at the trial were allowed to them), the majority of the Court, Vaughan Williams and Buckley, L.J.J., refused to interfere with the exercise of discretion, affirmed as it was by the Judge at chambers—Fletcher Moulton, L.J., dissenting upon the ground that the case was of such importance and difficulty that the costs of three counsel for the union in the Court of Appeal should have been allowed.

DENABY & CADEBY MAIN COLLIERIES, LD. *v.*  
[YORKSHIRE MINERS' ASSOCIATION, (1907) 23  
T. L. R. 635—C. A.]

12. *Costs—Counsel's Fees—Three Counsel—Discretion of Judge—Finality of*—In a divorce suit, the hearing of which lasted fourteen days, the Registrar allowed to the successful co-respondent the costs of two counsel only. The Judge, however, reviewed the taxation and allowed the costs of a third counsel.

HELD—that the Court of Appeal would not review the learned Judge's exercise of his discretion.

HARTOPP *v.* HARTOPP & COWLEY, (1904) 20  
[T. L. R. 216—C. A.]

13. *Fees—Counsel Advising after Action Begun—Right to be Briefed at Trial—Objection by Client—Right of Solicitor to Charge Fee to Client.*—The rules of etiquette as between members of the legal profession are not binding upon clients. Therefore where a counsel had advised a client during the progress of an action, but the client expressly told his solicitor not to brief the counsel at the trial, and the solicitor, acting under Resolution 20 as to Bar Etiquette (Annual Practice, 1908, vol. 2 p. 743), briefed the counsel at the trial and paid him his fees,

HELD—that the solicitor could not, upon taxation, charge his client with the fees paid to the counsel.

IN RE HARRISON AND ANOTHER, (1907) 24  
[T. L. R. 118—Parker, J.]

14. *Fees—Refreshers—Allowance of Full Refresher for Saturdays*—R. S. C., Ord. 45, r. 27 *sub-r.* 48.]—In a case which lasted nine days, which included two Saturdays, the taxing master was held to be justified in allowing refreshers to counsel in respect of eight days, although it was argued that under Ord. 45, r. 27 (48), refreshers were only payable in respect of clear days of at least five hours each.

DUNNING *v.* GROSVENOR DAVIES, [1901] W. N.  
[218; 46 Sol. J. 69; 112 L. T. Jo. 83—  
Joyce, J.]

15. *Barrister Peer—Right to Argue for Client.*—A barrister peer may argue as counsel for a client on an appeal to the House of Lords, but not before Committees

of the House, or before the House sitting to hear a criminal case under the presidency of the Lord High Steward.

IN RE LORD KINROSS, [1905] A. C. 468, 74  
[L. J. P. C. 137—H. L. (Committee of Privileges).]

**BASTARDY.**

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**I. AFFILIATION PROCEEDINGS.**

1. *Application for Summons—Three Applications at same Time—Different Magistrates—Duplicates*—On the 21st October, 1896, K. applied to three separate justices for summonses against C. in respect of a bastard child born on the 9th September, 1896.

The first summons was issued on the 28th July, 1897, and was heard on the 3rd November, 1897, when it was dismissed without prejudice to any further application. Subsequently, a second summons was issued, and heard on the 17th November, 1897, but, there being no proof of service, it was not proceeded with.

The third summons was issued, and heard on the 29th December, 1897, when an order was made.

HELD—that the rule *nisi* for a *certiorari* must be made absolute, on the ground that the original applications of the 21st October, 1896, were spent and exhausted by the hearing and dismissed on the 3rd November, 1897, for, although the three applications were to separate magistrates, they were in fact only duplicates, and the hearing of one exhausted the others.

R. *v.* ROBINSON, EX PARTE CORBISHLEY, [1898]  
[1 Q. B. 734; 62 J. P. 309; 67 L. J. Q. B.  
510, 78 L. T. 350; 14 T. L. R. 326; 46 W. R.  
462—Div. Ct.]

2. *Evidence—Corroboration in some Material Particular—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.*—In an application by a servant girl for an affiliation order against her master's grandson, evidence was given (with a view to corroborate her testimony) that they were seen "out together evenings in the lanes," and that after the birth of the child the appellant asked another servant if the respondent "was going to swear the child."

HELD (Wills, J., *dissentiente*)—that, having regard to the difference between the social position of the parties, the evidence of "walking out" might, under the circumstances, be accepted by the justices as "corroboration in some material particular" within sect. 4 of the Bastardy Act, 1872.

**Affiliation Proceedings—Continued.**

In such cases justices should act with great caution—per Lord Alverstone, C.J.

HARVEY v. ANNING, (1903) 67 J. P. 73; 87 L. T. [687—Div. Ct.

3 *Evidence—Corroboration in some Material Particular—What Is—Bastardy Laws Amendment Act, 1872* (35 & 36 Vict. c. 65), s. 4.]—In a bastardy summons against a master the only evidence relied on as corroboratory was the fact that the servant had moved into a bedroom nearer to the master's than her old one.

HELD—not sufficient.

*Semle* (per Alverstone, L.C.J.). corroborative evidence “in some material particular” within the meaning of sect. 4 of the Bastardy Laws Amendment Act, 1872, must be evidence having some relation to the conduct of the putative father, or at least have some relation to the probability of the person summoned being the father.

Bray, J., refrained from expressing any opinion as to a possible rule of law defining what evidence can be said to amount to “corroborative evidence in some material particular.”

*Harvey v. Anning* ((1903) 67 J. P. 73; 87 L. T. 687—Div. Ct., *supra*) explained.

REFFELL v. MORTON, (1906) 70 J. P. 347—[Div. Ct.

4. “*Single Woman—Wife Living Apart from her Husband—Illegitimate Child Born before Marriage—Bastardy Laws Amendment Act, 1872* (35 & 36 Vict. c. 65), s. 3.]—A married woman cannot after marriage to another man obtain an order of affiliation against the putative father of her illegitimate child born before the marriage although she is living separate and apart from her husband, he having turned her out of doors and refused to maintain her or the child on first learning of the child's existence. The husband is liable to maintain her and her child.

PEATFIELD v. CHILDS, (1899) 63 J. P. 117—[Div. Ct.

5 “*Single Woman—Wife Separated from Husband—Affiliation Order—Bastardy Laws Amendment Act, 1872* (35 & 36 Vict. c. 65), s. 3.]—A married woman who gives birth to an illegitimate child, and subsequently becomes separated from her husband, may obtain an affiliation order against the father of the child as a “single woman,” within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3.

WEBB v. MURRELL, (1904) 68 J. P. 104—[Stip. Mag.

6. “*Single Woman—Woman Living with Husband or only Colourably Separated from him at Date of Application—Bastardy Laws Amendment Act, 1872* (35 & 36 Vict. c. 65), s. 3.]—Where husband and wife are, at the

date of application, in fact living together, or only colourably living apart, the woman cannot obtain an affiliation order against another man under the Bastardy Laws Amendment Act, 1872, s. 3.

JONES v. DAVIES, [1901] 1 Q. B. 118; 70 [L. J. Q. B. 38; 64 J. P. 39; 49 W. R. 136; 83 L. T. 412—Div. Ct.

**II. CUSTODY OF BASTARDS.**

7. *Contract—Validity—Mother's Legal Responsibility towards her Child—No Power to Divest Herself of it—Void Contract to relieve Mother for ever from all Responsibility and Liability.*]—By a contract made between the plaintiff and the defendants, in consideration that the plaintiff, who was the mother of an illegitimate child, would place and allow the child to remain in the defendants' possession, if they approved and determined to keep her after the expiration of a month's trial, the defendants promised to maintain and bring up the child as though she were the defendants' child, and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the child. The child was placed in the defendants' possession, and maintained by them for some months, when they refused to maintain her any longer. In an action by the plaintiff to recover damages for breach of contract,

HELD—that the mother of the child owed a duty, and had a legal responsibility towards the child for its benefit, and that the mother could not by contract divest herself of it in favour of another person.

HUMPHREYS v. POLAK, [1901] 2 K. B. 385; 70 [L. J. K. B. 752; 49 W. R. 612; 85 L. T. 103—C. A.

8. *Rights of Parent—Adoption—Arrears of Aliment—Retention—Conduct of Parent—Objections to Parent's Custody—Custody of Children Act, 1891* (54 Vict. c. 3), ss. 1, 3.]—B. K., dairymaid at a farm, petitioned for delivery of her illegitimate child. Shortly after its birth the child was given to the respondent to be boarded, upon the agreement that aliment should be paid to the respondent for it at the rate of 16s per month, afterwards reduced by agreement to 12s. per month. B. K., so long as she was in farm service, had no home for the child along with herself. She was going to be married, and a house had been taken in which she was to live with her intended husband. The intended husband was willing and desirous that the child should live in family with, and be brought up by them. The respondent set up as a defence that by arrangement with the petitioner she agreed to adopt the child; she also claimed the right to retain the child as a security for money due in respect of its aliment.

HELD—that the defence could not be sustained, and that there was nothing disclosed in the pleadings to indicate or suggest the

**Custody of Bastards—Continued.**

existence of the conditions which were necessary to bring into operation the provisions of sect. 3 of the Custody of Children Act, 1891

KERRIGAN v. HALL, (1902) 4 F. 10—Ct. of Sess. [1st Div.

9. *Rights of Parent—Custody of Children Act, 1891* (54 & 55 Vict. c. 3), ss. 1, 3.]—The illegitimate daughter of a domestic servant had since her birth (seven years) been looked after by her mother's cousin, the house-keeper in a large house. The cousin had at first arranged for her to be boarded by respectable persons, and had subsequently obtained permission from her own master to bring the child to his house. The mother had never contributed to the child's expenses.

The mother, having now married, asked for the custody of her child.

HELD—that, having regard to all the circumstances of the case, the welfare of the child, and the kind of home in which she would have to live, the application ought not to be granted, although no moral turpitude was imputed to the mother of her husband.

M'DONALD v. WRIGHT, (1905) 7 F. 568 — [Ct. of Sess.

10. *Wishes of the Mother—Interests of the Child.*]—The wish of the mother of an illegitimate child as to its custody is primarily to be considered, but, if it be shown to be detrimental to the interests of the child to give the custody of it to the mother or to her nominee, the Court is not bound to accede to her wish.

A man and wife had for many years brought up as their own a woman's illegitimate child, and were willing and anxious to keep the child, without any charge, for good, and to settle a little money on it.

The mother desired to put the child into a Church institution.

HELD—that the mother's wish must prevail. Decision of the Div. Ct. (20 T. L. R. 515) affirmed.

REX v. NEW AND WIFE, (1904) 20 T. L. R. 583— [C. A.

**III. LEGITIMACY.**

11. *Action for Declaration—Presumption of Paternity.*]—H. married B. in 1894, and one child was born before they separated in 1895. In 1898 they were living in the same town, and occasionally met and spoke to each other: in that year a second child was born. In 1900 H. obtained a divorce, and he also obtained the custody of the first child in pursuance of an agreement, which recited that there was only one child of the marriage.

He now brought an action claiming a declaration that the second child was illegitimate.

HELD—(1) that the Court had no jurisdiction to entertain the action;

And (2) that (*semble*) the evidence would not have been strong enough to rebut the presumption of paternity.

YOOL v. EWING, [1904] 1 Ir. R. 434—M. R.

12. *Child Born after Marriage—Wife Pregnant at Date of Marriage—Evidence of Husband Admissible on this Point—Statement made by Wife before the Marriage.*]—The old legal presumption as to a child born after marriage, the husband being "within the four seas" at the date of conception, can no longer be relied on. The question of the legitimacy of such a child is, at the present day, one of fact, not of law; and though there is a presumption in favour of legitimacy, it may be rebutted.

Where a child is born so soon after marriage that it must have been conceived before, statements made by the wife before marriage, and by the husband even after marriage, are admissible to prove its illegitimacy.

P., who eventually succeeded to a peerage, married N. on June 23rd, 1849; in two months, discovering her to be *enceinte*, he left her, and made her a small allowance. On December 15th a fully-developed child was born, which P. and his family never recognised.

It was proved *alunde* that from April to June N. was living as the mistress of G., and she subsequently gave her child two of G.'s Christian names.

A statement made by N. to a friend before her marriage to the effect that she was pregnant by G. was held to be admissible; and also the sworn statement of P. that he was never intimate with his wife before marriage, that he was ignorant of her condition until after marriage, and that she admitted to him that G. was the child's father.

HELD—that the child was illegitimate.

*Anon. v Anon.* ((1856) 22 Beav. 481; 23 Beav. 273—Romilly, M.R.) disapproved.

*Morris v. Davies* ((1836) 5 Cl. & F. 163—H. L.) followed.

POULETT PEERAGE CASE, [1903] A. C. 395; 72 [L. J. K. B. 924; 19 T. L. R. 644—H. L. (Comm. of Priv.).

13. *Child Born after Marriage—Presumption—Adultery of Mother—Evidence of Husband's Non-Access.*]—Sexual intercourse between husband and wife is always to be presumed, unless the possibility of it taking place is actually disproved.

Evidence of a mother's adultery is not sufficient to bastardise a child born in wedlock unless it is actually proved that her husband did not have intercourse with her at the time of conception.

*Cope v. Cope* ((1833) 1 Moo. & Rob. 269; 42 R. R. 787) approved.

GORDON v. GORDON AND GORDON, [1903] P. 141; [72 L. J. P. 33; 89 L. T. 73—Jeune, P.

**Legitimacy—Continued.**

14. *Presumption of Legitimacy—Evidence to Bastardise—Child Born soon after Decree Nisi for Divorce—Statements—Admissibility as Evidence of "Conduct."*—The presumption in favour of the legitimacy of a child born in wedlock is rebuttable, but the evidence to rebut it must be "strong, distinct, satisfactory, and conclusive."

In such a case statements, which may be inadmissible as evidence of the actual facts stated, may yet be admissible as evidence of the "conduct" of the parties; *e.g.*, an entry in the register signed by the alleged father and stating himself to be the father: a written confession by the wife, and an affidavit by her husband verifying his petition in which non-access was alleged.

*Burnaby v Baillie* ((1889) 42 Ch. D. 482; 53 L. J. Ch. 842; 38 W. R. 125, 61 L. T. 634—North, J) followed.

*EVANS v. EVANS AND BLYTH*, (1904) 20 T. L. R. [612; 91 L. T. 600—Barnes, J.

**BATH AND WASH-HOUSES.**

*See* LOCAL GOVERNMENT.

**BATTERY.**

*See* CRIMINAL LAW, TRESPASS.

**BECHUANALAND.**

*See* DEPENDENCIES AND COLONIES, 194.

**BEER.**

*See* FOOD AND DRUGS.

**BEES.**

*See* ANIMALS, 20.

**BENCH WARRANTS.**

*See* CRIMINAL LAW AND PROCEDURE.

**BENEFICE.**

*See* ECCLESIASTICAL LAW.

**BENEFIT BUILDING SOCIETIES.**

*See* BUILDING SOCIETIES.

**BETTERMENT.**

*See* METROPOLIS, 181, 182.

**BETTING.**

*See* CRIMINAL LAW; GAMING AND WAGERING; INTOXICATING LIQUORS.

**BICYCLES.**

*See* CARRIERS; HIGHWAYS, 49, 117—119; STREET TRAFFIC.

**BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.**

*See also* AUCTIONS AND AUCTIONEERS, 18; BANKRUPTCY AND INSOLVENCY, 158, EVIDENCE.

*For* CHEQUES *see under* BANKERS AND BANKING.

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**I. BILLS OF EXCHANGE.**

1. *Acceptance—Bill Drawn on a Limited Company—Name of Company—Omission of "Limited"—Liability of Directors—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 41, 42.]*—A bill of exchange was drawn upon a limited company in its proper name, and it was accepted by two directors for the company, the word "limited," however, being omitted in the acceptance owing to the fact that the rubber stamp, by which the words of acceptance were impressed on the bill, was longer than the part of the bill on which the acceptance was stamped, and therefore the word "limited" overlapped the paper. The company did not pay the bill.

**Held**—that the name of the company was mentioned in the bill in accordance with sects. 41 and 42 of the Companies Act, 1862, and that the two directors were not personally liable thereon.

**Bills of Exchange—Continued.**

THE DERMATINE CO, LD. v ASHWORTH AND  
[ANOTHEE, (1905) 21 T. L. R. 510—  
Channell, J

2. *Blank Acceptance—Conversion into a Bill—Completion according to Authority and within reasonable Time.*—Where a person has signed a piece of blank stamp paper and delivered it to another for the purpose of its being converted into a bill, the onus is upon the signer to show that the bill was not completed according to authority and within a reasonable time.

ANDERSON v. SOMERVILLE, MURRAY & Co., [1898]  
[1 F. 90, 36 S. L. R. 86]

3. *Blank Acceptance—Inchoate Instrument—Filling in Name of Drawer—Liability of Acceptor*—If a person, however honestly, takes a piece of paper on which an acceptor's name appears, but no drawer's name, he runs the risk of the person who gives him the instrument not having authority to allow a drawer's name to be put to the instrument.

WATKIN BROTHERS, LD. v. LAMB AND ROBERTSON,  
[(1901) 85 L. T. 483; 17 T. L. R. 777—  
Kennedy, J.

4. *Accommodation Bill—Liability of Party to—Holder for Value—Holder in due Course.*—An accommodation party to a bill is liable to a holder for value although he be not a holder in due course, unless the title of the indorser were defective.

DOWNIE v. SAUNDERS' TRUSTEES, [1898] 6 S. L. T.  
[172—O. H.

5. *Conversion—Agent having Limited Authority to Indorse Bills “per pro.”—Authority Exceeded—Bills Negotiated—Liability of Recipient for Conversion—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25.*—The manager of the plaintiff's firm had authority to indorse bills and cheques “per pro.” for the purpose of paying them into the plaintiff's banking account, but he had no authority to cash them.

In fraud of the plaintiff he indorsed some bills in the firm name “per pro.” and others in the firm name *simpliciter*, and he persuaded the defendant (who acted in good faith) to give him cash for these bills. The plaintiff sued the defendant for conversion of the bills, and the jury found that (1) the plaintiff had not held out his manager as having general authority to indorse and cash cheques; (2) the bills indorsed “per pro.” were so indorsed in order to defraud the plaintiff; (3) the defendant acted in good faith.

HELD—that as to both classes of bills the plaintiff was entitled to recover; *quære*, whether, if the point had been taken, the damages ought only to have been nominal on the ground that a bill with a forged indorsement is valueless.

GOMPERTZ v. COOK, (1904) 20 T. L. R. 106—

[Wright, J.

6 *Dishonour—Action on Consideration—Part Payment of Debt—Indorsement for Value to Third Person—Bill in Third Person's Hands*]

An action does not lie on the consideration of a dishonoured bill while that bill is outstanding in a third person's hands.

A. owed B. £25. A. gave B. in part payment of this debt a bill for £20 payable in three months. During its currency B. indorsed this bill for value to C. At maturity C. presented the bill to A., but it was dishonoured. C. then sued B. as indorser. B. subsequently, but while the bill was still in C.'s hands, sued A. for the whole debt of £25. After the commencement of B.'s action against A., but before the trial, C. handed back the bill to B.

HELD—that, as B. at the commencement of the action was not in possession of the £20 bill, and in a position to deliver it to the defendant on payment of the amount due under it, his cause of action was not then complete, and the fact that before trial he obtained possession of the bill did not cure this defect.

DAVIS v. REILLY, [1898] 1 Q. B. 1; 66 L. J.  
[Q. B. 844; 77 L. T. 399; 46 W. R. 96—  
Div. Ct.

7 *Dishonour—Protesting—Place of Dishonour—Householder's Certificate—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 94.*—“Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill” (Bills of Exchange Act, 1882, 45, 46 Vict. c. 61, sect. 94).

HELD—that this section only applies to the place where a bill is dishonoured, and that the place where it has first been duly presented and dishonoured is the only place of dishonour within the meaning of this section.

Whether summary diligence may proceed, according to the law and practice of Scotland, upon a protest made by a householder under the 94th sect. of the Act of 1882, query.

SUMMERVILLE v. AARONSON, (1898) 25 R. 671; 35  
[Sc. L. R. 443—Ct. of Sess.

8 *Drawer—Liability of—Bill Drawn by Master of Ship—For Coal and Disbursements—Liability of Master—Notice of Dishonour—Delay—Special Circumstances—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 49, 50.*—In accordance with a standing contract between ship-owners and coal merchants, a master of a ship obtained bunker coal at Colombo and a small sum of money



**Bills of Exchange—Continued.**

for disbursements, drawing a bill upon the owners in these terms: "Value received on 300 tons coal and disbursements . . . supplied to my vessel to enable me to complete this voyage . . . for which I hold my vessel, owners and freight responsible." The bill was dishonoured in London on a Saturday, and the holders knew this upon the Monday. They ascertained that the vessel was somewhere in the Tyne, and spent two more days making fruitless inquiries as to her position. On the Thursday they posted notice of dishonour in a registered letter addressed to the master, "s s. E., Newcastle-on-Tyne," and the Post Office succeeded in delivering it.

**HELD**—(1) that the master was personally liable as drawer.

*The Ripon City* ([1897] P. 226; 66 L. J. P. 110; 77 L. T. 98—Barnes, J.) followed

(2) that under the circumstances the delay in giving notice was excused.

*THE ELMVILLE*, [1904] P. 319; 73 L. J. P. 104, [91 L. T. 151, 74 L. J. P. 69; 53 W. R. 287; 9 Asp. M. C. 606; 10 Asp. M. C. 23—

Barnes, J.

**9. Forged Indorsement—Forgery Abroad—Transfer for Value Abroad—Conflict of Laws—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 24, 72.]**—The transfer of bills of exchange or cheques by indorsement is within the rule of international law that the transfer of movable chattels is governed by the law of the country where the transfer took place.

*Alcock v. Smith* ([1892] 1 Ch. 238; 61 L. J. Ch. 161, 66 L. T. 126—C. A.) followed.

Section 24 of the Bills of Exchange Act, 1882, is merely declaratory of the English law, and does not control the rule of international law. A cheque which was drawn abroad in favour of the plaintiff upon a bank in London was indorsed by the plaintiff abroad to a particular person who carried on business in London. The cheque was stolen from the plaintiff's office abroad, and was taken to Vienna, where the indorsement was forged, and the cheque was paid to a banker there, who *bonâ fide* and without negligence paid the amount of it, and indorsed it to the defendant bank in London, who presented it to the bank on which it was drawn. By Austrian law the indorsement, though forged, and the transfer of the cheque in Vienna passed the property therein. In an action to wrongful conversion of the cheque,

**HELD**—that the Austrian law governed the transfer of the cheque in Vienna, and that, as that transfer conferred a title on the transferee, the defendants, who took from the transferee, had a good title to the cheque.

Decision of Walton, J. ([1904] 2 K. B. 870; 73 L. J. K. B. 993; 53 W. R. 92; 20 T. L. R. 794; 91 L. T. 652; 9 Com. Cas. 308), affirmed.

*EMBRICOS v. ANGLO-AUSTRIAN BANK*, [1905] 1 K. B. 677; 74 L. J. K. B. 326; 53 W. R. 306; 92 L. T. 305, 21 T. L. R. 268; 10 Com. Cas. 99—C. A.

**10 Form—Clerical Error—Omission of the Word "Pay"—Filling up Within a Reasonable Time—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2).]**—A bill payable two months after date was accepted on the 18th August, 1897. By a clerical error the word "pay" had been omitted from its text. This fact escaped the acceptor's notice, and the bill passed into the hands of a holder in due course, who presented it on maturity for payment. Then the acceptor observed and indicated the omission of the word "pay," and repudiated liability. On or about the 4th January, 1898, the holder in due course inserted the word "pay." An action was brought on the bill.

**HELD**—in the circumstances [including (a) it was a clerical error, (b) the acceptor never supposed he was signing anything else but a bill] that the defect had been remedied within a "reasonable time" within sect. 20 (2) of the Bills of Exchange Act, 1882.

*MACLEAN v. McEWEEN & SON*, [1899] 1 F. 381; 36 [S. L. R. 284.

**11. Holder for Value—Solicitor's Lien for Costs—Bill Overdue when Received by Solicitor—Bill Coming Back to Acceptor—Right of Action by Solicitor on Bill—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27, sub-s. 3.]**—The defendants, R. & Co., accepted a bill of exchange, and sent it to their agent, B., requesting him to fill in his name as drawer, and to get the bill discounted for them. B. filled in his name as drawer, endorsed the bill, and handed it to L., in order that he might discount it. L. claimed to retain the bill, on the ground of an alleged indebtedness of B. to him. The bill being a fully negotiable instrument, steps were taken to stop its negotiation, and accordingly an action was brought by B. against L. to recover the bill, and an interlocutory injunction was obtained restraining Lewis from negotiating it. At the time the action came on for trial the bill was overdue. The plaintiffs, who were the solicitors acting for B., obtained a verdict for the recovery of the bill. The question arose whether the plaintiffs could sue R. & Co. on the bill.

**HELD**—that they could not; that when the bill came back from L. the transaction, of discounting it, was wiped out as if it had never occurred; that the bill came back to B. when it was overdue and was then a dead instrument and had ceased to be negotiable, and the plaintiffs when their rights to it accrued knew the facts, that the plaintiffs got a lien, but they could not in the circumstances get any higher rights than their client B. had, and B. could not give them, in the circumstances, any rights upon the bill *qua* bill; and that when the plaintiffs

**Bills of Exchange—Continued.**

received a dead instrument they could not treat it as a living one.

Decision of Divisional Court ([1901] 85 L. T. 313, 17 T. L. R. 638) reversed.

REDFERN & SON v. ROSENTHAL BROTHERS AND [ANOTHER, (1902) 86 L. T. 855; 18 T. L. R. 718—C. A.]

12. *Indorsement—Blank Bill Filled In—Indorser Guaranteeing Debt—Circuity of Action*—The plaintiff was in the habit of selling goods to the defendant T., and the defendant S. agreed to be responsible for the price of the goods. The course of dealing was to be that T. should accept, and S. should indorse, a blank bill form and hand it to the plaintiff, who was to fill it up as a bill of exchange. In the case of two bills sued upon the plaintiff filled in his own name as drawer, and on one bill he signed his name as indorser above that of S., and on the other he signed his name as indorser below that of S. T. being unable to pay for the goods represented by these bills, the plaintiff sued S. upon the bills.

HELD—that, having regard to the agreement between the parties, S. could not set up the defence that the plaintiff was a previous indorser, nor the defence that when he indorsed the bills they were not complete and regular on the face of them.

Wilkinson v. Unwin ((1881), 7 Q. B. D. 636; 50 L. J. Q. B. 338; 56 L. T. 125; 29 W. R. 458—C. A.) and Jenkins v. Coomber ([1898] 2 Q. B. 168; 67 L. J. Q. B. 780; 78 L. T. 752; 47 W. R. 48—Div. Ct., *infra*) followed.

Decision of Lawrence, J. ([1907] 2 K. B. 507; 76 L. J. K. B. 874; 97 L. T. 434; 23 T. L. R. 596) affirmed.

GLENIE v. BRUCE SMITH AND ANOTHER, (1907) [24 T. L. R. 177—C. A.]

13. *Indorsement—Bill to order of Drawer—Indorsement by way of Security before Indorsement by Drawer—Bill not Complete and Regular—Liability of Indorser to Drawer—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 55, 56.*—A. was indebted to the plaintiffs, and, as he required time for payment, the plaintiffs agreed to take a bill from him provided he got his father's name on the back of the bill to guarantee payment. The plaintiffs accordingly drew a bill upon A. payable to their own order, and without indorsing the bill sent it to A., who accepted it and brought it back and gave it to the plaintiffs with the signature of his father (the defendant) written across the back of the bill. The plaintiffs subsequently indorsed the bill, which was not paid at maturity. In an action by the plaintiffs, as holders, against the defendant, as indorser,

HELD—that, as the bill had not become a complete and regular bill by the necessary indorsement of the drawers at the time the defendant wrote his name on the bill, the

defendant by so signing his name incurred no liability to the plaintiffs either on the bill, or upon any contract of indemnity or suretyship.

The principle laid down by the House of Lords in *Steele v. McKinlay* (5 App. Cas. 754), before the passing of the Bills of Exchange Act, 1882, followed.

JENKINS AND SONS v. COOMBER, [1898] 2 Q. B. [168, 67 L. J. Q. B. 780, 78 L. T. 752; 14 T. L. R. 425; 47 W. R. 48—Div. Ct.]

14. *Indorsement—Right of Transferee to have Transferor's Indorsement—"Holder"—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2; s. 31, sub-s. 4.*—The plaintiff agreed to advance a sum of money to one Chapman if the latter could procure a bill of exchange for the amount accepted by himself with the name of a responsible drawer attached Chapman accordingly brought to the plaintiff a bill drawn by the defendant to his own order and accepted by Chapman, and the plaintiff made the advance. The bill was not indorsed by the defendant, but this was not noticed at the time of the advance. The defendant, who had received no consideration for the bill, gave it to Chapman for the purpose of his raising money upon it. The defendant having refused to indorse the bill,

HELD—that the effect of the transaction was that the defendant was the "holder" of the bill within sect. 2 of the Bills of Exchange Act, 1882, immediately after it had been accepted by Chapman, and that he transferred the bill, by means of Chapman, to the plaintiff, and that the plaintiff as the transferee was entitled to have the indorsement of the defendant and to recover against him on the bill.

Decision of Phillimore, J. (20 T. L. R. 555), affirmed

WALTERS v. NEARY, (1905) 21 T. L. R. 146—[C. A.]

15. *Notice of Dishonour—Notice to Bank with Branches—Notice sent to Wrong Branch—Due Notice—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49.*—A bill of exchange payable in London was handed by the holders to the C. Bank at their Cardiff branch for collection, and was sent by that branch to the L. Bank in London to collect. The bill was dishonoured, and on the following day the L. Bank sent off notice of dishonour to the C. Bank, addressed by mistake to their branch at Cirencester. The mistake having been discovered, the L. Bank early on the next morning sent notice by telegram to the C. Bank at Cardiff. Thereafter due notice of dishonour was given to all the parties to the bill.

HELD—by Smith and Rigby, L.JJ. (*dis-sentiente* Collins, L.J.), that due notice of dishonour was given to the C. Bank in accordance with the provisions of sect. 49 of the Bills of Exchange Act, 1882.

**Bills of Exchange—Continued.**

*FIELDING AND CO. v. CORY,* [1898] 1 Q. B. 268;  
[67 L. J. Q. B. 7; 77 L. T. 453, 14 T. L. R.  
35; 46 W. R. 97—C. A.]

16. *Payment — Indorsee's Cheque — "Banker's Payment" given for Cheque, but returned to Paying Bank—Cheque Treated as Not Paid—Right of Holder to Recover from Acceptor.*—The plaintiffs, a bank, being holders for value of a bill of exchange accepted by one of the defendants, received from another of the defendants, who was an indorsee of the bill, a cheque drawn upon his account at the L. & C. Bank for the amount due upon the bill. The plaintiffs' collector presented the cheque for payment at the L. & C. Bank, but, instead of being paid in cash, he received a document called a "banker's payment," as is customary when a bank, being payee of a cheque, presents it for payment. Immediately after receiving the "banker's payment," the plaintiffs' collector was induced by an unfounded representation of a clerk in the L. & C. Bank to return it to the clerk. The plaintiffs did not afterwards obtain cash for the cheque, which was treated by the plaintiffs and the L. & C. Bank and the indorsee of the bill as a cheque which had not been paid.

**HELD**—that though the delivery of the "banker's payment" to the plaintiffs' collector was in law a payment of the cheque, yet as the plaintiffs had in fact never been paid the amount due upon the bill, the bill had not been discharged, and the plaintiffs as holders for value were entitled to recover the amount from the acceptor of the bill.

*LONDON BANKING CORPORATION, LD. v. HOES-*  
[NAIL, (1898) 3 Com. Cas. 105; 14 T. L. R.  
266—Bigham, J.]

**II. PROMISSORY NOTES.**

17. *Alteration—Alteration not Apparent—Indorsement—Stamp—Made in United Kingdom—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 34—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 64, 72, sub-s. 1 (a).*—A promissory note was made in England payable to the order of the Goderich Organ Company, and sent unstamped to the company in Canada. The company was turned into a limited company, and the word "limited" was, after the making of the note, inserted in the space after the name of the company, and the note was indorsed on behalf of the Goderich Organ Company, Ltd., to a bank for value.

**HELD**—(1) that the alteration, if material, was not "apparent" within the meaning of sect. 64 (1) of the Bills of Exchange Act, 1882; that, therefore, the note was set up according to its original tenor, and that the indorsement to the Goderich Organ Co., Ltd., was not equivalent to an indorsement of the Goderich Organ Company, who were the payees of the note, and could not therefore be relied upon as giving a cause of action.

And (2) that by sect. 34 of the Stamp Act,

1891, the note ought to have been stamped in England by the maker before he parted with it, and that therefore it could not be sued upon.

*BANK OF MONTREAL v. EXHIBIT AND TRADING*  
[Co., (1906) 22 T. L. R. 722, 11 Com. Cas.  
250—Phillimore, J.]

18. *Blank Form of—Note signed in Blank—Authority to Agent to Fill—Fraudulent Excess of Authority—Estoppel as against Payee—"Holder in Due Course"—"Negotiated"—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20.*—The defendant signed his name on a blank stamped piece of paper, and gave it to C. in order that the latter might himself sign it, and fill it up as a joint promissory note for £250. C. was then to hand it to the plaintiffs as security for his overdraft. C. in fact filled it up for £1,000, the stamp being sufficient to cover that amount. In an action by the plaintiffs on the note,

**HELD**—that they could recover the full amount, for the defendant was estopped from denying its validity.

Per Moulton, L.J., a note transferred for value to its payee is "negotiated to a holder in due course."

*Herdman v. Wheeler* ([1902] 1 K. B. 361;  
71 L. J. K. B. 270; 86 L. T. 48; 50 W. R. 300—  
Div. Ct., No. 20, *infra*) discussed.

*LOYD'S BANK, LD., v. COOKE AND OTHERS,* [1907]  
[1 K. B. 794; 76 L. J. K. B. 666; 96 L. T.  
715; 23 T. L. R. 429—C. A.]

19. *Blank Form of—Signed Paper—Paper handed to Person as Custodian—Fraudulent Issue of Note by Custodian—Estoppel.*—The defendant, who was about to leave South Africa for England, handed to his agent two blank forms of promissory notes signed by him, telling the agent to keep them for him, and saying that as he might want to make certain payments in South Africa, if he sent instructions to that effect his agent was to fill them up as promissory notes and raise money upon them. The agent, without receiving instructions to that effect from the defendant, filled up the notes and discounted them with the plaintiff, who *bonâ fide* gave full value for them. The agent misappropriated the money. In an action upon the notes,

**HELD**—that, as the defendant entrusted the blank signed forms of promissory notes to his agent as a custodian only and not with the intention that he should fill them up and raise money upon them, he was not estopped from denying that he was liable on the notes.

*Lloyd's Bank, Ltd. v. Cooke, supra*, distinguished.

*SMITH v. PROSSER*, [1907] 2 K. B. 735; 97 L. T.  
[155; 23 T. L. R. 597—C. A.]

20. *Blank form of—"After Completion Negotiated to a Holder in due Course"—Note not Filled up Strictly in Accordance*

**Promissory Notes—Continued.**

with the authority given—*Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 20.]—The defendant required a temporary loan of £15, and he applied to A. to lend him the money, and A. promised to do so. The defendant seems to have understood that A. proposed to get the money from some one else, and the name of the plaintiff was mentioned as a person who would lend it, but the defendant objected to borrowing the money himself direct from the plaintiff. The defendant gave to A. a promissory note payable to A. for £15. This was, however, burnt. In lieu of it the defendant gave to A. his signature on paper stamped with a ninepenny stamp, which would be sufficient for a note for £75. The defendant trusted A. to fill it up, but only authorised him to do so as a promissory note payable to himself and for £15 only. A. sent a cheque of his own for £15, which was, however, dishonoured. A. then asked the plaintiff to lend the defendant £25 upon his promissory note for £30 at a month. The plaintiff wrote a cheque for £25, payable to the order of the defendant, which was exchanged for the promissory note for £30 with the plaintiff's name inserted as payee. The plaintiff had not noticed that the note had been signed in blank or that A. had in any way acted without authority. The plaintiff's cheque for £25 was presented at the bank on which it was drawn with an indorsement which appeared to have been forged by A. The defendant got cash from some one for A.'s cheque, but when it was dishonoured he had to take it up. In the result, therefore, he got no part of the proceeds of the promissory note. The plaintiff brought an action against the defendant as the maker of the promissory note for £30.

**HELD**—that if the law were still as before the *Bills of Exchange Act, 1882*, there was no case which would be a distinct authority in favour of the plaintiff: that the note was not "negotiated" to the plaintiff within the meaning with which the words are used in the proviso to the 20th sect., viz., "negotiated to a holder in due course," and, therefore, the case was not covered by the words used in the proviso; and that the case fell within the first part of the second sub-sect. of sect. 20; and as the authority of the defendant was not strictly followed, he was not liable.

**HEEDMAN v. WHEELER**, [1902] 1 K. B. 361; 71 [L. J. K. B. 270; 50 W. R. 300; 86 L. T. 48, 18 T. L. R. 190—Div. Ct.

**21. Form—Stamp—Stamp Act, 1891, s. 33.]**—"In consideration of your advancing to M. and H. £250 on their joint and several promissory note, I undertake to pay £250 on demand, should their note not be met at maturity."

**HELD**—that this did not constitute a promissory note within the meaning of sect. 33 of the *Stamp Act, 1891*.

**DICKINSON v BOWER**, (1898) 14 T. L. R. 146—[Bigham, J.]

**22. Form—"Sum Certain in Money"—Bills of Exchange Act, 1882** (45 & 46 Vict. c. 61), s. 83 (1).—A letter addressed to an agent of a bank was in these terms—"We beg to acknowledge having received from you the sum of £250 stg., and we jointly and severally bind ourselves, our heirs and successors, to make payment of this sum, together with any interest that may accrue thereon."

**HELD**—that the letter was not a promissory note, as it was impossible on the face of it to ascertain any certain sum to be payable as required by the *Bills of Exchange Act, 1882*.

**LAMBERTON v. AIKEN**, (1900) 2 F. 189.

**23. Holder in Due Course—Maker of Note—Signature of Maker obtained by Fraud—Liability of Maker to Payee—Bills of Exchange Act, 1882** (45 & 46 Vict. c. 61), s. 29.]—The payee of a promissory note, who takes the note in good faith and for value, cannot recover upon it as against a joint maker of the note, who, without any negligence or want of due care on his part, has been fraudulently induced by the other joint maker to sign it in the belief that it was a wholly different document and that he was merely witnessing the signature of the other joint maker to such document. The person who has been so fraudulently induced to sign the note, if he has acted with due care and without negligence, is not estopped or precluded from setting up the true facts as a defence not only as against the payee, but also as against a holder in due course.

The payee, being one of the intermediate parties to the instrument, is not a holder in due course within the meaning of sect. 29 of the *Bills of Exchange Act, 1882*. The "holder in due course" is a person to whom, after its completion by and as between the immediate parties thereto, the bill or note has been negotiated in the manner provided for in that section.

**Foster v. Mackinnon** (L. R. 4 C. P. 704) followed.

**LEWIS v. CLAY**, (1898) 67 L. J. Q. B. 224; 77 [L. T. 653; 14 T. L. R. 149; 46 W. R. 319—Lord Russell of Killowen, C.J.]

**24. "Holder in Own Right"—Improper Negotiations by Payee—Payment by Maker—Note Fraudulently obtained by Payee from Holder—Return of Note by Payee to Maker—Bills of Exchange Act, 1882** (45 & 46 Vict. c. 61), s. 61.]—Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

The defendant being indebted to P., gave him certain promissory notes payable on demand. P. undertaking not to negotiate them, P. indorsed the notes generally to the plaintiffs to secure the repayment of an

**Promissory Notes—Continued.**

advance by them to him. The defendant paid off his debt to P., but did not ask for a return of the notes. Some months later P. obtained the notes from the plaintiffs by fraud, and sent them back to the defendant, who knew nothing of the fact of their having been negotiated.

**HELD**—that the plaintiffs were entitled to maintain an action on the notes against the defendant, who had received the notes back without any fresh consideration. The words “holder in his own right,” in sect. 61 of the Bills of Exchange Act, 1882, mean having a right not subject to that of any one else but his own—good against all the world, and do not mean “not in a representative capacity,” as executor, for instance.

Decision of Lord Russell of Killowen, C.J. (15 T. L. R. 264), reversed.

**NASH v. DE FREVILLE**, [1900] 2 Q. B. 72; 69 [L. J. Q. B. 484; 48 W. R. 434; 82 L. T. 642; 16 T. L. R. 268—C. A.

**25. Joint and Several Note—Clause as to Giving Time—Note not thereby Invalidated—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 83.**—A joint and several promissory note contained, in addition to the common clause as to payment by instalments, the following proviso:—“No time given to, or security taken from, or composition, or arrangement, entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party.”

**HELD**—that nevertheless the instrument was a valid promissory note.

**Yates v. Evans** ([1892] 61 L. J. Q. B. 446; 56 J. P. 565; 66 L. T. 532—Div. Ct.) approved.

**Kirkwood v. Smith** ([1896] 1 Q. B. 582; 65 L. J. Q. B. 408; 44 W. R. 480; 74 L. T. 423—Div. Ct.) overruled.

**KIRKWOOD v. CARROLL AND ANOTHER**, (1903) 72 [L. J. K. B. 208; 51 W. R. 374; 88 L. T. 52; 19 T. L. R. 253—C. A.

**26. Joint and Several Note—Surety—Notice to Creditor—Subsequent Advances—Right of Surety to Benefit of Securities.**—One L., in September, 1897, deposited with the plaintiffs the deeds of two houses by way of security for an overdraft of £200 and signed a memorandum of deposit. Subsequently this advance was cancelled, and L. obtained an advance for £900 on the deeds deposited in September, 1897, and on the deeds of two other houses, and signed a similar memorandum of deposit in respect of these two houses. In June, 1898, L. obtained a further advance of £450 from the plaintiffs, and he and the defendant signed a joint and several promissory note for £450 together with interest, payable to the plaintiffs, who sued upon it. At the time the defendant signed the note he was unaware of the previous securities given by L. to the plaintiffs. As between the plaintiffs and defendant there was no contract of suretyship; but as between L. and the defendant

the defendant signed the note merely as surety, and the plaintiffs' manager had notice of that fact. In April, 1899, the plaintiffs made further advances to L. to the extent of £500 against the security already in their hands. L. subsequently became insolvent.

**HELD**—that the defendant had priority over the plaintiffs in respect of the subsequent advances made by them, for that the obligation of the creditor was the same whether the surety knew of the existence of a security at the time he entered into the contract of suretyship or not. The surety was entitled to the benefit of any security existing at the time of the contract of suretyship or subsequently given.

**Forbes v. Jackson** ((1882) 19 Ch. D. 615; 51 L. J. Ch. 690; 30 W. R. 652; 48 L. T. 722—V.-C. Hall) followed.

**LEICESTERSHIRE BANKING CO., LD., v. HAWKINS**, [(1900) 16 T. L. R. 317—Mathew, J.

**27. Joint and Several Note—Principal—Surety—Discharge of Debt—Money Paid.**—The plaintiff and defendant gave a bank their joint and several promissory note, the plaintiff being surety for the defendant. The plaintiff, when the note was overdue, gave the bank, in payment and discharge of the joint and several note, his own sole note, and was accepted as sole debtor. It was not shown that the defendant knew of or assented to this transaction. Afterwards the plaintiff executed to the bank a mortgage, charged on his property, which was of adequate value to secure payment of the debt and interest. The note and mortgage were unpaid when the action was brought.

**HELD**—that in an action for money paid, the plaintiff was entitled to recover, and that, if necessary, the pleadings ought to be amended, though no amendment was asked for at the trial.

Per Gibson, J.—that the case was governed by **M'Kenna v. Harnett**, (1849) 13 Ir. L. R. 206.

Per Kenny, J.—that the case fell within **Fahey v. Frauley**, (1890) 26 L. R. Ir. 78.

**GORE v. GORE**, [1901] 2 Ir. R. 269—Q. B. Div.

**28. Presentation—Note payable at a particular place—Guarantee—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 87, sub-s. 1.**—Mrs. B. signed a guarantee in the following form: “If you will discount Mr. G. C.'s three promissory notes for £100 each, I will, in consideration of your so doing, in the event of all or either of the said promissory notes being dishonoured, pay you the amount of such dishonoured note or notes, as the case may be.” The promissory notes, with the exception of the date at which they became payable, were in the following form: “One month after date I promise to pay to Mr. H. G. E. s. or order the sum of £100, value received—G. C.” and across the note was written: “Payable at the London and Provincial Bank, Walthamstow—G. C.”

**Promissory Notes.—Continued.**

**HELD**—that the words written across the note were not in the body of the note, and that being so, by sect. 87 of the Bills of Exchange Act, 1882, presentment was not necessary at a particular place unless that particular place was mentioned in the body of the note; and that Mrs. B. was liable on her guarantee.

STEVENSON v. BROWN, (1902) 18 T. L. R. 268—  
Darling, J.

29. *Presentation—Payment on a Specified Day—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 51), s. 87 (1).*—By sect. 87, sub-s. (1) of the Bills of Exchange Act, 1882, it is provided that where a promissory note is in the body of it, made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other place presentment for payment is not necessary in order to render the maker liable. It is not necessary, in order to render the maker of the promissory note made payable at a particular place liable, that it should be presented there on the day when it becomes due. It will be sufficient if it is so presented on a subsequent day.

GORDON v. KERR, (1898) 25 R. 570, 35 Sc. L. R. [469.

**III. INSTRUMENTS NEGOTIABLE BY MERCANTILE USAGE.**

30. *Bearer Bonds—Law Merchant—Usages of Mercantile World—Evidence of Negotiability—Judicial Notice—Holders for Value—Liability of Brokers for Conversion of Stolen Bearer Bonds.*—It is no longer necessary to tender evidence in support of the fact that bearer bonds, whether Government bonds or trading bonds, foreign or English, are negotiable, as the Courts of Law ought to take judicial notice of it.

Bearer bonds of a foreign corporation and of an English company were stolen from the plaintiff by his clerk, who instructed a country broker to sell them. The broker sold them in the ordinary way of business through the defendants, who were brokers on the London Stock Exchange. The bonds were sold to jobbers, and when sold they were sent to the defendants, who handed them to the jobbers in exchange for the price. The money was then remitted to the country broker, who paid it to the clerk. The defendants acted throughout in good faith. It was proved that the bonds were treated in the mercantile world as negotiable instruments. In an action to recover the value of the bonds from the defendants,

**HELD**—that the negotiability of the bonds being established, the jobbers who bought them, having given value and having acquired them without any notice of infirmity in the vendor's title, could not be sued in trover by the plaintiff; that when in the ordinary course of business the de-

fendants negotiated the sale of the bonds to the jobbers they came under a personal liability to the jobbers to deliver them; this liability they undertook at the request of the country broker, and in consideration of their undertaking the liability the country broker promised he would deliver to them the bonds; that these circumstances made the defendants holders for value, and as the bonds were negotiable, gave them power to deal with the bonds; and that for these reasons the defendants became as much holders of the bonds for value as the jobbers, and that they were entitled to the same protection.

*Bechuanaland Exploration Co. v. London Trading Bank* ([1898] 2 Q. B. 658; 67 L. J. Q. B. 986; 79 L. T. 270; 3 Com. Cas. 285—Kennedy, J., No. 32, *infra*) followed.

EDELSTEIN v. SCHULER & Co., [1902] 2 K. B. [144, 71 L. J. K. B. 572; 40 W. R. 493; 87 L. T. 204; 18 T. L. R. 597; 7 Com. Cas. 172—Bigham, J.

31. *Bonds — Negotiable Instrument — Title of bona fide Holder for Value.*—The *bona fide* and onerous transferee of a negotiable bond from a person who has stolen it acquires a good title, and the mere fact that the person from whom the bond was stolen accidentally re-obtains permission of it does not entitle him to keep it in a question with the transferee.

WALKER AND WATSON v. STURROCK, (1897) 35 [Sc. L. R. 26—Ct. of Sess.

32. *Debenture Payable to Bearer — Evidence of Mercantile Usage—Negotiability Attaching to Instrument.*—Debentures were issued by the Beira Junction Railway Company in the following form: "The Beira Junction Railway (Port Beira to Fontesville) Limited (hereinafter called the company) will on the 1st day of July, 1925, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to the bearer, or, when registered, to the registered holder for the time being hereof on presentation of this debenture, the sum of one hundred pounds."

Among the conditions which appeared on the debentures were the following: (3) Except when registered this debenture is transferable by delivery, but the company will at any time, upon the request of the bearer whilst unregistered, register him or his nominee in the register below mentioned as the holder of this debenture, and indorse a note of such registration thereon, and the company will also at any time, upon the request in writing of the registered holder, his executors, or administrators, cancel the registration and the note thereof indorsed thereon, and thereupon this debenture will again become transferable by delivery. By conditions (4) and (5) a register is to be kept, and the registered holder will be considered as exclusively entitled; and by (6) every transfer of the debenture when registered is

**Instruments Negotiable, etc.—Continued.**

to be in writing under the hand of the registered holder or his legal personal representative, and before registration of the transfer proof must be given to the company of the title and identity of the transferee. and, "except whilst the same shall be registered, the bearer for the time being is entitled to the full benefit of this debenture, and all persons may act accordingly, and shall be deemed to adopt this condition". By (11) under certain conditions the money secured shall become immediately payable.

Twenty of these debentures were fraudulently stolen from the plaintiffs by their secretary, who has since died, and were deposited by him to secure advances made to him by the defendants in the ordinary course of business. The action was now brought by the plaintiffs against the defendants to recover these bonds. The question now raised was, whether these bonds were negotiable instruments, so that the defendants, who were *bonâ fide* holders for value, had a good title to the extent of their advances.

The defendants proved satisfactorily the usage of merchants and the use of the mercantile world generally, that such debentures were treated as negotiable instruments.

The plaintiffs contended that any such evidence ought not to be admitted.

**HELD**—following *Goodwin v Roberts* (L. R. 10 Ex. 76, 337; 1 App. Cas. 476) and *Rumball v. The Metropolitan Bank* (2 Q. B. D. 194), that as the mercantile custom had been satisfactorily proved these debentures could be treated as negotiable instruments. *Crouch v. The Credit Foncier of England* (L. R. 8 Q. B. 374) not followed.

**BECHUANALAND EXPLORATION CO., LD. v. LONDON TRADING BANK, LD.**, [1898] 2 Q. B. 658  
3 Com. Cas. 285; 67 L. J. Q. B. 986; 79 L. T. 270; 14 T. L. R. 587—Kennedy, J.

**33. Share Warrant of English Company—Warrant to Bearer—Companies Act, 1867** (30 & 31 Vict. c. 131), ss. 27, 28, 29—A share warrant to bearer issued by a company registered in England under the Companies Act, 1867, such warrant certifying that the bearer is entitled to one share in the company, may be proved by evidence of mercantile usage to be a negotiable instrument, and *quære* whether at the present date it is really necessary to call evidence on the point.

*Rumball v. Metropolitan Bank* ((1877) 2 Q. B. D. 194; 46 L. J. Q. B. 346; 25 W. R. 366, 36 L. T. 240) followed.

**WEBB, HALE & CO. v. ALEXANDRA WATERS CO.**, [LD., (1905) 93 L. T. 339; 21 T. L. R. 572—Div. Ct.

**BILLS OF LADING.**

*See also* **BANKRUPTCY**, 181; **SHIPPING AND NAVIGATION**.

**BILLS OF SALE.**

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*See also* **BAILMENT**, 1—3; **BANKRUPTCY AND INSOLVENCY**, 19, 184, 185, 221, 227, 231; **INTERPLEADER**, 6, 7; **MORTGAGES**.

**I. GENERALLY.**

**1. Absolute Bill of Sale—Bill of Sale as Security—Execution—Apparent Possession—Interpleader—Bills of Sale Act, 1878** (41 & 42 Vict. c. 31), ss. 4, 8, 11—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 Vict. c. 43).—In 1893 the defendant gave to his mother-in-law, who resided in the same house, an absolute bill of sale over his furniture in the house. The bill of sale was duly registered in the first instance, but there was no renewal of the registration subsequently. In 1900 the grantee gave a bill of sale over the same furniture to the claimant as security for an advance, and this bill of sale was duly registered. Subsequently the goods comprised in that bill of sale were taken in execution at the suit of an execution creditor, and an interpleader issue was directed to try the title to the goods. The mother-in-law lived all along in the house in which the goods were, and the execution debtor, the defendant, lived there also.

**HELD**—that although the registration of the absolute bill of sale never was renewed, yet at the date when the bill of sale by way of mortgage was granted to the claimant there was no person entitled to claim the goods as against her as execution creditor or trustee in bankruptcy, or who, under the Bills of Sale Act, 1878, was entitled to avoid the absolute bill of sale; that there was no evidence to show that the goods remained in the apparent possession of the execution debtor; and that the claimant was entitled to the goods as against the execution creditor.

*Cookson v Swire* ((1884) 9 App. Cas. 653; 54 L. J. Q. B. 249; 33 W. R. 181; 52 L. T. 30; —H. L. (E.)) followed.

**ANTONIADI v. SMITH**, [1901] 2 K. B. 589, 70 [L. J. K. B. 869, 49 W. R. 693, 85 L. T. 200; 17 T. L. R. 643; 8 Manson, 335—C. A.

**2. Covenant by Grantor to Replace Worn-out Articles—Assignment of Chattels so Substituted—Bills of Sale Act (1878) Amendment Act, 1882** (45 & 46 Vict. c. 43), ss. 4, 6, 9.—By a bill of sale, given to secure repayment of money, the grantor assigned the scheduled articles, and covenanted to replace with similar articles such of them as might become worn out. He also assigned such substituted articles.

**HELD**—that the bill of sale was valid.

**Generally—Continued**

*Seed v. Bradley* ([1894] 1 Q. B. 319, 63 L. J. Q. B. 387; 42 W. R. 257; 70 L. T. 214; 1 Manson, 157—C. A.) followed.

*COATES v. MOORE*, [1903] 2 K. B. 140; 72 [L. J. K. B. 539; 51 W. R. 648; 89 L. T. 8—C. A.]

See also No. 17, *infra*.

3. "*Defeasance or Condition*"—*Collateral Security—Guarantee by Third Person—Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 3—*Moneylender—Reopening Transaction—Moneylenders Act*, 1890 (63 & 64 Vict. c. 51), s. 1.]—A collateral security given by a third person upon the execution of a bill of sale, being a guarantee by that person for the payment of the principal advanced and the interest in case the bill of sale should prove insufficient or inoperative for that purpose, is not a "condition or defeasance" within the meaning of sect. 10, sub-s. 3, of the Bills of Sale Act, 1878, so as to require registration.

The Court, upon the particular facts, refused to re-open the transaction under sect. 1 of the Moneylenders Act, 1900.

*OAKES v. GREEN*, (1907) 23 T. L. R. 560—Channell, J

4. *Defeasance—Arrangement as to Manner of Paying Interest—Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 10.]—An arrangement as to the manner in which the interest should be paid is not a defeasance of a bill of sale within sect. 10 of the Bills of Sale Act, 1878.

*REED v. FRANKS*, (1900) 16 T. L. R. 347—Darling, J.

Overruled by *Pettit v. Lodge & Harper*, [1908] 1 K. B. 744; 77 L. J. K. B. 413—C. A.

5. *Estoppel—Approbating and Reprobating the Transaction—Bill of Sale Invalid—Bills of Sale Act*, 1882 (45 & 46 Vict. c. 43), s. 9.]—The defendant gave a bill of sale over his goods to the plaintiffs. Subsequently executions were levied upon the goods, and on each occasion the plaintiffs, at the request or with the knowledge and concurrence of the defendant, successfully asserted their title to the goods under the bill of sale. In an action by the plaintiffs against the defendant, the latter alleged that the bill of sale was invalid, the consideration not being truly stated.

**HELD**—that the defendant could not set up the invalidity of the bill of sale, as he could not both affirm and disaffirm the transaction.

*COMITTI & SON, LD. v. MAHER*, (1905) 22 T. L. R. [121; 94 L. T. 158—Kekewich, J.

6. *Hire-Purchase Agreement—Furniture—Licence to Seize—True Nature of the Transaction.*]—M. agreed to buy an hotel including the furniture, fixtures, &c., but could not find the last £2,000 of the pur-

chase-price. He applied to the defendants, who were wine merchants, for a loan, but, as he refused to give a bill of sale, it fell through. It was then arranged that the defendants should buy the furniture, &c., from the vendor for £2,000, and let it to M. on a hire-purchase agreement containing the usual licence to seize; and in return M. agreed to buy all wines from the defendants. In M.'s bankruptcy his trustee impeached the agreement as being really a bill of sale, and void for want of registration.

**HELD**—that the Judge had rightly drawn the inference that the sale to the defendants and the letting by them to M. were only colourable; that the transaction was really a loan upon the security of the agreement, and was void against creditors for non-registration as a bill of sale.

Decision of C. A., *sub nom. Mellor v. Maas* ([1903] 1 K. B. 226; 72 L. J. K. B. 82, 88 L. T. 50; 18 T. L. R. 139, 10 Manson, 26), affirmed

*MAAS v. PEPPER*, [1905] A. C. 102; 74 L. J. K. B. [452; 53 W. R. 513; 92 L. T. 371; 21 T. L. R. 304; 12 Manson, 107—H. L. (E.).

7. *Inventory with Receipt Attached—Sale by Sheriff—Receipt of Sheriff's Officer—Subsequent hire of Goods to Execution Debtor—Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 1.]—In April, 1901, the goods of an execution debtor were seized by the sheriff under a writ of *fi. fa.* By consent of the execution debtor the goods were, on April 22nd, sold by the sheriff to the claimant for £240, and the claimant paid this sum to the sheriff and took formal possession of the goods on the same day. The claimant, on April 25th, let the goods on hire to the execution debtor, who remained in possession thereof, and on the same day the claimant wrote to the auctioneer who had been employed by the sheriff with a view to a sale by auction asking him to send him an inventory of the goods. The claimant wished for the inventory in order that it might be attached to the hire agreement. The auctioneers sent to the claimant a receipt, dated April 27th, and signed by the sheriff's officer, for the purchase money of the goods, though the claimant had not asked for it, and also the inventory. In 1904 the goods were seized under a writ of *fi. fa.* issued under another judgment against the execution debtor.

**HELD**—that it was the intention of all parties that the property in the goods should pass to the claimant on April 22nd, 1901, and that the sale was complete on that day; that neither the inventory and receipt nor the receipt alone were intended to be an instrument of transfer or a record of the transaction, and that therefore neither of them required registration as a bill of sale.

*STAMMERS v. MARGRETT*, (1905) 21 T. L. R. 342—[Walton, J.]

8. *Letter of Lien—Bankruptcy of Traders—Order and Disposition—Goods in Hand of*



**Generally—Continued.**

*Bleachers—Advances by Bank—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44*—The debtors were in the habit of purchasing goods in England for transmission to India upon the orders of a firm there. In order to prepare the goods so bought the debtors sent them to bleachers, and for the purpose of paying for the goods they obtained an advance from a bank to whom they gave a letter of lien stating that the advance was a loan on the security of goods in course of preparation for shipment to the East, and that they held the goods then in the hands of the bleachers on the bank's account as security for the advance, and that when the goods were shipped to India the bills of lading and shipping documents would be handed to the bank. The bleachers' receipt for the goods was enclosed with the letter of lien. The debtors were adjudged bankrupts while some of the goods were in the hands of the bleachers and other goods were in the debtors' warehouse, having been sent there by the bleachers, in respect of which a letter of lien as above had been given to the bank. The trustee in bankruptcy claimed the goods upon the ground that the letter of lien was a bill of sale, and was therefore void as not being in the required form and not being registered.

**HELD**—(1) that, the intention of all parties being that the bleachers should hold the goods for the bank, the document came within the exception in sect. 4 of the Bills of Sale Act, 1878, as a "transfer of goods in the ordinary course of business of a trade or calling" or as a document "used in the ordinary course of business as proof of the control of goods," and was therefore not a bill of sale; and

(2) that the goods in the debtors' warehouse were not in their "order and disposition."

*Decision of Bigham, J. ([1905] 2 K. B. 381; 74 L. J. K. B. 677; 53 W. R. 589; 92 L. T. 779; 21 T. L. R. 536; 12 Manson, 131), affirmed.*

*IN RE HAMILTON, YOUNG & CO., EX PARTE CARTER, [1905] 2 K. B. 772, 21 T. L. R. 757; 54 W. R. 260; 93 L. T. 591; 12 Manson, 365*  
—C. A.

**9. Licence to take Possession—Goods on Premises of Railway Company—Tenancy—Lien of Company—Bankruptcy—Damages for Trespass and Causing Bankruptcy—Mutual Dealings—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 38, 44.**—A railway company let to a coal merchant a certain piece of land at a rental for the purpose of stacking coal unloaded from trucks on the company's sidings. The land adjoined the railway sidings, and was within the company's yard, the gates of which were closed during certain hours of the night. By certain agreements between the company and the coal merchant the latter agreed to pass over the company's railway a certain minimum quantity of coal each year, and the com-

pany agreed to open a monthly credit account for the carriage of coal upon condition that they should have a lien upon all waggon, goods, minerals, &c., conveyed on their line, or which should be at any time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company, the latter to be at liberty to sell and dispose of any such waggon, goods, minerals, &c., in order to satisfy the lien; and the company reserved the right to close the account upon giving one day's notice of their intention to do so, whereupon the whole of the account was to become due. The account being in arrear, the company gave notice and closed the account, and took possession of the coal both on the land and in the trucks on the sidings. The coal merchant shortly afterwards was adjudged bankrupt. His trustee in bankruptcy brought an action against the railway company to recover damages for wrongfully trespassing and seizing the goods, alleging that the agreement was a bill of sale, and was void for want of registration, and that the act of the company brought about the bankruptcy.

**HELD**—that the agreement was not a licence to take possession of goods within sect. 4 of the Bills of Sale Act, 1878, the company having already a certain degree of possession of the coal; and that therefore the agreement was not a bill of sale, and that the plaintiff could not recover.

*Semble*, that even if the agreement was a bill of sale, the right of action for (1) damages owing to the act of the company bringing about the bankruptcy, and (2) damages for the trespass (apart from the value of the coal seized) was in respect of a wrongful act personal to the bankrupt and would not pass to his trustee in bankruptcy.

*Semble* also, that the company would not have been entitled to set off, under sect. 38 of the Bankruptcy Act, 1883, the debt owing to them against any damages which the plaintiff might have recovered.

*LORD'S TRUSTEE V. G. E. RY. CO., (1907) 24 [T. L. R. 83—Phillimore, J.]*

**10. Principal and Interest—Payable by Instalments—Sale by Grantee authorised by Grantor—Interest subsequent to Sale.**—Where repayment under a bill of sale was to be made by monthly instalments extending over a certain period, and where before the expiration of that period the grantee by agreement with the grantor sold the security, and deducted from the purchase-money the principal and interest due to him up to the end of the period,

**HELD**—that the lender could only claim the principal and the interest up to the date the security was realised.

*WEST V. DIPROSE, [1900] 1 Ch. 337; 69 [L. J. Ch. 169; 64 J. P. 281; 48 W. R. 389; 82 L. T. 20—Cozens-Hardy, J.]*

**11. Unregistered Agreement—Apparent**

**Generally—Continued.**

*Possession—Bonâ Fide Purchaser—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.]—*G. in 1903 sold to a compar. certain furniture in his house by an agreement not registered as a bill of sale. In 1904 the company sold it by an unregistered agreement to G.'s mother, who allowed it to remain in his possession. In 1905 it was seized in execution by a creditor of G.

**HELD**—that his mother could not establish a claim to it.

**HOPKINS v. GUDGEON** (GUDGEON, CLAIMANT), [1906] 1 K. B. 690; 75 L. J. K. B. 452; 54 W. R. 419; 94 L. T. 578, 13 Manson, 363—Div. Ct.

**12. Verbal Agreement for Sale of Goods—Valuation and Inventory—Lease of House and Fixtures.]—**I, being indebted to H., his landlord, agreed to sell to him his "valuation at the M. Hotel—T. to value for both." On August 9th T. prepared a stamped inventory and valuation.

On September 12th H. gave to I. a new lease of the M. Hotel with the fixtures and effects set out in the schedule to the lease, which stated that "the whole of the valuation as per inventory is the property of H." I. signed the lease.

**HELD**—that neither the document of August 9th nor the lease constituted a bill of sale, as there was a good sale passing the property apart from the documents.

**CLAPHAM v. IVES** (HOLMES, CLAIMANT), (1904) 91 [L. T. 69—Div. Ct.

**II. REGISTRATION.**

**13. Affidavit—Grantor's Address—Misdescription.]—**With every bill of sale there must be filed an affidavit of the time of such bill being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale. In the case of an insufficient description in the affidavit the bill of sale may be looked at, but in the case of misdescription this cannot be done.

**Murray v. Mackenzie** ((1875), L. R. 10 C. P. 625; 44 L. J. C. P. 313; 23 W. R. 595; 32 L. T. (N.S.) 777) followed.

**MARKS v. DERRICK**, [1899] 80 L. T. 60—Div. Ct.

**14. Affidavit—Grantor's Name—Grantor generally known by an assumed Name—Registration in correct Name—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 2.]—**The Bills of Sale Act, 1878, requires as a condition precedent to the validity of the registration of a bill of sale, and consequently to the validity of the bill itself, that the affidavit which is filed with the bill should contain a description of the residence and occupation of the person making the same; but there is no corresponding requirement that the name of the grantor should appear on the file.

Miss O. was known to all except a very limited number of persons by the name of Mrs. S., and by that name alone. Throughout proceedings in the Chancery Division, and in a deed of assignment of certain furniture and in the affidavit filed upon registration of the deed, she was described by the name of O. alone, no reference being made to the name of S.

**HELD**—that the registration of the deed was not invalidated, for assuming O. was a wrong name, it was not combined with description which, although inaccurate, would nevertheless not be misleading if the name were correct.

**STOKES v. SPENCER**, [1900] 2 Q. B. 483; 69 [L. J. Q. B. 792, 49 W. R. 13; 83 L. T. 199; 16 T. L. R. 446—Div. Ct.

**15. Affidavit—Grantor's Occupation—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 2.]—**A married woman living apart from her husband was employed as manager of a dressmaking business at a weekly salary. In a bill of sale of which she was the grantor, and in the affidavit filed on registration, she was merely described as a married woman.

**HELD**—that the registration was bad because her occupation was not described.

**KEMBLE v. ADDISON**, [1900] 1 Q. B. 430; 69 [L. J. Q. B. 299; 48 W. R. 331; 82 L. T. 91—Div. Ct.

**16. Affidavit—Grantor's Occupation—Married Woman Carrying on Separate Business—Described as "Wife of A. B."—Provision for Payment of Insurance Moneys to Grantee—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2)—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 8, 9.]—**Where a married woman living with her husband, A. B., carries on a separate business, the question whether a description of her in the affidavit filed on registration as "the wife of A. B., of the same place, commission agent," is sufficient or insufficient so as to render the bill of sale bad is a question of degree, and the test to be applied is that laid down by Martin, B., in *Luckin v. Hamlyn*, (1869) 18 W. R. 43, 21 L. T. 366, where he says: "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is that such a description should be given that if inquiry be made in the place where the person resides he may be easily identified."

Where there is a provision for insurance of the chattels by the grantor of a bill of sale, and "that he will expend any moneys paid in consequence of loss or damage by fire under such policy in discharge of the moneys secured by these presents," it does not vitiate the bill of sale as making uncertain the time for payment of the moneys lent contrary to the form in the schedule to the Act of 1882.

**NEVERSON v. SEYMOUR**, (1907) 52 Sol. Jo. 12—[Div. Ct.

**Registration—Continued.**

17. *Filed Copy—Defects in—Supplying Defect from the Filed Affidavit—Bills of Sale Act, 1878* (41 & 42 Vict. c. 31), s. 10 (2).]—A bill of sale was duly executed and attested, but the copy filed on registration omitted the grantor's signature, and the signature, address, and description of the attesting witness.

**HELD**—that the bill of sale was valid, for all the defects could be supplied from the affidavit of the attesting witness filed with the copy.

*Thomas v. Roberts* ([1898] 1 Q. B. 657, 67 L. J. Q. B. 478; 78 L. T. 812; 5 Manson, 70—Div. Ct., *infra*) approved and applied.

*COATES v. MOORE*, [1903] 2 K. B. 140; 72 [L. J. K. B. 539; 51 W. R. 648; 89 L. T. 8; 10 Manson, 271—C. A.

*See also* No. 2, *supra*.

18. *Filed Copy—No Date—Date in Original and Affidavit—Bills of Sale Act, 1878* (41 & 42 Vict. c. 31), s. 10, sub-s. 2.]—A Bill of sale is not void because the copy filed in pursuance of sect. 10 of the Bills of Sale Act, 1878, has no date inserted, where the original bill and the affidavit filed with such copy contain the actual date.

*THOMAS v. ROBERTS*, [1898] 1 Q. B. 657; 67 [L. J. Q. B. 478; 78 L. T. 712; 14 T. L. R. 309; 5 Manson, 70—Div. Ct.

**III. SEIZURE.**

19. *Default in Payment of Interest—Seizure for Protection of Security—Relief—Bills of Sale Act, 1882* (45 & 46 Vict. c. 43), s. 7.]—The grantor of a bill of sale, given as security for the repayment of money, made default in a monthly payment of interest due under the bill. The grantee hereupon seized the goods comprised in the bill for the purpose of holding them until payment of the interest due.

**HELD**—that, as the seizure was merely for the purpose of protecting the security, not for the purpose of realising it, an order could not be made under sect. 7 of the Bills of Sale Act, 1882, that the grantee should deliver up the bill to the grantor on payment of the principal and interest due, and costs.

*Wickens v. Shuckburgh, Ex parte Wickens* ((1898) 1 Q. B. 543, *infra*) distinguished.

*EX PARTE ELLIS*, [1898] 2 Q. B. 79; 67 L. J. Q. B. [734; 78 L. T. 733; 5 Manson, 231; 14 T. L. R. 454; 46 W. R. 531—C. A.

20. *Non-production of Receipt for Rent—Reasonable Excuse—Seizure to Realise Security—Payment of Amount Due—Discharge of Security—Jurisdiction of Judge—Bills of Sale Act, 1882* (45 & 46 Vict. c. 43), s. 7.]—When the personal chattels assigned by a bill of sale have been seized by the grantee for the purpose of realising his security, a judge has power, under sect. 7 of the Bills of Sale Act, 1882, to order that

the security shall be discharged upon payment of the principal sum secured with interest to the date of payment.

The grantor of a bill of sale does not fail to produce the last receipt for rent "without reasonable excuse," within the meaning of sect. 7 (2) of the Bills of Sale Act, 1882, if the rent is not long in arrear, and the landlord has not pressed for payment.

*Ex parte Cotton* (11 Q. B. D. 301) approved.

*Semble*, a demand by the grantee of a bill of sale that the grantor shall send the last receipt for rent to him at his address is not a demand that it shall be "produced," within the meaning of sect. 7 (4) of the Bills of Sale Act, 1882.

*WICKENS v. SCHUCKBURGH, EX PARTE WICKENS*, [1898] 1 Q. B. 543; 67 L. J. Q. B. 397; 78 L. T. 213; 5 Manson, 55; 46 W. R. 385—C. A.

**IV. STATUTORY FORM. \***

*See also* under II. REGISTRATION.

21. *Amount, and Dates for Payment of Interest Uncertain—Validity—Bills of Sale Act Amendment Act, 1882* (45 & 46 Vict. c. 43), Sch.]—A bill of sale in consideration of £50 due from the grantor to the grantee assigned chattels "by way of security for the said sum of £50," and provided for the payment of "the said principal sum with interest thereon after the rate of £5 per cent. per annum by the following instalments, viz., £10 on the 25th December, 1903, and the like sum of £10 on the 25th March . . . in each year succeeding, until the whole amount be duly paid."

**HELD**—void, as not being in accordance with the statutory form.

*ATTIA v. FINCH (TOWERS, CLAIMANT)*, (1904) 91 [L. T. 70—Div. Ct.

22. *Principal and Interest Repayable by Instalments—Omission of Words "Pounds" or "Shillings"—Reasonable Certainty as to Meaning—Held Good—Bills of Sale Act, 1882* (45 & 46 Vict. c. 43), s. 9. Sch.]—By a bill of sale, given by way of security for the payment of £70 and interest at the rate of 1s. per £ per month, the grantor agreed to pay "the principal sum aforesaid, together with the interest then due, by monthly instalments of seven on the 25th day of every month." It was contended that the omission of "pounds" or "shillings" after "seven" renders the instrument uncertain and void.

**HELD**—that, though the Court could not look beyond the document itself, yet, as that showed the interest alone to be £3 10s. per month, there could on the face of it be no reasonable doubt that the word omitted was "pounds," and that, therefore, the document was substantially in accordance with the schedule form, and valid.

*MOURMAND AND ANOTHER v. LE CLAIR (PROVINCIAL UNION BANK, CLAIMANTS)*, [1903] 2 K. B.

**Statutory Form—Continued.**

216; 72 L. J. K. B. 496; 51 W. R. 589; 88 L. T. 738; 19 T. L. R. 454; 10 Manson, 261—Div. Ct.

**23. Consideration—Statement of—“The sum of £300 now Paid”—Promissory Note not due at the Date of the Bill of Sale—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 8.]**—A bill of sale stated the consideration therefor to be a sum of £300 “now paid” by the grantee to the grantor. Of the £200 paid by the grantee to the grantor £100 was, in pursuance of a previous agreement between them, applied by the grantor to the retirement of a promissory note then current, upon which the grantor and grantee were jointly and severally liable to a third party, and which was shortly to become due.

**HELD**—that as the liability, to the satisfaction of which the money was agreed to be applied, was a liability to a third person and not to the grantee, the fact that the liability was not a debt already due did not render it obligatory to set out in the bill of sale the agreement as to the application of the money, and that the consideration of the bill was truly stated.

**IN RE WILTSHIRE, EX PARTE EYNON, [1900] 1 Q. B. 96; 69 L. J. Q. B. 145; 48 W. R. 256; 81 L. T. 616—Div. Ct.**

**24. Consideration—Statement of—Payment off of a prior Bill of Sale with Money advanced—Provision for Repayment of Principal and Interest by Monthly Instalments of a Specified Amount—Right of Grantee to Interest as if the Date for Repayment had been inserted—Misdescription of Grantor which is not Misleading.]**—Where the money consideration as set forth in a bill of sale has been actually paid to the grantor it is not necessary to refer to the payment off of a prior bill of sale out of the proceeds. Where the principal and interest advanced on a bill of sale is to be repaid by regular instalments of a specified amount, the holder is in the same position as if the date of repayment which can be gathered by calculation had been inserted in the bill of sale, and can only be redeemed by payment of interest to that date.

*Semble*, a misdescription of a grantor, which is not calculated to mislead, does not avoid a bill of sale.

**IN RE DAVIES, EX PARTE EQUITABLE INVESTMENT [Co., LD., [1898] 77 L. T. 567; 4 Manson, 358—Wright, J.**

**25. Consideration—Occupation of Grantor—Specific Description of Farm Stock—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 4, 8, 9.]**—The defendant, Sarah Jenkins, borrowed from the claimant prior to the 29th of April, 1899, at various times sums of money amounting to £40. On that date it was agreed that the claimant should advance

her a further sum of £50, and that she should give a bill of sale on her farm stock to secure the sum of £90; and a bill of sale was thereupon executed and the £50 advanced. In the bill of sale the consideration was stated to be “the sum of £90 now due and owing,” and the grantor, who farmed the farm herself, was merely described as “Sarah Jenkins, of Ynysgwas Farm, in the county of Glamorganshire, married woman.” In the schedule the farm stock was described as “two horses, four cows.”

An execution having been levied by the plaintiff upon the goods comprised in the bill of sale, the claimant claimed the goods, and the bailiff interpleaded. The county court judge held the bill of sale to be good, and gave judgment for the claimant. The plaintiff appealed.

**HELD**—that the words “two horses, four cows” were not such a specific description of the farm stock as to satisfy sect. 4 of the Bills of Sale Act, 1882, and therefore they must be excluded from the schedule.

**Carpenter v. Deen ([1889] 23 Q. B. D. 566; 61 L. T. 860) followed.**

**HELD ALSO**—that the bill of sale was void, on the ground that the consideration was not truly stated, since the bill omitting to acknowledge the receipt of the £50 then advanced was not in accordance with the form prescribed by the Act.

**HELD ALSO**—that the point raised as to the sufficiency of the description of the grantor’s occupation must be decided in favour of the validity of the document.

**DAVIES v. JENKINS, [1900] 1 Q. B. 133; 69 [L. J. Q. B. 187; 48 W. R. 286; 81 L. T. 788—Div. Ct.**

**26. Covenant to Produce, when called upon, last Receipts for Rent, Rates and Taxes—Power to Seize on Breach of any Covenant—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 7, 9.]**—By a bill of sale the grantor agreed to pay the rent, rates and taxes payable by him in respect of the premises in which the chattels assigned to the grantee were; and also, when called upon by the grantee, to produce to him the last receipts for such rent, rates and taxes, and by the bill of sale it was provided that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, that was to say, “(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee produce to him the last receipts for rent, rates and taxes”; and it was further provided that if the chattels thereby assigned should be seized or taken possession of by the grantee in consequence of the breach of any of the covenants therein contained, the grantee should be at liberty to remove and sell the same.

**HELD**—that the bill of sale was good, as

**Statutory Form—Continued.**

the general words of the further proviso were covered by sect. 7 of the Act incorporated in the bill of sale.

IN RE BULLOCK, EX PARTE WARD, [1899] 2 Q. B. 517; 68 L. J. Q. B. 953, 48 W. R. 46; 81 L. T. 268; 6 Manson, 367—Wright, J.

**27. Deviation from—Personal Chattels—Title Deeds of Leasehold Property—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 9.]**—By a bill of sale given as security for a loan the grantor assigned to the grantee the several chattels and things specifically described in the schedule thereto, being in a certain licensed house, and the bill of sale provided that the chattels and things should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in sect. 7 of the Bills of Sale Act, 1882, and that if the chattels and things thereby assigned should be seized or taken possession of in consequence of the breach of any of the covenants therein contained, the grantee might remove or sell the same at the expiration of five days from the day of such seizure or taking possession. The schedule contained a list of personal chattels, including the following item:—“Assignment dated January 24, 1902 (between Walter Edward Lovegrove and Edward Richard Lovegrove, of the first and second parts, and the grantor of this bill of sale, Edmund Basil Denton, of the third part), of lease (dated November 13, 1891) of the said” licensed house, “and all the muniments of title referred to in the said assignment.”

**HELD**, by Vaughan Williams and Romer, L.J.J., Cozens-Hardy, L.J., dissenting—that the bill of sale did not create a charge on the land, but merely a security upon the title deeds, and that it was valid as being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

SWANLEY COAL CO. v. DENTON, [1906] 2 K. B. 873; 75 L. J. K. B. 1009; 22 T. L. R. 766; 95 L. T. 659; 13 Manson, 353—C. A.

**28. Description of Grantor's Occupation—Misleading Misdescription Held Invalid—Bills of Sale Acts, 1878 (41 & 42 Vict. c. 31), s. 10 (2), and 1882 (45 & 46 Vict. c. 43), s. 8.]**—L. granted a bill of sale to his mother on August 8th, describing himself in the document, and in the affidavit filed therewith, as “auctioneer and valuer.” He had in fact, for some time, carried on business as an auctioneer, but on July 5th his licence expired, and was not renewed. After July 5th he carried on a cycle business with two branches, and on August 8th he converted such business into a company, of which he was managing director.

**HELD**—that this was not the case of a true description omitting to mention other occupations, but was a misdescription liable to

mislead, and that it invalidated the bill of sale.

PROCTOR v. LUCIUS (LUCIUS, CLAIMANT), (1903) [19 L. T. R. 453—Div. Ct.

**29. Grantee—Limited Company—Address and Description of—Necessity of Inserting in Bill of Sale—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 9, and form in schedule.]**—A bill of sale is not in accordance with the statutory form, and is therefore void, if the address and description of the grantee be not inserted in the bill of sale, and it makes no difference in this respect that the grantee is a limited company registered under the Companies Acts.

ALTREE v. ALTREE, [1898] 2 Q. B. 267; 67 [L. J. Q. B. 882; 78 L. T. 794; 5 Manson, 235; 14 T. L. R. 460; 47 W. R. 60—Div. Ct.

**30. “Stipulated Times or Time of Payment”—Covenant to Pay “on or before” a Certain Date—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 9.]**—Action to set aside a bill of sale, given as security for money on the ground (*inter alia*) that it was not “in accordance with” the form given in the schedule to the Bills of Sale Act, 1882, and was therefore void under sect. 9 of the Act. The grantors agreed that they would pay to the grantee the principal sum “on or before the 1st day of November, 1899.”

**HELD**—that the “time of payment” in the form means the time at which the obligation of the grantor to pay is to be fixed; that in the bill in question the time was fixed and the bill of sale was “in accordance with” the statutory form.

Decision of North, J. (16 T. L. R. 39), reversed.

DE BRAAM v. FORD, [1900] 1 Ch. 142; 69 [L. J. Ch. 82; 81 L. T. 568; 16 T. L. R. 69; 7 Manson, 28—C. A.

**31. Two Grantors—Each being Separately Possessed of part of Goods—Departure from Statutory Form—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9, Schedule.]**—Husband and wife by bill of sale jointly and severally assigned to a third person all and singular the several chattels and things specifically described in the schedule thereto annexed, by way of security, for payment of a sum of money and interest. The County Court judge found that none of the chattels named were jointly owned by the two grantors, but some of them belonged to the husband and some to the wife. There was no evidence of any agreement between the grantors altering the property as between themselves. The schedule, though it named the goods, did not distinguish which of them belonged to the husband and which of them belonged to the wife.

**HELD**—that the result was that the bill of sale operated, if at all, as two separate grants of separate portions of furniture, which were not distinguished as belonging

**Statutory Form—Continued.**

to either of the grantors, and that such an arrangement could not be brought into the form prescribed by the Bills of Sale Act (1878) Amendment Act, 1882, and was, therefore, void under sect. 9 of that Act

Decision of Divisional Court ([1901] 1 Q. B. 70, 70 L. J. B. 34, 49 W. R. 127; 83 L. T. 712; 17 T. L. R. 72; 8 Manson, 31) affirmed.

SAUNDERS v. WHITE, [1902] 1 K. B. 472; 71 [L. J. K. B. 318; 50 W. R. 325; 86 L. T. 173; 18 T. L. R. 280; 9 Manson, 113—C. A.

**BIRTH, PROOF OF.**

See EVIDENCE.

**BIRTHS, DEATHS & MARRIAGES (REGISTRATION OF).**

See EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS; MEDICINE AND PHARMACY.

**BISHOPS.**

See ECCLESIASTICAL LAW.

**BLACKMAIL.**

See CRIMINAL LAW AND PROCEDURE.

**BLASPHEMY.**

See CRIMINAL LAW AND PROCEDURE.

**BOARDING-HOUSES.**

See INNS AND INNKEEPERS; LANDLORD AND TENANT.

**BONDS.**

See also BANKRUPTCY AND INSOLVENCY, 132; BILLS OF EXCHANGE, 30, 31; EXECUTORS.

1. *Joint and Several Bonds—Judgments Thereon—Release of one Judgment Debtor—Effect of.*—Co-debtors, jointly and severally

liable, and not standing in the relationship of principal and surety, are each liable for the whole debt, with a right to contribution to the extent of one-half from the other.

Therefore, if the creditor releases one co-debtor, the other co-debtor is also released to the extent of the one-half, but his own half of the debt remains unsatisfied.

IN RE GERVAIS' ESTATE, [1903] 1 Ir. R. 172—[K. B. Div.]

**BOOKS, ENTRIES IN.**

See BANKERS AND BANKING; DISCOVERY, ETC.; EVIDENCE.

**BOROUGH AUDITORS.**

See ELECTIONS, 76, 77.

**BOROUGHES.**

See LOCAL GOVERNMENT.

**BOTTOMRY.**

See SHIPPING AND NAVIGATION.

**BOUGHT AND SOLD NOTES.**

See STOCK EXCHANGE.

**BOUNDARIES AND FENCES.**

And see HIGHWAYS, 24—30, 32, 36, 37; LIMITATION OF ACTIONS, 34; MINES AND MINERALS.

1. *Hedge and Ditch—Ownership—Adjacent Lands—Fences—Soil thrown on Land of Owner of Ditch—Presumption—Rebuttal by Acts of Ownership.*—Lands of the defendants abutted upon land of the plaintiff at two places. The plaintiff sued the defendants for trespass in cutting down and carrying off trees situated in the two fences, which were the boundary fences between the lands of the plaintiff and lands of the defendants. The plaintiff proved no act of ownership except that for the last three years the gamekeeper of the plaintiff had been in the

**Boundaries and Fences—Continued.**

habit of collecting eggs in the fences as being the boundary fences of the estate. But the plaintiff rested his case on the fact that in both cases the fences in question had a ditch on the side of the defendants. The defendants admitted the existence of this presumption, but they relied on acts of ownership, such as repairing the fences, cutting the trees in the fences, which acts were known only to the plaintiff's tenant and not to the plaintiff. Two old maps showed that the boundary of the parish ran along the edge of the ditch. An estate map of the year 1866 was produced by the defendants, which coincided with the presumption that the boundary of the two properties ran along the edge of the ditch.

**HELD**—that the evidence of acts of ownership on the part of the defendants was of a very shadowy and neutral character, and not sufficient to displace the presumption.

*Decision of Ridley, J. ((1901) 17 T. L. R. 399), reversed.*

*EARL OF CRAVEN v. PRIDMORE AND OTHERS, (1902) [18 T. L. R. 282—C. A.]*

**2. Hedge and Ditch—Legal Presumption as to Boundary—Rebutting Evidence—Trimming Fence and Cleaning Ditch without Owner's Knowledge.**—Where there is a hedge with a ditch, the legal presumption that the boundary is marked by the edge of the ditch furthest from the fence cannot be rebutted by evidence that a tenant of the adjoining land has trimmed the hedge and cleaned the ditch for many years, unless such acts have been brought to the notice of the presumptive owner or his agent.

*Craven v. Pridmore, ((1902) 18 T. L. R. 282—C. A., supra) applied.*

*HENNIKER v. HOWARD, (1904) 90 L. T. 157—[Div. Ct.]*

**3. Line of Trees planted by adjoining Lessees as Boundary—Plans and Measurements in Deeds Inaccurate—Two Hundred Feet "or thereby"—Whether Agreement as to Boundary Binding on Purchaser.**—Two adjacent plots were feued to different persons: they were described in the deeds by a plan and by measurements qualified by the words "or thereby." It was impossible to define the boundary from these plans and measurements, which were inaccurate, and by consent of the superiors the feuars agreed upon a line, and at their joint cost planted a row of trees along it.

**HELD**—that this arrangement, followed by possession in accordance with it, was binding on a purchaser without notice, and that the trees were common property.

*HETHERINGTON v. GALT, (1905) 7 F. 706—[Ct. of Sess.]*

**4. Parcels—Boundaries — "Sea" — "Sea-beach"**—*Quære* whether a boundary by the "sea-beach" is the same thing as a boundary by the "sea."

*MUSSELBURGH MAGISTRATES v. MUSSELBURGH [REAL ESTATE CO. LD., (1905) 7 F. 308—Ct. of Sess.]*

**5 Railways — Fences — Duty to Fence Lands—Owner or Occupier of Adjoining Land—Licensee of Adjoining Occupier—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68**—Cattle of the tenant of a farm near a railway station who has only a licence to depasture his cattle in a wood through which a railway goes, cannot be considered to be the cattle of either the owner or the occupier of the adjoining land within the meaning of sect. 68 of the Railways Clauses Consolidation Act, 1845.

*LUSCOMBE v. GREAT WESTERN RAILWAY, [1899] [2 Q. B. 313; 68 L. J. Q. B. 711; 81 L. T. 183—Div. Ct.]*

**BRANDY.**

*See FOOD AND DRUGS.*

**BRAWLING.**

*See CRIMINAL LAW; ECCLESIASTICAL LAW.*

**BREACH OF PROMISE OF MARRIAGE.**

*See CONFLICT OF LAWS; HUSBAND AND WIFE.*

**BREACH OF THE PEACE.**

*See CRIMINAL LAW AND PROCEDURE.*

**BREAD.**

*See FACTORIES AND WORKSHOPS; FOOD AND DRUGS.*

**BRIBERY.**

*See AGENCY; CRIMINAL LAW AND PROCEDURE; ELECTIONS*

**BRIDGES.**

*See HIGHWAYS, STREETS AND BRIDGES.*

**BRITISH COLUMBIA.**

*See DEPENDENCIES AND COLONIES.*

**BRITISH SOUTH AFRICA.***See* DEPENDENCIES AND COLONIES.**BROKERS.***See* AGENCY; SALE OF GOODS; STOCK EXCHANGE.**BROTHELS.***See* CRIMINAL LAW AND PROCEDURE.**BUILDERS, BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.**

- I. ARCHITECTS . . . . . 279  
 II. BUILDING CONTRACTS . . . . . 282

**I. ARCHITECTS.***And see* ARBITRATION, 45.

1. *Authority—Building Contract—Deviations from Contract.*—A builder contracted with B. to use cement mortar in building the walls of a house which he was erecting for B.

**HELD**—that B.'s architect had no authority without B.'s consent to sanction the use of milled lime instead of cement mortar.

**STEEL v. YOUNG**, [1907] S. C. 360—Ct. of Sess.

2. *Authority—Employment of Quantity Surveyor—Liability of Building Owner to Surveyor's Fees for Taking out Quantities—Custom of Building Trade—Unreasonableness.*—The defendant, desiring to build certain houses, employed an architect to make out plans. The architect having done so, instructed the plaintiff, a quantity surveyor, to take out quantities, and when these were completed the architect invited tenders, all of which exceeded the limits of the defendant's proposed expenditure. No tender was accepted. It did not appear that the defendant had authorised the application for tenders. The plaintiff sued for the amount of his charges for taking out the quantities, and relied on the alleged custom in the building trade, throwing on the building owner the liability for the surveyor's fees where no tender is accepted, or for other reasons the work is not proceeded with. The jury found at the trial that the employment of the surveyor was neither within the scope of the architect's authority nor sanctioned by the defendant; and that there is no custom authorising such employment without the consent of the building owner:

**HELD** (Sir P. O'Brien, L.C.J., dissenting)—that the defendant was entitled to judgment. Per O'Brien and Gibson, JJ., that the custom relied on was not one of which the Court must take notice; that even if the alleged custom was reasonable (as to which *quære*), the verdict against the custom could not be interfered with. Per Sir P. O'Brien, L.C.J., that if the defendant impliedly or expressly authorised the architect to invite tenders, she thereby impliedly authorised the employment of the surveyor, and that accordingly a question should have been left to the jury, whether she did so authorise the architect, and that therefore there should be a new trial.

**Moon v. Whitney Union** ((1837) 3 Bing. N. C. 814; 5 Scott, 1; 3 Hodges, 206) considered.

**ANTISELL v. DOYLE**, [1899] 2 Ir. R. 275—Q. B.

3. *Building Contract—Architect's Final Certificate—Whether Conclusive as to No Penalties having been Incurred for Delay.*

—A building contract contained a penalty clause for delay, and also a provision that the architect might, under certain circumstances, extend the time for the completion of the work: no express power to deal with the question of penalties was given to him. The architect gave the following final certificate: "We hereby certify the sum of . . . to be due to . . . in settlement of contract for erection of power stations." In an action by the building owner to recover penalties for delay.

**HELD**—that, as the contract only gave the architect power to deal with penalties if circumstances arose justifying an extension, and as his certificate did not show on the face of it circumstances giving him such jurisdiction, the certificate was not conclusive evidence that he had considered and dealt with the question; and that therefore there must be an issue of fact to ascertain whether he had done so or not.

**BRITISH THOMSON HOUSTON CO., LTD. v. WEST** [Bros., (1903) 19 T. L. R. 493—Phillimore, J.

4. *Building Contract—Right to Withdraw Interim Certificate.*—*Semble*, an engineer or architect who has once signed an *interim* certificate for a payment to a contractor, cannot afterwards withdraw it.

**DAVEY v. GRAVESEND CORPORATION**, (1903) 67 [J. P. 127—Lawrance, J.

5. *Negligence—Building Contract—Architect undertaking Supervision—Defective Work—Liability of Architect.*—An architect who undertakes the supervision of building operations is liable in damages to his employer for defective work done by a contractor, where due supervision on his part would have detected and prevented the defect.

**JAMESON v. SIMON**, [1899] 36 S. L. R. 883.

6. *Negligence—Building Contract—Certifi-*



**Architects—Continued.**

*cate—Architect's Position as Arbitrator.*—The defendant employed the plaintiff to prepare plans for buildings he was about to erect, and to superintend and measure up the work. The work was done by a contractor. The contract between the defendant and the contractor provided (clause 20) as follows "A certificate of the architect . . . showing the final balance due or payable to the contractor is to be conclusive evidence of the works having been duly completed, and the contractor is entitled to receive payment of the final balance." The plaintiff had incorrectly measured up certain of the materials used, the result of which was that the amount of the certificate was larger than it ought to have been. The plaintiff brought an action against the defendant for commission, and the defendant counter-claimed for damages for negligence in ascertaining and certifying the amount payable by the defendant to the contractor.

**HELD** (by A. L. Smith, M.R., and Collins, L.J., Romer, L.J., dissenting)—that in ascertaining and certifying the amount payable by the defendant to the contractor, the plaintiff was in the position of an arbitrator between the building owner and the contractor, and consequently the building owner could not sue him for negligence, and therefore the counter-claim was not maintainable.

Judgments of Divisional Court ((1900), 16 T. L. R. 154, 180), and of Mathew, J. (*infra*), affirmed.

**CHAMBERS v. GOLDTHORPE, RESTELL v. NYE**, [1901] 1 K. B. 624; 70 L. J. K. B. 482; 49 W. R. 401; 84 L. T. 444; 17 T. L. R. 304—C. A.

**7. Negligence—Building Contract—Certificate as to Work Done.**—When two men employ a third to settle a dispute they are bound by what he decides. The parties are supposed to have satisfied themselves as to the third person's skill and care, and they are not allowed to say, after his decision has been given, that he has acted negligently or with want of skill.

**RESTELL v. NYE**, (1900) 16 T. L. R. 154—[Mathew, J.  
And see No 6, *supra*.

**8. Negligence—Measure of Damages—Failure to Correctly Measure Site—Plans not in fact Required—Charges of Quantity Surveyor.**—The plaintiffs authorised the defendant to prepare plans, etc., and to employ a surveyor to take out quantities, for a building on a certain site. He did the work and was paid for it, and plaintiffs sold the site without building on it. Subsequently it was discovered that he had never measured the site, and that the building planned by him would not cover the whole site.

**HELD**—that there had not been a total failure of consideration entitling the plain-

tiffs to recover back the defendant's fee; and that, so far as the plans were concerned, the damages were only nominal, for the defendant would be bound to correct them for nothing, but that the plaintiffs were entitled to the £40 which a quantity surveyor would charge for adapting the bills of quantities to the new plans.

**COLUMBUS Co., Ld. v. CLOWES**, [1903] 1 K. B. [244; 72 L. J. K. B. 330; 51 W. R. 366—Wright, J.

**9. Plans and Specifications—Property in—Custom.**—An architect was employed by the owner of certain houses to design and carry out the conversion of the houses into flats, and he was to receive five per cent. on the contract price for his services. The architect accordingly prepared plans and specifications, and superintended the work of conversion. At the conclusion of the work the owner paid the architect his fees, and claimed to be entitled to the plans and specifications. At the trial the architect tendered evidence of a custom in the profession by which, in the circumstances of the case, the plans and specifications were the property of the architect.

**HELD**—that the custom was unreasonable, and that the evidence was not admissible, and that the plans and specifications belonged to the building owner.

**Ebdy v. McGowan** ((1870) 2 Hudson on Building Contracts, p. 7) approved and followed.

**GIBBON v. PEASE**, [1905] 1 K. B. 810; 74 L. J. [K. B. 502; 69 J. P. 209; 53 W. R. 417; 92 L. T. 433; 21 T. L. R. 365; 3 L. G. R. 461—C. A.

**II. BUILDING CONTRACTS.**

And see **ARBITRATION**, 45; **BANKRUPTCY**, 228, 229.

**10. Abandonment—Quantum meruit—Evidence of new contract.**—The plaintiff agreed to erect certain buildings on the defendant's land for a lump sum. Before he had finished the buildings he abandoned his contract. The defendant thereupon took possession of the unfinished buildings and completed them. The plaintiff sued on a *quantum meruit*.

**HELD**, that there was no evidence of any new contract by the defendant to pay for the unfinished buildings, and therefore the plaintiff could not recover in the action.

**Munro v. Butt** (8 E. & B. 738) followed.

**SUMPTER v. HEDGES**, C. A., [1898] 1 Q. B. 673; [67 L. J. Q. B. 545; 78 L. T. 378; 46 W. R. 454—C. A.

**11. Arbitration Clause in Contract—Sub-contract—Incorporation of Arbitration Clause—Construction.**—A contractor for certain work employed a sub-contractor for part of it. The sub-contract provided that the work was to be executed according to "plans and specifications," which included a "general specification," forming part of the

**Building Contracts—Continued.**

original contract. "This general specification" contained an arbitration clause. Questions having arisen between the contractor and the sub-contractor:

**HELD**—that the arbitration clause did not apply to disputes which only concerned them and not the building owners; but that it applied so as to make decisions in an arbitration between such owners and the contractor binding upon the sub-contractor.

GOODWINS, JARDINE & Co. v. BRAND & SON,  
[1906] 7 F. 995—Ct. of Sess.

12. *Building Owner to have Lien on Plant and Materials after Notice—Seizure of Plant and Materials in Execution—Subsequent Notice by Building Owner—Rights of Parties.*—Under a building contract, if the contractor failed to proceed with due diligence, the owner might give him notice to do so. After receipt of such a notice the contractor was not to remove any plant or materials, and the owner was to have a lien on them from the date of the notice. If the contractor still failed to proceed the owner might enter and complete the work, having a lien upon the plant until completion, and the materials becoming his property absolutely.

Execution under a judgment against the contractor was levied upon the plant and materials, and the owner thereupon gave him notice to proceed.

**HELD**—that, as the sheriff had seized the plant before the notice was given, the claim of the execution creditor took priority over the owner's lien; but that, as the unused materials had in fact been already paid for by the building owner, they were his property.

BYFORD v. RUSSELL; MORRIS, CLAIMANT, [1907]  
[2 K. B. 522; 76 L. J. K. B. 744; 97 L. T.  
104—Div. Ct.]

13. *Construction—Defective Work—Certificate of Architect—Conclusiveness—Arbitration Clause.*—By a contract the contractor agreed to execute certain works in accordance with certain plans and specifications to the satisfaction of the building owner's architect. The architect had power to order from time to time during the progress of the works, the removal of any materials which, in his opinion, were not in accordance with the contract, and the substitution of proper materials therefor, and any defects or faults which might appear within twelve months from the execution of the works, arising, in the opinion of the architect, from the materials or workmanship not in accordance with the contract, were upon the directions of the architect to be made good. The contractor was to be paid upon the certificates of the architect as the works progressed, but no certificate was to be considered conclusive evidence as to the sufficiency of any works or materials, nor was it to relieve the contractor from lia-

bility to make good defects, as provided by the contract. The contract further provided that in case any dispute or difference should arise between the employer or the architect, on his behalf, and the contractor, either during the progress of the works or after the determination of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder (with certain exceptions) or as to the withholding by the architect of any certificate, then either party was to give to the other notice of such dispute or difference, and such dispute or difference was to be referred to arbitration, and the arbitrator was to have power to open up, review, and revise any certificate (with the above exceptions), and to determine all matters in dispute submitted to him in the same manner as if no such certificate had been given. The architect gave certificates for sums due under the contract, and the builder brought an action against the building owner to recover those sums. The building owner counter-claimed for damages for breach of contract in supplying improper work and materials.

**HELD**—that in view of the arbitration clause the certificate of the architect was not conclusive as to the work and materials, and that, therefore, the counter-claim was maintainable.

Decision of Farwell, J. ([1904] 2 Ch. 261; 73 L. J. Ch. 712; 52 W. R. 587; 90 L. T. 772, 20 T. L. R. 576), reversed.

ROBINS v. GODDARD, [1905] 1 K. B. 294; 74 [L. J. K. B. 167; 92 L. T. 10; 21 T. L. R. 120—C. A.]

14. *Construction—Delay on part of Specialists—Action by Builder against Building Owner in respect of Damage from Delay.*—By a contract made between builders and building owners the builders undertook to erect and complete the "works" of a hospital, including chimney-stacks and heating apparatus, in two years for £210,688, with penalties for delay. The chimney-stacks and heating apparatus were to be provided by specialists or sub-contractors. The building owners reserved to themselves the option to employ these specialists. Certain specialists for the work of the chimney-stacks and heating apparatus were appointed by the architect under the contract, and he made terms with them as to the works they were to execute and the prices they were to charge. These prices were subsequently paid by the builders out of the whole sum paid to them under the contract. The architect sent the builders orders to give to the specialists, and the builders made no objection, and gave them to the specialists. In the execution of these works there was delay on the part of the specialists whereby, as the builders alleged, they suffered damage.

**HELD**—that the builders and not the building owners contracted with the specialists. There was nothing in the contract inconsistent with such sub contracts. The builders,

**Building Contracts—Continued.**

therefore, had no right of action against the building owners for the delay of the specialists.

LESLIE v. METROPOLITAN ASYLUMS BOARD, (1896)  
[1904] 68 J. P. 86, 1 L. G. R. 862 (n)—C. A.

15. *Construction — Delay on part of Specialists—Damage Resulting to Builder—Action by Builder against Building Owners—Rights of Parties.*—By a contract in writing with specification annexed, made between a builder and building owners, the builder undertook to do the whole of certain work for a certain sum, but part of the work was to be sub-contracted. The specialists or sub-contractors were appointed by the building owners, but they were to be paid by the builder out of the contract price. The builder undertook to finish the work by a certain date, unless the works were hindered by (*inter alia*) delay on the part of the engineers or other specialists. The builder was not to be liable for any defects in works provided by the specialists, unless by reason of contributory negligence on his part or his having paid any final balance to the specialists without first having the architects' written authority to do so. In the course of the work there was delay on the part of the specialists whereby the builder suffered damage. The builder brought an action for breach of contract against the building owners, alleging that under the contract and specification there was an implied promise on the part of the building owners that the delivery and fixing of the specialists' work should not be unreasonably delayed or that the delivery and fixing should be done at such reasonable times as to enable the builder to complete his work within the time fixed by the contract or within a reasonable time thereafter, and that the building owners had broken one or both of these implied promises.

HELD—that on the proper construction of the contract and specification, there were no such implied promise or promises, and that there was no breach of contract on the part of the building owners, affording the builder a right to damages.

Leslie & Co, *Ld.* v. Metropolitan Asylums Board (*supra*) followed.

MITCHELL v. GUILDFORD UNION, (1904) 68 J. P. 84; 1 L. G. R. 857—Phillimore, J.

16. *Construction — Whether Arbitration Clause applied to all Provisions of Contract — Reasonableness — Injunction Restraining Owners from Re-entering on Works.*—Although, if the terms of a contract are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not, yet, where the language will admit it, it should be presumed that the parties meant only what was reasonable.

An engineering contract contained a num-

ber of general conditions, of which No. 2 provided for the completion of the "whole works in a thoroughly sound and workman-like manner," to the entire satisfaction of the engineer of the defendant council, and also provided for arbitration in the event of any difficulty or dispute arising between the contractor and the engineer as to the mode of carrying out the work, &c. The other conditions dealt with materials, implements, ability of foreman, deviation from plans, &c, and No. 10 gave the engineer power to dismiss the contractor "if in the judgment of the engineer sufficient dispatch is not used."

HELD—that the Arbitration Clause applied to all cases where the engineer had to exercise "judgment," as to materials, implements, delay, &c.; for, if it applied to none of them, there was virtually nothing left to which it could apply.

By direction of the Council the engineer purported to dismiss the contractor for "want of dispatch."

HELD—that an injunction ought to be granted to preserve the *status quo* until an award could be made as to the correctness of the engineer's decision. The words of condition No. 10 implied a negative agreement by the Council not to dismiss and re-enter, until their right to do so had been determined, and therefore an injunction might be granted.

FOSTER AND DICKSEE v. CORPORATION OF  
[HASTINGS, (1903) 87 L. T. 736; 19 T. L. R. 204—Farwell, J.]

17. *Delay—Building Owners Entering upon Works—Delay in Fact Caused by Owners—Rights of Contractor.*—The appellants had guaranteed the due performance by a contractor of building works which he had undertaken to execute for a corporation. Upon the contractor's default they employed the respondent to complete the works on the terms of the original contract; but they allowed the corporation to supervise the work and to make all arrangements. Subsequently the corporation seized the works on the ground that the respondent was in default.

A jury found that the delay was really attributable to the acts of the corporation, and that their re-entry and seizure were not justifiable.

HELD—that the appellants having constituted the corporation their agents must be regarded as having improperly seized the works, and that the respondent was entitled to treat the contract at an end, and sue on a quantum meruit.

LODDER v. SLOWEY, [1904] A. C. 442; 73 L. J. [P. C. 82; 91 L. T. 211; 20 T. L. R. 597; 53 W. R. 131—P. C.]

18. *Delay—Penalties—Undue Interference by Building Owner—Exclusive Jurisdiction of Building Owner.*—By clause 16 of a building contract the contractors were to

**Building Contracts—Continued.**

complete the whole of the works within a certain time unless the works were delayed by specified matters "or other causes beyond the contractors' control, satisfactory proof of all of which must at the time of occurrence be at once afforded to the board of directors of the employers, who shall adjudicate thereon and make due allowance therefor if necessary, and their decision shall be final."

**HELD**—that the exclusive jurisdiction of the directors under clause 16 did not extend to delay caused by undue interference by the building owners or their architect with the conduct of the works and by default in not giving possession of premises on which work was to be done, and in not providing plans and drawings in due time; and that the plaintiffs were, therefore, relieved from their liability for penalties under the contract for delay.

**WELLS v. ARMY AND NAVY CO-OPERATIVE [SOCIETY, LD., (1902) 86 L. T. 764—Wright, J.]**

**19. Failure to Perform — "Penalty" — Liquidated Damages.]**—By a contract for the supply of an electric lighting installation to a theatre the whole of the work, except the plant, was to be completed by a certain day subject to a "penalty" of £15 a day, and the plant was to be completed by a later day subject to a "penalty" of £3 a day for every day the work remained unfinished. The contract also gave the engineers power, if necessary, to employ other contractors to complete the work, and provided that the defaulting contractor should be liable for loss so incurred, without prejudice to his obligation to pay the penalties incurred by him under the contract.

**HELD**—that whilst the presumption was in favour of the word "penalty" meaning that which it *prima facie* bore, yet the real intention as gathered from the contract was that the amounts specified should be treated as liquidated damages.

**IN RE WHITE AND ARTHUR, (1901) 84 L. T. 594; [17 T. L. R. 461—Div. Ct.]**

**20. Fraudulent Representations — Representations not Intended to be Solely Acted Upon—Provision as to Verification by Contractor of Matters which could Influence Tender.]**—In a contract to execute certain sewage works the plaintiffs covenanted to do the works described in the drawings and specifications according to the drawings, specifications, &c., and the defendants covenanted to pay for the works on the receipt of the certificate in writing of their engineer, as provided by the conditions. The specification provided, *inter alia*, that the plaintiffs must verify all representations, and not rely upon their accuracy. On completion the plaintiffs claimed £36,574 from the defendants on the grounds—first, that the plans showed a certain existing wall

extending nine feet below the Ordnance datum line which could be utilised for the purposes of the works; that this wall did not exist, and that consequently the plans for the works had been altered, and the plaintiffs, at the direction of the engineer, had completed the works at this extra cost. Secondly, that the defendants had fraudulently misrepresented the structure and existence of this wall, and had thereby induced the plaintiffs to enter into the contract to their detriment. The defendants relied on the absence of a certificate from their engineer and on the conditions of the specification, and they denied the making of any representation and any fraud.

**HELD**—that the specification only protected the defendants in respect of honest mistakes by themselves or their agents.

**Cornfoot v. Fowke (6 L. J. Ex. 297; 6 M. & W. 358) explained.**

**Decision of C. A. ([1907] 2 I. R. 82) reversed.**

**PEARSON v. DUBLIN CORPORATION, [1907] A. C. [357; [1907] 2 I. R. 537—H. L. (E.).]**

**21. Payment by Instalments on Engineer's Certificate—Specified Firms to supply Machinery—Power for Engineer, on Contractor unduly delaying Payment for Machinery, to order direct Payment to Firms—Receiving Order against Contractor—Subsequent Order by Engineer for direct Payment to Firms—Title of Trustee—Secured Creditors—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168.]**—A. agreed with a local authority to construct sewage works at a price to be paid by monthly instalments, less 10 per cent., on the certificate of the engineer of the local authority; the 10 per cent. to be retained and paid six months after completion. The contract provided that certain machinery was to be supplied to A. by specified firms, and that (clause 54), "If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power, if he thinks fit, to order direct payment to them."

In October, 1904, A. was adjudicated bankrupt on his own petition. At this date the contract was substantially completed, and there was then due under it the sum of £1,574 15s. 10d. only, of which £1,349 17s. 8d. was retention money, and £224 18s. 2d. was a sum payable on the engineer's next certificate, and these two sums were claimed by the trustee in bankruptcy. At the same date A. owed £836 8s. 9d. in various amounts to the specified firms for machinery supplied to him for the works; and subsequently, in 1905, the engineer made two orders under clause 54 directing payment of the £836 8s. 9d. out of the £1,574 15s. 10d. to the firms in settlement of their accounts.

**HELD**—that A. by presenting his own petition in bankruptcy "unduly delayed proper payment" to the machinery firms within the meaning of clause 54.

**HELD ALSO**—that the power conferred by

**Building Contracts—Continued.**

that clause on the engineer was not annulled or revoked by A.'s bankruptcy, and that the firms by virtue of the two orders of the engineer were entitled to be paid the £836 8s. 9d out of the £1,574 15s. 10d. in priority to the claim of the trustee.

IN RE WILKINSON, EX PARTE FOWLER, [1905] 2 [K. B. 713; 74 L. J. K. B. 969; 54 W. R. 157; 12 Manson, 377—Bigham, J.

**22. Plant and Materials on the Premises—Building Owner's Property—Temporary Dam.]**—The common clause in a building contract as to all plant and materials brought on to the works becoming the building owner's property is inserted with two objects; partly, to enable the contract to be performed by another contractor, if the first fails, but also as a security for due performance. Therefore, the building owner may retain such plant, &c., as against the defaulting contractor, or the holder of a bill of sale, even though no one else is in fact employed to complete the work.

The materials of a temporary dam are within the words "plant and materials."

*Sumpter v. Hedges* ([1898] 1 Q. B. 673; 67 L. J. Q. B. 545, 46 W. R. 454, 78 L. T. 378—C. A., No. 10, *supra*), and *In re Parnell, Ex parte Barrell* (1875) L. R. 10 Ch. 512, 44 L. J. Bkcy. 138, 33 L. T. 115) applied.

HART v. PORTGAIN HARBOUR CO., LD., [1903] 1 Ch. 690; 72 L. J. Ch. 426; 51 W. R. 461, 88 L. T. 341—Farwell, J.

**23. Possession of Site—Implied Term as to Giving—Waiver.]**—A builder contracted to pull down fifteen old houses and erect twelve new buildings on the site, the work to be completed within six months of the date of the contract. He consented to a delay of two weeks from the date of the contract in obtaining possession of the site. The building owner did not give possession at the expiration of that period, but subsequently gave it in parts, the last portion not being handed over until five months from the date of the contract.

**HELD**—that a term must be implied in the contract that possession of the whole site should be given forthwith, but this being waived by the consent of the builder to a fortnight's delay, it was altered to a reasonable time; that possession was not given within a reasonable time, and that the builder was entitled to recover damages for loss sustained in consequence of the breach.

FREEMAN & SON v. HENSLEER, (1900) 64 J. P. 260 [—C. A.

**24. Price of Work to be Fixed by Certificate of Local Authority's Engineer—Death of the Engineer—Powers and Position of his Successor—Oral Variation of Contract under Seal.]**—A contract to do work for a local authority stipulated that payment for work done should only be made on the production of a certificate from the engineer

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appointed under the contract, who was to fix the price of all extra work done under the contract but not included in the specification. The engineer under the contract was "J. M., of the firm of J. M. & Sons, or other the engineers of the corporation." While extra work was being done, but before a price had been agreed upon, the engineer named in the contract died, and a member of his firm was appointed to carry out his duties under the contract. The contractor contended that the engineer so appointed had no jurisdiction to fix the price of the extra work. He also alleged that the condition in the contract as to engineers' certificates had been waived by the defendants by an oral agreement with himself.

**HELD** (1)—that such an oral variation of a contract under seal would be bad. Any variation of such a contract must itself be under seal.

**HELD** (2)—that the duly appointed successor to the engineer named in the contract had jurisdiction to determine the price to be paid for work which was begun before his appointment.

KELLETT v. STOCKPORT CORPORATION, (1906) 70 [J. P. 154—Walton, J.

**25. Special Goods Ordered Payable by Builder or Building Owner as Architect Certifies—Liability of Building Owner.]**—The defendant entered into a contract with a builder, by which the latter agreed to build a house for him under the supervision of an architect. The contract provided that the provisional sums for goods to be ordered from special artists or tradesmen should, as the architect should certify, be payable by the builder or the building owner. Special goods according to a particular design were ordered by the builder from the plaintiff, who was a metal worker, and the architect certified the sum for these goods as due from the defendant to the plaintiff, deducting the amount from the certificate to the builder.

**HELD**—that the architect had authority to determine who was to pay as well as to whom payment should be made; that the initial liability of the defendant—the building owner—in respect of this class of work was established; and that all the parties dealt upon that footing.

Decision of Kennedy, J. (1901) 17 T. L. R. 83, affirmed.

HOBBS v. TURNER, (1902) 18 T. L. R. 235—C. A.

**26. Wrongful Cancellation—Dissatisfaction with Progress of Work—Conduct Preventing Contractor from Proceeding with Work—Construction of Contract.]**—Where, in answer to a claim by a contractor, the building owner pleads that he determined the contract, as he was entitled to do, on account of the contractor's slow progress, it is a good replication on the part of the contractor that the delay was caused by the owner's own default in fulfilling his part of the contract.

**Building Contracts—Continued.**

**HELD**, however, upon the evidence—that the allegations necessary to support such a replication had not been proved.

Decisions of Supreme Court of New South Wales (21 N. S. W. L. R. 263; 2 S. R. 391) affirmed.

**MORT'S DOCK AND ENGINEERING CO., LD. v. [WADDEY, (1905) 22 T. L. R. 61—P. C.]**

**27. Power to re-enter and take Possession of Plant—Breach of Agreement—Damages.]**—By a building agreement dated the 10th June, 1896, the defendant agreed with the plaintiff to pull down and re-erect Holloway's Hotel, Dover-street, in carcase before the 25th Dec., 1896, and thereupon to take a lease of it from the plaintiff for eighty years from the 24th June, 1896, at a peppercorn rent for the first year, and at a rent of 1,100l. for the second and every subsequent year of the term. The defendant undertook to finish his part of the agreement by the 25th Dec., 1896.

By clause (2) of the agreement "on default by the lessee of the stipulation contained in this clause" (i.e. to complete within the time allowed) "he shall forfeit all benefit under this agreement which shall thereupon cease and be determined, and all the materials and buildings on the said premises shall be forfeited to and become the absolute property of the lessor."

And by clause (11): "If the new buildings shall not be erected or completed within the time and in the manner aforesaid before the 25th Dec., 1896, or if the lessee shall fail to observe or perform any of the stipulations herein and in the said form of lease contained or on his part to be observed and performed, or if he shall not proceed with the works with proper diligence, then and in any of the said cases the lessor shall be entitled to re-enter upon and to take immediate possession of the said piece of land and premises with all buildings, erections, plant, and materials thereon without making to the lessee any allowance or compensation in respect thereof, and without any process at law or any notice to the lessee or any other person or persons to quit the said premises or to determine the holding thereof."

The defendant went into possession on the 10th June, 1896, but beyond pulling down about 200l. worth of materials did nothing, and on the 19th Jan., 1897, the plaintiff re-entered.

The defendant contended that the effect of these two clauses was to limit the plaintiff to such compensation as he could get by re-entry and taking possession of the materials on the premises, and that he could recover no damages. The plaintiff on re-entry could only relet from June, 1899, at £900 a year rent.

**HELD**—that in addition to the re-entry, the plaintiff could recover as damages the loss of two years' rent at 1,100l., and the loss of

200l. a year at twenty-five years' purchase, viz., 5,000l., in all 7,200l.

**MARSHALL v. MACKINTOSH, (1898) 78 L. T. 750; [14 T. L. R. 458; 46 W. R. 580—Kennedy, J.]**

**28. Tender of Lump Sum upon Plans and Specification with Bill of Quantities Scheduled—Schedule of Prices—Quantities too Small—More Labour and Work Required—General Usage in Building Trade Contradicting Contract—Bill of Quantities not a Warranty but merely an Estimate.]**—A bill of quantities, though scheduled to a contract, only constitutes a representation, a suggestion or an estimate, and does not amount to a warranty.

An architect, on behalf of building owners—the defendants—invited tenders for the erection of a building upon plans and a specification and certain conditions of contract, and a bill of quantities scheduled to the specification. Builders—the plaintiffs—sent in a tender for the work, together with a schedule of prices for the purpose of determining the amount to be paid or allowed in respect of any alterations or deviations from the original plans, and their tender was accepted. A contract was entered into between the plaintiffs and the defendants, which referred to the schedule of prices as the prices upon which the contract was based, for the execution of the works in accordance with the plans and specifications for a lump sum, the bill of quantities not being mentioned in the contract, but it was set out on the back of the specification. It turned out that the quantities were too small, and that to do the work described in the contract required more labour and materials than appeared by the bill of quantities. The arbitrator found that there was a general usage in the building trade that where tenders were invited for the erection of works in accordance with plans, and a bill of quantities was furnished, a person making a tender was not expected to verify the quantities himself, but was expected and intended to assume the correctness of the quantities and to tender upon that assumption, and that if such quantities in the event proved to be greater or less than the actual quantities, the price was to be reduced or increased by an amount ascertained and determined by the scale of prices given in the tender as the scale by which payments for extras were to be determined.

**HELD**—that it was a well-ascertained practice that the bill of quantities, whether it formed part of the specification or was a separate document, was not intended to be a representation in the sense of a warranty—it was an estimate which the builder might act on as an honest estimate made by a qualified person, but it was not a warranty; that the contract was for a lump sum—as the builder chose to rely on the architect's estimate he must abide by it; that the custom found by the arbitrator contradicted the contract, and was one which could not be maintained; that in ascertaining the

**Building Contracts—Continued.**

amount to be paid by the defendants—the building owners—to the plaintiffs—the builders—regard was not to be paid to the custom found by the arbitrator; that the plaintiffs were entitled only to be paid the lump sum mentioned in the contract with such deductions and additions as were provided to be made in respect of alterations and deviations; and that the plaintiffs were not entitled to be paid the value of all the works actually executed by them for the defendants at the prices upon which the contract was based, whether such value should be more or less than the lump sum mentioned in the contract.

FORD & Co. v. BEMBROSE & SONS, LD., (1902)  
[18 T. L. R. 443—C. A.]

**BUILDING SOCIETIES.**

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And see LIMITATION OF ACTIONS, 47; MORTGAGES.

**I. RULES.**

1. *Special Powers—Recognised Insolvency—Constitutional Rights—Breach of Trust.*—A building society may rightly pass a rule conferring special powers of realisation and of compromising and settling claims after known and recognised insolvency, so long as the rule does not of necessity involve altering the constitutional rights of members *inter se*, or the rights of creditors, inasmuch as it may be exercised so as to be advantageous to all members alike; however, if such a rule is so exercised as to give unfair or undue advantage to individuals, such exercise will constitute a breach of trust. A rule may be passed with the object and intention of facilitating realisation, of avoiding the expense of a sale by auction, and of enabling the society to get rid of burdensome obligations.

SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. [HILLS, [1899] 2 Ch. 60; 68 L. J. Ch. 476; 47 W. R. 647; 81 L. T. 86—Byrne, J.]

2. *Withdrawal of Members—Death of Members—Winding-up—Advance Secured on Fully-paid Shares—Ultra vires—Priority—Set-off.*—The rules of a building society empowered any person who had become a member of the society for the prescribed time of six months, and who had not received any advance, and whose subscriptions and fines were not in arrear, to withdraw from the society; and entitled him to exercise that power upon giving the society one month's previous notice in writing of such his intention. The result of that was that he

became entitled to recover certain amounts mentioned in the schedule to the rules, and that the payment of those amounts was to be made according to the priority of the notice of withdrawal. The directors under the rules had full power from time to time to limit the number of shares that should be withdrawn in any one month so as not to exceed one-half of the monthly income from share subscriptions.

HELD—(1) that the rules conferred an absolute right of withdrawal; but that they limited the working out of the withdrawals so as to confine them in operation to a fund consisting of one-half of the monthly income from share subscriptions, and that the notices of withdrawal did not become invalid because there happened to have been a large number of notices of withdrawal given in any particular month; though the result would be that the notices which were given prior to the date of the resolution for winding-up would exhaust the whole of the funds of the society; (2) that a deceased member would take precedence of all persons who had given notice to withdraw, and the right must be determined at the date of the dissolution.

*In re West London and General Permanent Benefit Society* ((1898) 78 L. T. 393—C. A., No. 5, *infra*), followed.

A member had received an advance on the security of his fully-paid shares, which was admitted to be an *ultra vires* transaction.

HELD—that by so doing he had waived the notice to withdraw he had given, and elected to continue a member of the society, and that he was bound to discharge this liability for the purpose of satisfying the claims of those who were entitled to the assets of the society in priority to himself.

*Brownlie v. Russell* ((1883) 8 App. Cas. 235; 47 J. P. 757; 48 L. T. 881—H. L. (Sc.)) distinguished.

IN RE COUNTIES CONSERVATIVE PERMANENT [BENEFIT BUILDING SOCIETY; DAVIS v. NORTON, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71—Stirling, J.]

**II. WINDING-UP.**

3. *Building Society formed under Repealed Act of 1836—Jurisdiction of Court—Interpretation Act, 1889* (52 & 53 Vict. c. 63), s. 38.]—A building society was established and certified in 1873 under the Building Societies Act, 1836, now repealed, but not incorporated or registered under the Act of 1894.

HELD—that, the society having been legally formed, its rights were preserved on the repeal by sect. 38 of the Interpretation Act, 1889; that consequently it was not one of the class of companies forbidden by sect. 4 of the Companies Act, 1862, and that the Court had jurisdiction to wind it up on a creditor's petition.

SMITH'S TRUSTEES v. IRVINE AND FAIRFAXTON [BUILDING SOCIETY, (1904) 6 F. 99—Ct of Sess.]

**Winding-up—Continued.**

4. *Cancellation of Registry—Creditor's Remedy—Building Societies Act, 1894* (57 & 58 Vict. c. 47), s. 6, sub-ss. 1, 5; s. 8.]—Where the registration of a building society has been cancelled, and it has ceased to carry on business, a creditor's remedy is to petition for a winding-up order.

In such a case the Court may direct that no proceedings be taken under the order without leave beyond the transfer of assets to the official receiver.

IN RE GROSVENOR HOUSE PROPERTY ACQUISITION [AND INVESTMENT BUILDING SOCIETY, (1902) 71 L. J. Ch. 748; 50 W. R. 680—Buckley, J.]

5. *Scheme of Arrangement—Surplus Assets—Priorities—Widows and Children of Deceased Members—Building Societies Act, 1836* (6 & 7 Will. 4, c. 32).—Upon the construction of a scheme of arrangement entered into between the creditors and contributories of an unincorporated building society, in the course of its winding-up by the Court, it was declared that the surplus assets ought to be distributed according to the rights of the shareholders under the rules of the society.

The question then arose whether the widows and children of deceased members were entitled to precedence, having regard to the customary provision in the rules that "if more than one member shall give notice to withdraw at one time they shall be paid in rotation, according to the priority of notice; provided always that the widows and children of deceased members shall always have the precedence."

The rules also provided (clause 25) that, in case of a member dying, his shares and interest should belong to his executors or administrators, or other the person or persons thereafter mentioned; that, when on the death of any member without leaving a will a sum of money not exceeding £50 should become payable, such sum should, in default of letters of administration being taken out to the deceased member, be paid to any person nominated by the deceased in writing (such person being husband, wife, father, mother, child, brother or sister, nephew or niece, of such member), and in case there should be no such nomination, or the person so nominated should have died before the deceased member, or in case the member should have revoked such nomination, then such sum should be paid to the person who should appear to be entitled under the Statutes of Distributions to receive the same, without taking out letters of administration.

HELD—that the true construction of the rules was that, whenever there was a competition between persons who had given notice to withdraw their shares and the widows and children of deceased members whom the society was bound to recognise under clause 25, then the widows and children should always have precedence.

HELD, therefore, that, under the scheme,

such widows and children were entitled to be paid in priority to the other shareholders of the society, such widows and children ranking *inter se* according to the dates of the deaths of the deceased members through whom they claimed.

RE THE WEST LONDON AND GENERAL PERMANENT BENEFIT BUILDING SOCIETY, (1898) 78 L. T. 393; 14 T. L. R. 304—C. A.

6. *Winding-up Order—Unpaid Creditor—Society Unauthorised by Law—Repeal of Act Authorising Society—Jurisdiction—Building Societies Act, 1836* (6 & 7 Will. 4, c. 32)—*Building Societies Act, 1874* (37 & 38 Vict. c. 42), s. 40—*Building Societies Act, 1894* (57 & 58 Vict. c. 47), s. 25—*Companies Act, 1862* (25 & 26 Vict. c. 89), ss. 4, 199.]—A society was duly formed in 1868 under the provisions of the Building Societies Act, 1836, but it ceased to have full protection and recognition of the law by reason of the repeal of the Building Societies Act, 1836, which took effect in 1896. In March, 1900, the secretary misappropriated a large portion of its funds, and the society was found to be insolvent. The directors, by contributing some £800 of their own and having all the assets of the society sold, were in a position to offer 12s. 6d. in the pound to the creditors of the society. All the creditors whose claims were undisputed, except the petitioner, accepted that offer. The petitioner then petitioned to wind up the society.

HELD—that as a general rule an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ*; but that rule is subject to exceptions—e.g., where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order, that the petitioner would gain nothing by his petition, which must be dismissed, the more so because the petitioner had waited till a previous petition, which he did not appear in support of, was got rid of and the funds had been distributed and everything settled; and that the petition must be dismissed without costs, as the society refused to withdraw its defence that it was non-existent.

IN re Chapel House Colliery Co. ((1883) 24 Ch. D. 259; 52 L. J. Ch. 934; 31 W. R. 933; 49 L. T. 575—C. A.) followed.

*Semble*, the words "or is formed in pursuance of some other Act of Parliament" in sect. 4 of the Companies Act, 1862, mean formed and having its existence recognised by another Act of Parliament.

IN RE ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY, [1901] 1 Ch. 102; 69 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44—Wright, J.

**III. IN GENERAL.**

7. *Infant Member—Advances—Purchase and Mortgage by Infant—Repudiation after attaining Majority—Society's Lien—Building Societies Act, 1874* (37 & 38 Vict. c. 42), ss. 13.



**In General—Continued.**

14, 15, 21, 23—*Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), s. 1.]—Though the Building Societies Act, 1874, enables a minor to become a member, it does not authorise his borrowing while under twenty-one years of age by means of advances on mortgage of his property.

A young married woman (an infant) applied to a building society, whose rules enabled infants to become members in the ordinary way, to become a member of the society, and also applied for an advance to be made to her in order to enable her to make a purchase of some land and to complete the buildings on it. She became a member of the society, and then the society advanced the money to purchase the land she wished to buy, and afterwards made further advances, which were expended in completing the buildings upon the property. The transaction was carried out by deeds which were dated on different days, viz., July 21st and 22nd, 1898. The young woman sought to keep the property free from any claim or lien on behalf of the society.

**HELD**—that the mortgage deed was void as against the plaintiff under the *Infants' Relief Act*, 1874, and the defendant society must deliver it up to be cancelled; that the contract for the purchase of the land was voidable only and not void, and had been adopted and confirmed by the plaintiff; and that the society became entitled on July 21st, 1898, to an equitable charge on the land and premises purchased by the plaintiff and conveyed to her by the deed of July 21st, 1898, to secure so much money as was paid by the society in or towards payment of the purchase-money payable by the plaintiff for the land and premises, with interest at 4 per cent. per annum.

Decision of the C. A. ([1902] 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135), varying decision of Joyce, J. ([1901] 1 Ch. 88; 49 W. R. 56; 83 L. T. 424, 17 T. L. R. 7) affirmed.

**NOTTINGHAM PERMANENT BENEFIT BUILDING [SOCIETY v. THURSTAN, [1903] A. C. 6; 72 L. J. Ch. 134; 67 J. P. 129; 51 W. R. 273; 87 L. T. 529, 19 T. L. R. 54—H. L. (E.)**

**8 Reconveyance of Mortgage—Stamp—Exemption of Building Society—Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 41, 42—Stamp Act, 1891 (54 & 55 Vict. c. 39).]**—By the Building Societies Act, 1874, sect. 41, certain documents, including transfers and receipts, are not to "be subject or liable to be charged with any stamp duty or duties whatsoever, provided that the exemption shall not extend to any mortgage"; and by sect. 42, where moneys secured by any mortgage or further charge are paid, a receipt in the form in the schedule to the Act indorsed on the deed is sufficient release. A deed was executed by the society, its trustees, and the mortgagor, reconveying the mortgaged property, as all the money due under the mortgage had been duly paid,

**HELD**—that the deed was exempt from duty.

**OLD BATTERSEA AND DISTRICT BUILDING SOCIETY [v. INLAND REVENUE COMMISSIONERS, [1898] 1. Q. B. 294, 67 L. J. Q. B. 696; 78 L. T. 746—Div. Ct.**

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*See MASTER AND SERVANT, METROPOLIS.*

**BURIAL AND CREMATION.**

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**I. BURIAL GROUNDS.**

*And see CHARITIES, 41; INCOME TAX, 5.*

**1. Contract by Burial Board to Buy Land—"New Burial Ground"—Refusal by Secretary of State to Approve—Specific Performance—Ultra vires—Burial Act, 1852 (15 & 16 Vict. c. 85), ss. 9, 25, 26, 28—Burial Act 1853 (16 & 17 Vict. c. 134), ss. 1, 6—Burial Act, 1855—(18 & 19 Vict. c. 128), s. 9]**—Sect. 6 of the Burial Act, 1853, provides that where by an Order in Council it is ordered that no new burial ground shall be opened in any city or town, or within any limits therein mentioned, without the previous approval of one of Her Majesty's principal Secretaries of State, no new burial ground shall be "provided and used" in such city or town, or within such limits, without such previous approval.

**HELD**—that the approval of the Secretary of State is not necessary to render valid a contract by a burial board, entered into with the approval of the vestry, to purchase land for a burial ground, and that such a contract can be enforced although his approval is afterwards refused.

**HELD**—also, that an addition to a pre-existing burial ground is a "new burial ground" within that section.

Decision of Byrne, J., reversed.

**WARD v. PORTSMOUTH CORPORATION, [1898] 2 Ch. [191; 62 J. P. 820; 67 L. J. Ch. 489; 78 L. T. 771; 14 T. L. R. 472; 46 W. R. 610—C. A.**

**2. Fees—Erection of Monuments—Burial Ground "Laid Out and Used" before the Passing of the Burial Act, 1900—Addition to Existing Burial Ground—Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (4) (1).]**—In 1893 a burial board purchased, for burial purposes, eight acres of land adjoining, but separated by a wall from, a burial ground of seventeen acres, then being used by them. Before the

**Burial Grounds—Continued.**

date of the passing of the Burial Act, 1900, the board laid out the eight acres as a burial ground, pulled down the dividing wall, and made a communication for foot passengers and carriages between the eight acres and the seventeen acres; they also obtained the sanction of the Home Secretary for the division of the enlarged ground into consecrated and unconsecrated portions; but the consecration did not take place until after the passing of the Act, and no part of the eight acres was actually used for burials until after that date. The incumbent of one of the parishes to which the burial ground was appropriated claimed a right in respect of the erection of monuments in any part of the burial ground to such fees as were payable to him in respect of the like matters before the passing of the Burial Act, 1900.

**HELD**—that the claim failed, by *Vaughan Williams and Buckley, L.J.*, on the ground that, although the eight acres was used as a burial ground before the passing of the Act, within the meaning of the first proviso to sub-sect. (4) of sect. 3, the right of the incumbent to the fees in question did not arise until consecration, which did not take place until after the passing of the Act; by *Fletcher Moulton, L.J.*, on the ground that at the passing of the Act the eight acres was not used as a burial ground.

**Decision of Channell, J.** ([1906] 1 K. B. 338; 75 L. J. K. B. 225; 70 J. P. 107; 54 W. R. 507, 94 L. T. 196; 22 T. L. R. 163; 4 L. G. R. 121) affirmed on other grounds.

**YOUNG v. KINGSTON-ON-THAMES, &C., BURIAL COMMITTEE**, [1907] 1 K. B. 416; 76 L. J. K. B. 382; 71 J. P. 121; 96 L. T. 134, 23 T. L. R. 218; 5 L. G. R. 481—C. A.

**3. Charges for Keeping Graves in Order—Income Tax—Income Tax Act, 1842** (5, 6 Vict. c. 35) sect. 60, *Schedule A., No. 3, Rule III.*—The Paisley Cemetery Company was registered as a limited liability company under the Companies Acts, 1862 to 1880. Its object was to acquire lands, and lay these out as a place for interment, of lairs, tombs, and graves, &c. Upon payment by the proprietors of lairs of the sum of £2 for each breadth of 3 feet the company undertook to keep, maintain, and dress such lairs in good order and condition during each year "in all time coming." The company having been assessed for income tax on the sums so received by them, as being part of its annual profits, contended that they were not entitled to divide these sums as profits, but were compelled to retain them so as to meet the obligation undertaken by them for all time.

**HELD**—that this contention could not be upheld, and that such sums were assessable under the Income Tax Act, 1842, *Schedule A., No. 3, Rule III.*

**RE PAISLEY CEMETERY CO., LD. v. REITH**, (1898) [25 R. 1080, 35; Sc. L. R. 947; 63 J. P. 806—Ct. of Sess.]

**4. Fees—Part-Consecrated though allotted as Unconsecrated by Secretary of State—Burials therein Not Conducted by Incumbent under Burial Laws Amendment Act, 1880** (43 & 44 Vict. c. 41)—*Right of Incumbent to Fees—Burial Act, 1852* (15 & 16 Vict. c. 85), s. 32—*Burial Act, 1900* (63 & 64 Vict. c. 15), s. 3 (4).—Part of a burial ground of a parish was consecrated by a bishop in due legal form by an act or sentence of consecration, although the Secretary of State, acting under sect. 7 of the Burial Act, 1853, had only sanctioned that part as unconsecrated ground. Certain burials took place in this portion of the ground which were not conducted under the Burial Laws Amendment Act, 1880, and at which the incumbent of the parish performed no service. On a claim for burial fees in respect of each of these interments by the incumbent against the burial authority,

**HELD**—that, even if the ground was validly consecrated (as indeed the Court were of opinion that it was), neither under sub-sect. 4 of sect. 3 of the Burial Act, 1900, nor otherwise, could the incumbent recover from the burial authority burial fees in respect of such interments where he had rendered no service.

**WILLIAMS v. BRITON FERRY BURIAL BOARD**, [1905] 2 K. B. 565; 74 L. J. K. B. 840; 69 J. P. 313; 92 L. T. 697; 3 L. G. R. 859; 54 W. R. 187—Div. Ct.

**5. Restriction on Burials—Burial within 100 yards of Dwelling-house—Ground "not already used" as a Cemetery—Dwelling-house erected after Acquisition of Land for Cemetery—Burial Act, 1855** (18 & 19 Vict. c. 128), s. 9.—In 1905 a burial board purchased a piece of land and laid it out as a cemetery. Subsequently to the purchase an adjoining land-owner erected a dwelling-house within 100 yards of the cemetery. Upon motion by the landowner for an injunction to restrain the burial board from allowing burials to take place within 100 yards of his house in contravention of sect. 9 of the Burials Act, 1855, which prohibits ground "not already used" as a cemetery from being used for burials within 100 yards "from any dwelling-house" without consent of the owner,

**HELD**—that "already" meant "at the time of the passing of the Act," so that the prohibition applied to all land acquired for cemeteries since 1855; and that houses, although built subsequently to the acquisition of any such cemetery, were within the protection of the Act, and that the injunction must be granted.

**Decision of Kekewich, J.** (94 L. T. 606; 22 T. L. R. 496; 4 L. G. R. 519) affirmed.

**GODDEN v. HYTHE BURIAL BOARD**, [1906] 2 Ch. [270; 75 L. J. Ch. 595; 70 J. P. 285; 95 L. T. 129; 22 L. R. 631; 4 L. G. R. 787—C. A.]

**II. CHURCHYARDS.**

*And see CHARITIES, 71; COMPULSORY PURCHASE, 58.*

**6. Addition of Ground "adjoining"—Con-**

### Churchyards—Continued.

*secration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 1.]*—A plot of ground immediately opposite to, but separated by a high-way twenty-five feet wide from, an existing churchyard, was proposed to be added to the churchyard under the Consecration of Churchyards Act, 1867, which contains provisions for the conveyance and consecration "of portions of ground adjoining and added to existing churchyards."

HELD—that it was "adjoining" land within the meaning of the Act.

IN RE BATEMAN (BARONESS) AND PARKER'S CON-  
[TRACT, [1899] 1 Ch 599, 68 L. J. Ch. 330,  
63 J. P. 345; 47 W. R. 516, 80 L. T. 469—  
C. A.]

*7. Reservation of Grave Space—Sale by Rector to Non-parishioner—Confirmatory Faculty—Interference with Rights of Parishioners—Rector Ordered to Discontinue Burial of Non-parishioners.]*

*Semble*—An incumbent may grant reserved grave spaces to non-parishioners on payment to him (or to him and the churchwardens) of special burial fees; but a faculty from the ordinary is necessary to complete the grantee's title.

The rector of a parish just outside London, and with a present population of 46, had made such grants for some years past. The churchyard had been extended about 20 years ago, and had now vacant space for 70 graves, on an average only one parishioner died every year. On the application by a grantee for a confirmatory faculty, the people's churchwarden opposed on the ground that the grants of reserved spaces to non-parishioners were detrimental to the rights of parishioners.

HELD—that the faculty should be granted; but that no further grants to non-parishioners should be made during the present rector's tenure of office.

DE ROMANA v. ROBERTS, [1906] P. 332—Consistory Ct. of London, Dr. Tristram, K.C., Chancellor.

*8 Tombstone—Inscription—Prayers for the Souls of the Dead—Faculty to Remove Tombstone Erected without the Permission of the Rector]*—S. caused a tombstone to be erected over a grave in the churchyard of a parish bearing the following inscription: "Of your charity pray for the repose of the soul of W. A., the beloved son of G. and A. S., also of G. E. . . . on whose souls, sweet Jesus, have mercy." The tombstone was erected without the permission of the rector of the parish, and without the inscription having been submitted to him for his approval. On the rector protesting and requesting S. to remove it he refused to do so. The rector, therefore, prayed the Court to decree a faculty authorising him to remove the tombstone from the churchyard. S. prayed the Court to decree to him a faculty confirming its erection and autho-

rising its retention in the churchyard. It was in the consecrated portion of the churchyard that the tombstone was erected. The cost of keeping up the churchyard was defrayed by the churchwardens out of the offertories in the church. The S. family were Roman Catholics.

HELD—that as by ecclesiastical law the rector was entitled to have the inscription submitted to him for his approval, and that the tombstone in the first instance ought not to have been erected without his permission, he had made out a good case for the granting of a faculty for removing it; that S. had not satisfied the Court that the inscription was in all respects unobjectionable, and the burden of so doing lay on S.; and that a faculty should issue to the rector authorising him to remove the tombstone from the churchyard.

PEARSON (CLERE) v. STEAD, (1902) 18 T. L. R. [331 [1903] p. 66; Dr. Tristram, K.C., Chancellor, Consistory Court of Ripon.

### III DISUSED BURIAL GROUNDS.

*9. Building on—Alterations in Disused Churchyard—Faculty—"Building" — Wall forming Arcade—Protection of Frescoes—Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3—Open Spaces Act, 1887 (50 & 51 Vict. c. 32), ss. 4, 14—Paintings—Introduction in Church—Abuse—Conscientious Objections—Introduction of Discord.]*—The churchwardens of the parish of St. Botolph, Aldersgate Without, brought a suit to authorise the erection in the parish churchyard, disused for burials under an Order of Council, of a churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on that side of the wall which would be inside the churchyard. The churchyard was laid out with great taste as a garden, and thrown open to the public.

HELD—that as, after the construction of the covered way, the whole of the churchyard would practically remain as much an open space for the exercise and recreation of the inhabitants of the parish as it was before, the introduction of the covered way would not contravene the provisions of the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887, and that the covered way was not a "building" such as was prohibited by those two Acts.

The introduction of paintings into a church for the purpose of decoration is neither prescribed nor prohibited by ecclesiastical law.

Where the vestry and the parishioners are unanimous, or substantially so, in favour of accepting a presentation painting of merit for the decoration of their church, its introduction may be properly sanctioned by a faculty, unless it should appear to the Court to be likely to be abused by superstitious reverence or to be otherwise inappropriate

**Disused Burial Grounds—Continued.**

for a church, or to be such as might reasonably give offence to present or future parishioners.

Where the Court was of opinion that the objections taken to the introduction into the parish church of certain paintings as church decorations, and in particular to the central one, might be conscientiously entertained by members of any congregation in a church without disparagement to those who might entertain a view favourable to them, and that from the evidence the Court was satisfied that no less than 120 resident parishioners and Churchmen, eight of them being churchwardens, conscientiously objected to their introduction, though it was on a matter of taste, and that their introduction would offend their religious feelings and would introduce discord into an admirably worked parish where there had been none before, it felt in the exercise of its judicial discretion that its duty was to decline to sanction their introduction by faculty.

ST. BOTOLPHE, ALDERSGATE WITHOUT (VICAR OF),  
[v. PARISHIONERS OF SAME, [1900] P. 69—  
Consistory Court of London, Dr. Tristram,  
Q. C., Chancellor.

10 *Building on Churchyard Closed for Burials—Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), s. 3.—By the exception in sect. 3 of the Disused Burial Grounds Act, 1884, it is lawful to build upon a disused burial ground (defined by that Act to mean a burial ground closed for burials under an Order in Council) for the purpose of enlarging a church, chapel, or meeting-house, or other place of worship.

**HELD**—that the ordinary had jurisdiction to authorise by faculty the vicar and churchwardens of the parish, after having taken down the building which had been and was still used as a place of worship, to erect on its site, and on a portion of the churchyard adjoining it, a larger building in substitution for, and as an enlargement of, the present building for the purposes of a mission-room as well as for religious and parochial meetings, and a school-room.

ST. JAMES THE LESS, BETENAL GREEN (VICAR OF),  
[v. PARISHIONERS OF SAME, [1899] P. 55—  
Consistory Ct. of London.

11. *Building on—Enlargement of School upon—Rebuilding an Existing School—Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), s. 3.—The Disused Burial Grounds Act, 1884, only permits a building to be erected upon a disused burial ground for the purpose of enlarging a church, chapel, meeting house, or other place of worship. In 1860 a faculty was granted allowing a part of an old burial ground to be appropriated to the purposes of a school and playground, and it had now become necessary to rebuild and extend the school.

**HELD**—that in consequence of the Act of

1884 no faculty could be granted authorising the extension of the school buildings so as to encroach upon the playground.

ST. SEPULCHRE, HOLBORN VIADUCT, IN RE, (1903)  
[19 T. L. R. 723—Consistory Court of  
London, Dr. Tristram, Chancellor.

12. *Building on—Erection of Hoarding to prevent Acquisition of Right to Light—“Building”*—*Metropolitan Open Spaces Acts, 1877* (40 & 41 Vict. c. 35), s. 1; and 1881 (44 & 45 Vict. c. 34), s. 5—*Open Spaces Act, 1887* (50 & 51 Vict. c. 32), s. 4—*Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), s. 3.—A local authority in the Metropolis, in whom a disused burial ground is vested as an open space for the use of the public, have power to erect a screen upon the open space for the purpose of preventing the owner of the adjoining land from acquiring a right to the access of light over it so long as such screen is not so constructed as to be a “building” within the meaning of sect. 3 of the Disused Burial Grounds Act, 1884.

It is quite possible to erect a screen which will not be a “building.”

Decision of C. A. ([1903] 2 Ch. 557; 72 L. J. Ch. 695; 68 J. P. 49; 52 W. R. 114, 89 L. T. 383; 19 T. L. R. 648) reversed.

PADDINGTON BOROUGH COUNCIL v. ATTORNEY-  
[GENERAL, [1906] A. C. 1; 75 L. J. Ch. 4; 70  
J. P. 41; 54 W. R. 317; 93 L. T. 673; 22  
T. L. R. 55, 4 L. G. R. 19—H. L. (E.)

13. *Building on—Faculty for Erection of a Vestry Hall—“Enlarging a Church”*—*Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), s. 3.—The Court is not precluded by sect. 3 of the Disused Burial Grounds Act, 1884, from granting a faculty for the erection on a disused burial ground of a vestry hall abutting on a church with doors leading out of it into the church. The Court worded the faculty so as to preclude the hall from being used for secular purposes, allowing it to be used as a vestry room and for ecclesiastical and charitable purposes, and inserted a provision in the faculty to enable parties interested in the matter, in case they considered that the room was being used for secular purposes, to apply to the Court on motion for an order to prevent its being so used.

IN RE HOLY TRINITY, STEPNEY, (1902) 18 T. L. R.  
[789—Dr. Tristram, Chancellor, Consis-  
tory Court of London.

14. *Building on—Land set apart for Interment in Breach of Order in Council—Power to Build on—Metropolitan Open Spaces Act, 1881* (44 & 45 Vict. c. 34), s. 1—*Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), s. 3—*Open Spaces Act, 1887* (50 & 51 Vict. c. 32), s. 4, and *Sch.*—The provisions of sects. 1, 6 of the Burial Act, 1853, apply to an addition to an existing burial ground as well as to a new ground.

Land which has been “set apart for the purposes of interment” within the meaning of sect. 1 of the Metropolitan Open Spaces

*Disused Burial Grounds—Continued.*

Act, 1881, as amended by sect. 4 of the Disused Burial Grounds Act, 1884, cannot be used for building purposes by reason of the provisions of sect. 3 of the Disused Burial Grounds Act, 1884, even although such land was so set apart in breach of an Order in Council, and could never be lawfully used for the purposes of interment.

Decisions of Wright and Bray, JJ. ([1905] 1 K. B. 403; 74 L. J. K. B. 382; 69 J. P. 130; 92 L. T. 269, 3 L. G. R. 249) affirmed.

IN RE BOSWORTH AND GRAVESEND CORPORATION, [1905] 2 K. B. 426; 74 L. J. K. B. 810; 69 J. P. 337; 54 W. R. 39; 93 L. T. 226; 21 T. L. R. 608; 3 L. G. R. 849—C. A.

15. *Building on—What Buildings may be Authorised by Faculty—Not a Parochial Hall—Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), s. 3.]—For a building to fall within the definition “enlargement of a church,” as used in the Disused Burial Grounds Act, sect. 3, it must have physical connection with the church, and must serve some purpose ancillary to the conduct of the services.

Vestries, heating chambers, &c., satisfy both these requirements; but a parochial hall does not; and therefore a faculty ought not to be granted authorising its erection upon a disused burial ground to which the Act applies.

Decision of Dr. Tristram (18 T. L. R. 789) disapproved on the merits, but supported on other grounds.

LONDON COUNTY COUNCIL v. DUNDAS AND [OTHERS, (1903) 19 T. L. R. 670—Dean of Arches

16. *Churchyard Closed for Burials—Widening Highway—Removal of Human Remains—Joint Application.*]—On an application by the vicar and churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester, for a faculty to use a strip of land, part of the churchyard, as an addition to the road, it appeared that the churchyard had been closed for burials by Order in Council. It was admitted that it was necessary to widen the street.

HELD—that if the human remains were treated with all due care and reverence, and removed into consecrated ground, and the ancient and new position of each interment carefully marked and identified, if the wishes of the surviving relatives were consulted and their assent obtained, then, in the interests of the great city of Leicester, of the parishioners, and of the church generally, it was desirable to accede to the application and grant the faculty to the vicar and churchwardens, omitting the Corporation.

ST. NICHOLAS, LEICESTER (VICAR OF), v. LANGTON [1899] P. 19—Consistory Ct. of Peterborough

17. *Widening of Street—Appropriation of*

*Consecrated Burial Ground—Faculty.*]—Although the general proposition that ground once consecrated cannot afterwards be applied to secular purposes accurately expresses the law of the subject in general terms, yet it cannot be applied without qualification to cases in which the purpose for which the ground was originally consecrated can no longer be lawfully carried out.

Where, accordingly, a consecrated burial ground has been closed for interments by an Order in Council, the ordinary has jurisdiction to grant a faculty for a portion of its area to be thrown into the public way for the purpose of making a path. But, if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground, and will still be subject to ecclesiastical jurisdiction, and to the statutes as to the mode in which burial grounds may be lawfully used.

IN RE BIDEFORD PARISH, EX PARTE RECTOR, &c., [OF BIDEFORD, [1900] P. 315; 64 J. P. 743; 16 T. L. R. 540—Court of Arches—  
Sir A. Charles, D. A.

## IV. EXHUMATION OF REMAINS.

And see No. 16, *supra*.

18. *Consistory Court of London—Jurisdiction—Acceptance of Letters of Request in Aid of Probate Action.*]—The Consistory Court of London will, in the exercise of its discretion, accept letters of request signed by the President of the Probate, Divorce and Admiralty Division, requesting that in aid of the trial of an issue in a probate action a faculty may be granted authorising the opening of a vault in a consecrated burial ground in the diocese, and the opening and inspection of a coffin there buried, for the purpose of identification, and decree a faculty according to the tenor of the letters of request. The Home Secretary's licence is not necessary to enable the person in whose favour the faculty is granted to act upon it.  
DRUCE v. YOUNG, [1899] P. 84—Consistory Ct. [of London.

19. *Disinterment of Body—Jurisdiction of Consistory Court—Burial Act, 1857* (20 & 21 Vict. c. 81), s. 25.]—A consistory court has no jurisdiction to order the disinterment of a body.

REG. v. DR. TRISTRAM, (1899) 63 J. P. 391; 80 [L. T. 414; 15 T. L. R. 214—Div. Ct.

20. *Removal of Remains—Churchwardens removing Human Remains without having obtained a Faculty—Acting under Order in Council.*]—Sect. 23 of the Burial Act, 1857, provides that “it shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal Secretaries of State, by and with the advice of Her Privy Council, from time to time to order such acts to be done by or under the

**Exhumation of Remains—Continued.**

direction of the churchwardens, or such other persons as may have the care of any vaults or places of burial, for preventing them becoming or continuing dangerous or injurious to the public health; and every such Order in Council shall be published in the *London Gazette*, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid." Two Orders in Council were issued under the above section, and served on the respondents, whereby they, or such other person or persons as might have the care of the vaults under the Church of St. Mildred, Bread Street, should adopt the following measures, namely, that the whole of the human remains then lying beneath the floor of that church be removed and forthwith reburied in a certain given burial ground. The churchwardens accordingly, and in pursuance of the said Orders, but without having applied for or obtained any faculty, which they considered unnecessary, removed all the pews, flooring, and monumental flagstones from the said church, and several coffins out of the vaults preparatory to removal. Burials in the parish of St. Mildred had been discontinued by an Order in Council dated August 9, 1853, and the last burial there recorded was on June 15, 1853.

**HELD**—that the churchwardens in doing the acts they did without a faculty had acted illegally, and that the Orders in Council afforded them no justification.

**LEE v. HAWTREY AND OTHERS, CHURCHWARDENS**  
[OF ST. MILDRED, BREAD ST., [1898] P. 63—  
Consistory Ct. of London.

**21. Removal of Remains — Consistory Court—Jurisdiction over Bodies Buried in Consecrated Ground—Faculty—Licence of Secretary of State—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 25.]**—Sect. 25 of the Burial Act, 1857, has taken away no part of the jurisdiction of the Consistory Court (as representing the Ordinary) over human remains buried in consecrated ground. A faculty is still necessary for the exhumation of such remains, though by sect. 25, save where the exhumation is merely for the purpose of removing the remains from one consecrated place of burial to another, the licence of the Secretary of State is also made necessary. When the licence of the Secretary of State is necessary the faculty can be granted either before or after the licence has been obtained, but if granted before it cannot be acted upon until the licence has also been granted.

**REG. v. TRISTRAM, [1898] 2 Q. B. 371; 67**  
[L. J. Q. B. 857; 79 L. T. 74; 46 W. R.  
653—Div. Ct.

**22. Removal of Remains—From Consecrated to Unconsecrated Ground—Faculty—Home Secretary's Licence—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 25.]**—The ground on which an Ecclesiastical Court would for-

merly have refused a faculty for the removal of remains from consecrated to unconsecrated ground having been taken away by the Burial Act, 1857, s. 25, the Court, where it entertains no doubt that a licence from the Home Secretary is necessary for the removal of remains as ancillary to the faculty, will decree the faculty subject to the Home Secretary's licence being obtained. But in a case where there is any doubt in the mind of the Court whether a licence is necessary, the practice is to issue the faculty without any proviso, leaving the party to whom it is granted to apply or not, as he may be advised, for a licence before taking action on the faculty.

**IN RE TALBOT, [1901] P. 1.**—Dr. Tristram, Consistory Court of London.

**BUTTER.**

*See* FOOD AND DRUGS.

**BYE-LAWS.**

*See* COMPANIES, FISHERIES; HIGHWAYS; LOCAL GOVERNMENT; MARKETS AND FAIRS, 1, 11; METROPOLIS; OPEN SPACES; PUBLIC HEALTH; RAILWAYS; TRAMWAYS, 1—5; WEIGHTS AND MEASURES, 5.

**CABS.**

*See* METROPOLIS; STREET TRAFFIC.

**CANADA.**

*See* DEPENDENCIES AND COLONIES.

**CANALS.**

*See* HIGHWAYS, 132; RAILWAYS AND CANALS.

**CAPE COLONY.**

*See* DEPENDENCIES AND COLONIES.

**CAPITAL AND INCOME.**

*See* SETTLEMENTS; TRUSTS.

**CAPTURE.**

*See* CONFLICT OF LAWS; INSURANCE.

**CARDS.**

See GAMING AND WAGERING.

**CARGO.**

See SHIPPING AND NAVIGATION.

**CARRIAGE OF PASSENGERS.**

See NEGLIGENCE; RAILWAYS.

**CARRIERS.**

I. RIGHTS AND LIABILITIES . . .	309
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**I. RIGHTS AND LIABILITIES.**

1. *Damage to Goods in Transit—Inherent Vice, or Unfitness of Article.*—The rule as to the non-liability of a common carrier for damage resulting to a thing carried, from its own "inherent vice," is not limited to cases in which the damage would have occurred, even if the thing had never been carried at all.

The plaintiff was the owner of an engine furnished with shafts and road wheels to enable it to be moved from place to place, he employed the defendants as common carriers to carry it to another town, and, as their horses were drawing it to their station, a shaft broke, and in consequence the engine was overturned and damaged. The defect in the shaft could not have been detected by any ordinary examination.

Held—that obviously both parties intended the engine to be drawn by horses to the station; that there was an inherent and unknown defect rendering it unfit for such a journey; and that therefore the defendants were not liable for damage arising from such defect.

LISTER v. LANCASHIRE AND YORKSHIRE RY. CO., [1903] 1 K. B. 878; 72 L. J. K. B. 385; 88 L. T. 561; 52 W. R. 12—Div. Ct.

2. *Damage to Goods in Transit—Rejection of Goods—Repair of Damage.*—In order to entitle the consignee of goods carried by a public carrier to reject the goods and claim their full value as new from the carrier, leaving it to the carrier to dispose of and make what he can out of the damaged goods, it is not sufficient to prove that the goods have been damaged to some extent, however slight. In every case it is a question of circumstances, depending upon the extent to which goods are damaged. Where

the damage sustained is serious, and the probable cost of repairing the machine great, it is not reasonable to call upon the consignee to accept delivery and content themselves with being repaid the cost of repairing the machine.

British Columbia Sawmills v. Nettleship ((1868) L. R. 3 C. P. 499; 37 L. J. C. P. 235; 16 W. R. 1046) distinguished.

DICK v. EAST COAST RAILWAYS, (1902) 4 F. 178.

3. *Declaration of Value and Nature of Articles—Increased Charge—"Trinkets"—"Glass"—"Plated Articles"—Opera Glasses and Photographic Apparatus.*—Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1.—A jury found that opera glasses and photographic apparatus were not within sect. 1 of the Carriers Act, 1830.

LEVI, JONES & CO, LD v. CHESHIRE LINES [COMMITTEE, (1901) 17 T. L. R. 443—Bruce, J., and Jury.

4. *Negligence—Liability of Bargeowners—Construction of Contract—"Loss which can be covered by Insurance."*—A common carrier who intends to exclude his liability for negligence must do so by clear and explicit language; and, if an exemption clause is capable of two constructions, one including, and the other excluding, a case of negligence, the latter construction must *prima facie* prevail.

Phillips v. Clark ((1857) 2 C. B. (n.s.) 156; 26 L. J. C. P. 168) followed.

Goods were loaded on the defendants' barge on the following terms: "We will not be liable for any loss of, or damage to, goods which can be covered by insurance; the marine or other policy should stipulate that insurance is effected without recourse to lighterman." The goods were lost owing to the negligence of the defendants' bargemen.

Held—that the loss in the present case was within the words "loss . . . which can be covered by insurance," but that the defendants were nevertheless liable, for a carrier cannot rid himself of liability for default or negligence except by express and explicit words; an exemption in general words must be construed, not as relieving him from the duty of taking reasonable care, but as merely limiting his liability as an insurer.

Decision of Walton, J. ([1903] 1 K. B. 750; 72 L. J. K. B. 374; 51 W. R. 477; 88 L. T. 428; 19 T. L. R. 328; 8 Com. Cas. 155; 9 Asp. M. C. 398) affirmed.

PRICE AND CO. v. UNION LIGHTERAGE CO., [1904] 1 K. B. 412; 73 L. J. K. B. 222; 52 W. R. 325; 89 L. T. 731; 20 T. L. R. 177; 9 Com. Cas. 120—C. A.

5. *Passenger's Personal Property—Loss of Gold Watch and Money—Theft—Negligence—Conditions on Ticket—Ship—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502 (ii.).*—The plaintiff was a passenger on the defendants' steamship upon the terms of a

**Rights and Liabilities—Continued.**

ticket which provided that the defendants would not be responsible for loss or injury of or to the person or property, goods, or articles belonging to or carried by a passenger, whether occasioned by thefts or robberies by persons in the defendants' employment or others, or any other acts, defaults, or negligence of the defendants' agents or servants of any kind whatsoever. The plaintiff at night placed his gold watch and chain and some money in the watch pocket over his berth in his cabin. The watch pocket was close to a fanlight opening on to a ventilating shaft through which a person on deck could reach the watch pocket. The watch pocket was placed there under the directions of the defendants' marine superintendent when the vessel was being built. The watch, chain, and money were stolen one night by a person on deck reaching through the ventilating shaft. In an action to recover their value upon the grounds—(1) of negligence on the part of the defendants in placing the watch pocket where it was, and (2) of breach of warranty in not providing a safe cabin for the carriage of the plaintiff's property,

**HELD**—that if the defendants were negligent, they were protected by the terms of the ticket; that, with regard to the warranty as to articles which remained in the personal control of the passenger, such as his watch, chain, and money, the liability of a carrier was the same as in the case of a passenger—namely, an obligation to exercise reasonable care; that this obligation did not become more extensive at night by reason of the passenger placing the articles in the receptacle intended for them; but that if the obligation did become more extensive, sect. 502 (1) of the Merchant Shipping Act, 1894, protected the defendants, the value of the articles not having been declared and the loss not having occurred through the personal fault of the defendants.

**SMITTON v. THE ORIENT STEAM NAVIGATION CO.,**  
[*Ld.*, (1907) 96 L. T. 848; 23 T. L. R. 359; 12 Com. Cas. 270—Channell, J.]

**II. RAILWAYS.****(a) Passengers' Luggage.**

**6 Articles not Personal Luggage—Commercial Travellers' Samples—Bicycles—Charges.**—A commercial traveller in bicycles who travels with the component parts and with incomplete machines is entitled to the special terms given by railway companies in respect of commercial travellers' luggage, and should not be charged the higher rates for bicycles.

**GORMULLY AND JEFFREY MANUFACTURING CO. v. MIDLAND RAILWAY CO.,** (1898) 14 T. L. R. 84  
—Bigham, J.]

**7. Articles not Personal Luggage—Commercial Travellers' Samples—Contract to Carry by Passenger Train—Conditions Re-**

**lieving from Liability—Contract not Signed—Validity—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.]—Sect. 7 of the Railway and Canal Traffic Act, 1854—which provides that a railway company shall be liable for the loss of articles and goods in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of the company or its servants, provided that no special contract between the company and any other parties respecting the receiving, forwarding, or delivering thereof shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such articles or goods for carriage—is not limited to goods or articles which the company are bound to carry by the particular class of train in which they are in fact carried. The section, therefore, applies to goods carried by passenger train which the company are only under a legal obligation to carry by goods train, e.g., to commercial travellers' samples carried as luggage.**

**Decision of Div. Ct.** ([1906] 2 K. B. 619; 75 L. J. K. B. 603, 94 L. T. 820, 22 T. L. R. 591) affirmed.

**WILKINSON AND ANOTHER v. LANCASHIRE AND YORKSHIRE Ry. Co.,** [1907] 2 K. B. 222, 76 L. J. K. B. 801; 97 L. T. 35; 23 T. L. R. 509  
—C. A.]

**8 Articles not Personal Luggage—Bicycle.]—A bicycle—however common it may be among people to carry bicycles about with them—cannot be said to be carried as luggage, in the sense of ordinary personal luggage.**

**BRITTEN v. GREAT NORTHERN RAILWAY,** [1899] 1 Q. B. 243; 68 L. J. Q. B. 75; 69 L. T. 640; 15 T. L. R. 71—Channell, J.]

**9. Contract to Carry Passengers' Luggage Free—Jewelry in Luggage—Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), ss. 1, 2, 6.]—The plaintiffs, who were husband and wife, were passengers on the defendants' railway, and took with them a box which with its contents was passengers' ordinary personal luggage, and which they were entitled, under a notice in the defendants' time-table, to have carried free of charge. The box contained articles of jewelry belonging to the wife, above the value of £10, and their value and nature were not declared, nor was any charge paid in respect thereof in accordance with sect. 1 of the Carriers Act, 1830. The box and its contents were lost on the journey.**

**HELD**—that the contract by the company to carry a specified quantity of personal luggage free of charge was not inconsistent with the application of sect. 1 of the Carriers Act, 1830, and that therefore the defendants were not liable for the loss of the jewelry

**CASSWELL AND WIFE v. CHESHIRE LINES COM- MITTEE,** [1907] 2 K. B. 499; 76 L. J. K. B. 734; 97 L. T. 209, 23 T. L. R. 580—Div. Ct.]



**Railways—Continued.**

10. *Declaration of Value (if over £10) and Nature of Articles—Increased Charge—Carriers Act, 1830* (11 Geo. 4 & 1 Will. 4, c. 68), s. 1.]—The plaintiff claimed to recover £240, the value of the jewelry contained in a dressing-case which was lost at Victoria Station when she was about to start for Cologne by the Flushing boat train. The defendants pleaded that under the Carriers Act, 1830, they were not liable for more than £10.

HELD—that the words of sect. 1 of the Carriers Act were conclusive.

DYKE v. SOUTH-EASTERN AND CHATHAM RAIL-  
[WAYS MANAGING COMMITTEE, (1901) 17  
T. L. R. 651—Lord Alverstone, C.J.]

11. *Free Pass by Railway and Steamer—Loss of Life—Loss of Luggage—Conditions Relieving from all Responsibility—Fatal Accidents Act, 1846* (9 & 10 Vict. c. 93)—*Canal Traffic Act, 1854* (17 & 18 Vict. c. 31), s. 7—*Railway Clauses Act, 1863* (26 & 27 Vict. c. 92), s. 31—*Regulation of Railways Act, 1868* (31 & 32 Vict. c. 119), s. 14—*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 503.]—Mr. J. Le M. was, at the time of his death, in the service of the London and North-Western Railway Company, and obtained a free pass from the London and South-Western Railway Company, similar accommodation being given by the London and North-Western Railway Company to the employees of other railway companies. He was travelling with his wife from London to Jersey with a free pass, issued by the London and South-Western Railway Company, at the foot of which there was, in print, the words—"For conditions see back." On the back the conditions were set out as follows. "This free pass is granted on the following conditions," and the second of those conditions was that, "It shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass."

The luggage of Mr. and Mrs. Le M. was placed in the luggage van at Waterloo for delivery at the end of the journey, but they took a portion with them in the railway carriage, and on going on board the steamer at Southampton Mrs. Le M. handed her travelling bag, containing money and jewellery, to the stewardess for safe custody. The vessel stranded on the Black Rock. Mrs. Le M. was saved and her husband was drowned.

Mrs. Le M. claimed, on behalf of herself and four children, damages, under Lord Campbell's Act, and for the loss of her husband's luggage and for her lost personal effects.

HELD—that (1) the conditions which were on the back were terms agreed to by the passenger, Mr. Le M., and those terms excluded such a loss as that which happened;

(2) the conditions were applicable to the whole transit from London to Jersey; (3) the pass was equally binding so far as it related to any claim for loss of, or injury to, the luggage which either Mr. Le M. or his wife had under the charge of the company, and the travelling bag was so; (4) the Railway Clauses Act, 1863, extending to steamers belonging to railway companies sect. 7 of the Railway and Canal Traffic Act, 1854, being a Clauses Act, applied to railways whose special Acts were passed after 1863 (see sect. 30), and the London and South-Western Acts were before that time; (5) sect. 14 of the Regulation of Railways Act, 1868, was not applicable to the contract, as it deals with the case of a company agreeing by through-booking contracts in the ordinary course of business where a payment is made. And that the claims put forward must, therefore, be excluded from the fund paid into Court which had to be distributed.

HELD ALSO—that the words "or other things whatsoever on board the ship" in sect. 503, sub-sect. 1 (b) of the Merchant Shipping Act, 1894, include "passengers' luggage."

THE "STELLA," [1900] P. 161; 69 L. J. P. 70;  
[82 L. T. 390; 16 T. L. R. 306, 9 Asp. M. C.  
66—Barnes, J.]

**(b) Carriage of Animals.**

12. *Condition Limiting Liability—Reasonableness—Onus of Proof—Railway and Canal Traffic Act, 1854* (17 & 18 Vict. c. 31), s. 7.]—A dog was consigned by the plaintiff for carriage by the defendants' railway under a special contract, signed by the plaintiff, which contained a condition that the defendants would not "in any case be responsible beyond the following sums . . . dogs, deer or goats, £2 each, unless a higher value be declared at the time of delivery to the company, and a percentage of 1½ per cent. (minimum 3d.) paid upon the excess of the value so declared." The value of the dog was £300, and the plaintiff paid 4s. for its carriage, but made no declaration as to its value. The dog was lost owing to the negligence of the defendants. In an action to recover its value, the defendants contended that the plaintiff was duly entitled to recover £2, and they gave evidence that the special rate of 1½ per cent. was the usual charge made by all railway companies.

HELD—the special rate of 1½ per cent. was "just and reasonable" within sect. 7 of the Railway and Canal Traffic Act, 1854; and that therefore the plaintiff was entitled to recover only £2.

Decision of Walton, J. (23 T. L. R. 236; 12 Com. Cas. 158), reversed.

WILLIAMS v. MIDLAND RY. CO., [1908] 1 K. B.  
[252; 98 L. T. 81; 24 T. L. R. 170—C. A.]

13. *Horses—Pair of Horses Forwarded by Train—Loss of one Horse—Limit of £50—Signed Conditions—Declaration as to Higher Value—Railway and Canal Traffic Act, 1854* (17 & 18 Vict. c. 31), s. 7.]—Plaintiff was a

**Railways—Continued.**

horse dealer, and bought a pair of horses and resold them at a profit for £140. He delivered the horses at the defendants' station at Tubs Hill, Sevenoaks, for carriage to Victoria Station, and signed certain conditions, of which one was as follows: "The managing committee will not, in any case, be responsible beyond the following sums: horses, £50 each . . . unless a higher value be declared at the time of delivery to the committee, and a percentage of 1½ per cent. paid upon the excess of the value so declared." On arrival at Victoria one of the horses was found strangled. The other horse went on to Peterborough, where the purchaser refused to accept it. The plaintiff claimed £100 damages, including depreciation caused to the surviving horse as one of a pair.

HELD—that, as all the damage arose from the mishap to one horse, the amount recoverable was limited to £50.

BERRY v. SOUTH EASTERN AND CHATHAM AND [DOVER RAILWAY COMPANIES' MANAGING COMMITTEE, (1902) 18 T. L. R. 159—Darling, J.

**(c) Carriage of Goods.**

And see Nos 6, 7, 8, *supra*, and SHIPPING, 121—169.

**15. Carriage of Wool—Custom of Trade—Liability of Carrier.]**

HELD—to be proved upon the evidence that the contract of carriage customary in the trade for the carriage of wool from import ship in London to Bradford *via* Goole is one by which the carrier undertakes to deliver the wool in as good condition as he receives it, the act of God and of the King's enemies excepted.

FRANCE FENWICK & Co. v. MANNHEIM INSURANCE [Co., (1905) 10 Com. Cas. 242—Channell, J.

16. *Delay—Loss of Market—Condition relieving from Liability—Negligence—Notice—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.]—The Railway and Canal Traffic Act, 1854, only becomes important, and the exemptions under that Act, and the question of conditions and their reasonableness, only become important, if there is negligence.*

Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.

The defendants accepted the goods with the knowledge that they were to be sold at next morning's market; but the plaintiffs gave them the goods with the knowledge that the defendants said that they would not be liable for any loss of market. Both the consignor

and the defendants knew that it was very probable, or at all events very possible, that the goods would not reach the market in time. The consignment note contained the condition that "the company will not be liable for any loss of market."

HELD—that the case was outside sect. 7 of the Railway and Canal Traffic Act, 1854, as there was no negligence on the part of the defendants; that, though the condition was unreasonable within that Act, it was good as a notice.

DUCKHAM v. GREAT WESTERN RAILWAY Co., [(1899) 80 L. T. 774; 15 T. L. R. 328—Darling, J.

17. *Misdescription of Goods to obtain Lower Rate—"Account of goods"—"Demand"—Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), ss. 98, 99.]—A consignor sent goods to a railway company for carriage on the railway, and with the goods he sent a consignment note giving a false description of them in order to avoid payment of the proper rates. Unless the consignment note containing a description of the goods had been sent the railway company would not, as the consignor knew, receive the goods. The consignor having been charged under sects. 98 and 99 of the Railway Clauses Act, 1845, with having given a false account of the goods with intent to avoid payment of tolls,*

HELD—that where a consignor, knowing that a demand for an account would be made by the railway company before receiving the goods for carriage, sent the goods with the account, that was equivalent to a demand so as to make the giving of a false account an offence under the sections; that it was not necessary that the goods should be on the railway at the time the demand was made or the account rendered; and that the word "tolls" in the sections included charges for the carriage of goods in the railway company's own trucks, and was not limited to charges for the carriage of goods in the consignor's trucks.

BARR, MOERING AND Co. v. LONDON AND NORTH-WESTERN RAILWAY Co., [1905] 2 K. B. 113; 74 L. J. K. B. 540; 69 J. P. 233; 53 W. R. 605; 92 L. T. 421; 21 T. L. R. 412—Div. Ct.

18. *Owner's Risk—Over-carriage—Substituted Route—Liability of Company.]—The plaintiff consigned goods by the defendants' line to J. by a specified route upon the terms of an owner's risk note relieving the defendants from liability except for wilful misconduct. The goods ought to have been transhipped at E. and sent on *via* S.; by mistake they were carried on to T., and were then intentionally sent on *via* W., such substituted route being under the circumstances admittedly the quickest. They arrived later than they would have done, if no mistake had been made, but earlier than if they had been sent back to E., and thence onward *via* S.*

**Railways—Continued.**

**HELD**—that the defendants were not liable for the delay.

*Mullet v. Great Eastern Ry. Co.* ([1899] 1 Q. B. 309; 68 L. J. Q. B. 256; 47 W. R. 334, 80 L. T. 53—Div. Ct., No. 22, *infra*) distinguished and doubted.

**FOSTER v. GREAT WESTERN RY. CO.**; [1904] 2 [K. B. 306, 73 L. J. K. B. 811; 52 W. R. 685; 90 L. T. 779; 20 T. L. R. 472—Div. Ct.

**19. Owner's Risk—Special Contract—Declaration of Value—Customs Declaration—Carriers Act, 1830** (11 Geo. 4 and 1 Will. 4 c. 68), s. 1—*Customs Consolidation Act, 1876* (39 & 40 Vict. c. 36), s. 64—*Railway and Canal Traffic Act, 1854* (17 & 18 Vict. c. 81), s. 7.]—Four bales of furs were consigned abroad for carriage to London by the defendants' steamer from Holland to Harwich and thence by their railway to London. The bales were carried at a reduced rate at owner's risk, subject to certain exceptions which were not material, under a special contract signed by the consignors. A declaration as to the nature and description of the goods was made under sect. 64 of the Customs Consolidation Act, 1876, treating the four bales as one parcel. On arrival at the railway station in London one of the bales was stolen. The Judge came to the conclusion upon the facts and documents that the bale was lost before the transit was at an end.

**HELD**—that the defendants were protected from liability by the special contract.

*Semble*, the fact that the goods were received by a common carrier under a special contract would not deprive him of the protection of sect. 1 of the Carriers Act, 1830, unless the terms of the contract were inconsistent with the goods having been received by him as common carrier.

*Semble*, also, the customs declaration is not a declaration of the value of the goods to the common carrier within the meaning of sect. 1 of the Carriers Act, 1830.

**HIRSCHEL AND MEYER v. THE GREAT EASTERN** [Ry. Co., (1906) 22 T. L. R. 651; 96 L. T. 147; 12 Com. Cas. 11—Kennedy, J.

**20 Owner's Risk—"Wilful Misconduct."**—The plaintiff consigned sheep skins for carriage from Paddington to Winchester by the defendants' railway "at owner's risk," exempting the defendants from liability except upon proof that the loss arose from the wilful misconduct of the defendants' servants. The skins were packed by the defendants' servants at Paddington on wood chips laid on the floor of the truck. In consequence, the chips got entangled in the wool and the skins were injured. In answer to a complaint by the plaintiff, the station-master at Winchester wrote that the defendants were not liable because the goods were carried at owner's risk, and continued: "I have, however, asked our Paddington people

not to use the kind of litter you object to in the future." The plaintiff subsequently consigned another lot of sheep skins from Paddington to Winchester by the defendants' railway at owner's risk, and they were similarly damaged through being packed on wood chips. In an action to recover damages in respect of the second consignment,

**HELD**—that, in the absence of proof that the danger of using wood chips was communicated to those in charge of the loading at Paddington, there was no wilful misconduct on their part in loading the skins as they did, and that the defendants were not liable.

And *semble* the word "object" would not convey the danger of damage.

**FORDER v. GREAT WESTERN RAILWAY CO.**, [1905] 2 K. B. 532; 74 L. J. K. B. 871; 53 W. R. 574; 93 L. T. 344; 21 T. L. R. 625—Div. Ct.

**21. Owner's Risk—Contract with one Company for through Carriage—Privilege of Contract—Special Contract—Alternative Rates—Railway and Canal Traffic Act, 1854** (17 & 18 Vict. c. 31), s. 7.]—The plaintiff bought goods in Belgium and consigned them to England by a firm of shippers at Hull; the latter consigned the goods to the plaintiff's home over the lines of the North-Eastern and Great Northern Railway Companies in pursuance of an owner's risk contract entered into by them with the former company; the goods were lost on the line of the latter company (the defendants). In an action to recover the value of the goods,

**HELD**—that the shippers were the plaintiff's agent to make the contract, and that the defendants, having authorised the North-Eastern Railway to make it, were entitled to the benefit of it; that it was a special contract with a reasonable alternative rate within the meaning of sect. 7 of the Railway and Canal Traffic Act, 1854; and that therefore the plaintiff could not recover.

**BARRETT v. GREAT NORTHERN RY. CO.**, (1904) 52 [W. R. 479, 20 T. L. R. 175—Div. Ct.

**22. Owner's Risk—Delay—Conveying Goods by different Route—Damages—Liability.**—A railway company contracted with M. to carry goods to Jersey, *via* the Great Western Railway. Instead of doing so they carried them *via* the London and South-Western Railway, and in consequence there was delay, and M. suffered damage and loss. The contract was for carriage at owner's risk. In the contract was a clause relieving the company from all liability for loss, damage, misdelivery, delay or detention, except where such arose from the wilful misconduct of the company.

**HELD**—that, as the company had not carried out the terms of the contract, the above clause did not apply, and the company were liable.

**Railways—Continued.**

MALLET *v.* GREAT EASTERN RAILWAY CO., [1899]

[1 Q. B. 309; 68 L. J. Q. B. 256; 47 W. R. 334; 80 L. T. 53; 15 T. L. R. 137—Div. Ct.]

*But see* No. 18, *supra*.

**23. Owner's Risk—"Wilful Misconduct"—Delay—Acts of Omission—Knowledge—Onus of Proof.**—G., having contracted with the railway company that they were to be exonerated from liability in respect of the transit of his goods, save when the damage arose from their wilful misconduct, delivered at Ballymena railway station, for carriage to Manchester, a case of fowls, which the railway company knew to be perishable goods requiring to be forwarded without delay. They failed to despatch the goods by either of two trains, which would have ensured their arrival in time for the Manchester markets on the following morning, for which they were intended, and when the goods did arrive in Manchester they were late, and, being perishable, had deteriorated in value. At G.'s instance, the consignee refused to take delivery, and G. sued the company for the loss occasioned by their wilful misconduct in delaying the goods.

**HELD** (Palles, C.B., *diss.*)—that, under the circumstances, unreasonable delay, even though entirely unexplained, was not sufficient to amount to wilful misconduct, and that it lay upon the plaintiff to prove that the defendants intentionally delayed the goods.

**HELD** (by Palles, C.B.)—that the defendants being aware, from the perishable nature of the goods, that substantial damage would result from delay, there was evidence that their omission to forward them at once was wilful, and therefore there was evidence of wilful misconduct.

GRAHAM *v.* BELFAST AND NORTHERN COUNTIES  
[RAILWAY CO., [1901] 2 Ir. R. 13.]

**24. Through Booking—Rail and Sea—Legal Liability of Carriers beyond their own Line and during Sea Transit.**—The Highland Railway Company accepted from Logan & Co. a piano, in packing-case, for transit in terms of a consignment-note to Kirkwall, Orkney. The consignment-note was printed, except so far as the details in the different columns were filled in by or upon the instructions of Logan & Co. The consignment-note contained (*inter alia*) the following heading and terms:—Ordinary consignment-note for traffic carried at company's risk. The Highland Railway will please receive the undermentioned goods and forward them subject to the conditions on the back hereof. Senders: *Logan & Company*. Consignee: *James Grant, Esq*. Address: *Kirkwall, Orkney*. Mode of transit: *Goods and Steamer, via Aberdeen*. Who pays the carriage? *Senders to Aberdeen only*. Consignee pays *Steamer freight*. One of the conditions indorsed on the con-

signment-note was:—“In respect of any . . . goods and articles booked through by them or their agents for conveyance partly by railway and partly by sea . . . the company shall be exempted from liability for any loss, damage, or delay which may arise during the carriage by sea from . . . accidents from machinery, boilers and steam.” On arrival at Kirkwall the piano was found to be materially damaged, and the consignee refused to take delivery. The senders sued the railway company for damages.

**HELD**—that under the contract the piano was carried at the risk of the railway company, not only during the railway carriage from Inverness to Keith or to Aberdeen, but also from Aberdeen to Kirkwall during the sea transit.

LOGAN & CO. *v.* HIGHLAND RAILWAY CO., (1900)  
[2 F. 292.]

**25. Through Booking over several Railways—Contracting Company Limiting its own Liability—Validity—Onus of Proof.**—Where there is a through booking of goods which necessitates their being carried over lines owned by different companies, a condition limiting the liability of the contracting company to wilful misconduct of its servants on its own line is valid. When the goods are damaged in transit the *onus* of proving that they were not damaged by the wilful misconduct of the servants of the contracting company on its lines lies on the contracting company.

MAHONY *v.* WATERFORD, LIMERICK, AND WEST-  
[ERN RY. CO., [1900] 2 Ir. R. 273—Q. B. Div]

**CEMETERY.**

*See* BURIAL AND CREMATION.

**CERTIFICATES.**

*See* COMPANIES; EVIDENCE; HIGH-  
WAYS, 44, 46—48.

**CERTIORARI.**

*See* BANKRUPTCY AND INSOLVENCY;  
CROWN PRACTICE.

**CEYLON.**

*See* DEPENDENCIES AND COLONIES.

**CHANNEL ISLANDS.**

*See* DEPENDENCIES AND COLONIES.

## CHARGING ORDER.

See ADMIRALTY, 19; BANKRUPTCY AND INSOLVENCY; PRACTICE.

## CHARITIES.

### I. ADMINISTRATION OF CHARITABLE TRUSTS.

- (a) Generally . . . . . 321  
(b) Schemes . . . . . 329

### II. CHARITABLE GIFTS.

- (a) Generally . . . . . 334  
(b) Mortmain Acts . . . . . 350  
(c) Uncertainty . . . . . 353

And see ACTION, 4; WILLS, 378—381.

### I. ADMINISTRATION OF CHARITABLE TRUSTS.

#### (a) Generally

1. *Charity* ]—The Royal General Theatrical Fund Association is a charity. *Spiller v. Maude* (1886) 32 Ch. D. 158, n; 13 W. R. 69 approved. That case was not overruled, or intended to be overruled, by *Cunnack v. Edwards* ([1896] 2 Ch. 679, 65 L. J. Ch. 801; 45 W. R. 99, 75 L. T. 122, 12 T. L. R. 614).

IN RE LACY; ROYAL GENERAL THEATRICAL FUND [ASSOCIATION v. KYDD, [1899] 2 Ch. 149; 68 L. J. Ch. 488; 47 W. R. 664; 80 L. T. 706—Stirling, J.

2. *Charitable Foundation—Charitable Use—Purpose—Inn of Chancery—Clifford's Inn*—“Maintenance of . . . School of Learning”—*Study of Law*—43 Eliz. c. 4.]—The question whether funds are dedicated to a charitable use within the statute 43 Eliz. c. 4 depends, not on the source from which the funds are derived, but on the purpose to which they are to be applied.

By an indenture dated March 29th, 1618, the Earl of Cumberland and Lord Clifford granted, bargained, and sold the messuage known as Clifford's Inn to the principal and other members of Clifford's Inn, and by the indenture it was agreed by all the parties thereto that the messuage should for ever thereafter retain and keep the same usual and ancient name of Clifford's Inn, and should for ever thereafter be continued and “employed as an Inn of Chancery for the furtherance of the study and practice of the Common Laws,” for the good of that society and for the benefit of the commonwealth as aforesaid, and not otherwise, nor to any other use, intent, or purpose. A sum of £600 was paid for the property. The property had always been enjoyed and dealt with by the society as its own property and for its own purposes. The society claimed to dispose of it as they might think fit. Clifford's Inn was an Inn of Chancery connected with the Inner Temple.

HELD—that having regard to the terms of the deed and to the nature and use of the  
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Inn at the date of the deed, as shown by the terms of the deed itself and by the records of the Inn, and also having regard to the statements made at or about the period concerning the Inns of Chancery by Sir John Fortescue, Lord Coke, and Stowe, and to the various orders and regulations made from time to time concerning and affecting these Inns, the hereditaments known as Clifford's Inn were conveyed upon trusts affecting them which were of such a public and general character as to be charitable within the provisions of the statute 43 Eliz. c. 4, where one of the charitable purposes mentioned is the “maintenance of . . . schools of learning,” and that the property was impressed with a charitable trust, and was not held by the trustees as private property for the individual members of the society for their own personal benefit, to be divided and disposed of as they might think fit.

Judgment of Cozens-Hardy, J. ([1900] 2 Ch. 511; 69 L. J. Ch. 755; 64 J. P. 772; 82 L. T. 795), affirmed.

SMITH v. KERR, [1902] 1 Ch. 774; 71 L. J. Ch. 369; 86 L. T. 477; 18 T. L. R. 456—C. A.

3. “Charitable Use”—*Advowson—Charitable Trusts of—Practice—Parties—Mortmain and Charitable Uses Act, 1891, s. 8.*—An advowson held by trustees on trust to present a fit and pious person of godly life and conversation being in holy orders capable of accepting or holding the same, and of which advowson the trustees shall be well known or reputed to be of godly life and conversation, and shall profess themselves to be members of the Church of England, and shall be well known to be well attached to the good principles of the reformed faith contained in the Liturgy and articles of the said church, is not a charitable trust, as it is not a trust for any particular school of thought in the Church of England.

Therefore the Court has no jurisdiction under sect. 8 of the Mortmain Act, 1891, to sanction the trustees retaining the advowson.

In the case of a summons under sect. 8, where a year has lapsed since the testator's death, the Official Trustee of Charity Lands must be made a party, but not the Charity Commissioners.

*Semble*, there may be a charitable trust to appoint an incumbent of a particular school of thought.

*Hunter v. A.-G.* ([1899] A. C. 309; 68 L. J. Ch. 449; 47 W. R. 673; 80 L. T. 732—H. L. No. 57 *infra*), discussed.

Decision of Buckley, J. ([1904] 1 Ch. 41; 73 L. J. Ch. 77; 68 J. P. 64; 52 W. R. 106; 89 L. T. 505; 20 T. L. R. 52) affirmed.

RE CHURCH PATRONAGE TRUSTS; LAWRIE v. ATTORNEY-GENERAL, [1904] 2 Ch. 643; 73 L. J. Ch. 712; 53 W. R. 85; 20 T. L. R. 713; 91 L. T. 705—C. A.

4. *Dispute as to Objects—Letter of Charity*  
11

### Administration of Charitable Trusts—Contd.

*Commissioners—No Appeal—Final Determination—Local Government Act, 1894* (56 & 57 Vict. c. 73), s. 70 (2).—In consequence of disputes as to the proper objects of a charity and of an application made to them by the defendant, who was a trustee, the charity commissioners caused a local inquiry to be held, and subsequently wrote to the defendant stating their views on the matter. No appeal was brought against their decision.

**HELD**—that the letter constituted a determination of the commissioners under sect. 70, sub-s. 2, of the Local Government Act, 1894, and was conclusive upon the question.

*ATTORNEY-GENERAL v. HUGHES*, (1900) 48 W. R. [150; 81 L. T. 679—Cozens-Hardy, J.

5. *Ecclesiastical Charity*—"Member of Church of England as such"—*Appointment of Trustees—Local Government Act, 1894* (56 & 57 Vict. c. 73), ss. 14, 19, 70, 75.

*In re Perry's Almshouses*.—The founder of a charity required that the objects of it should be selected from persons who should have (1) regularly attended Divine service at the parish church for a fixed period; (2) been partakers of the Holy Communion; (3) lived a godly, righteous, and sober life to the glory of God's holy Name; and that the trustees should be members of the Church of England.

**HELD** (affirming Stirling, J., [1898] 1 Ch. 391; 67 L. J. Ch. 206, 46 W. R. 360, 78 L. T. 103)—that this was a charity for the members of the Church of England "as such," and was therefore an ecclesiastical charity within the meaning of sect. 75 of the Local Government Act, 1894; and that therefore the parish council had no power to appoint new trustees under sect. 14, sub-s. 1 of the same Act.

*In re Ross's Charity*.—A testatrix charged certain lands with the payment of £3 a year, to be paid on a certain day annually to the churchwardens of A., to be laid out by them in the purchase of clothing to be given to six old and poor widows of the said parish, whom they should judge to be the poorest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the Church.

**HELD** (affirming North, J., [1897] 2 Ch. 397; 66 L. J. Ch. 662; 61 J. P. 742; 46 W. R. 27; 77 L. T. 89)—that this was not an ecclesiastical charity within the meaning of sect. 75 of the Local Government Act, 1894, and that, therefore, under sect. 14 (2) of that Act, the power to appoint new trustees was vested in the parish council, and not in the churchwardens.

*IN RE PERRY'S ALMSHOUSES, IN RE ROSS'S [CHARITY]*, [1899] 1 Ch. 21; 68 L. J. Ch. 66; 63 J. P. 52; 47 W. R. 197; 79 L. T. 366; 15 T. L. R. 42—C. A.

### 6. Future Income—Power of Churchwar-

*dens to Anticipate—Money Borrowed by them for Parish Purposes—Claim to be Indemnified—Charitable Trusts Amendment Act, 1855* (18 & 19 Vict. c. 124), s. 29].—During the years 1884 to 1889 the churchwardens of a parish were, under a trust deed dated in 1865, and in accordance with previous deeds and immemorial custom of the parish, during their respective terms of office, trustees for the administration of the funds derived from the parish estates. By the deed of 1865 those estates were conveyed by the surviving trustee under a former trust deed to certain persons upon trust to permit the churchwardens for the time being to receive the rents and profits of the parish estates for such charitable uses, intents, and purposes as the same had been usually disposed of and employed by the parishioners of the parish, whether in or about the repairs of the church, the relief of the poor of the parish, or any other the public affairs of the parish, and to and for no other use, trust, or purpose whatever. Between 1885 and 1888 sums amounting in all to £3,000 had been advanced by bankers to the parish and credited to the churchwardens' account in the books of the bank. The moneys were borrowed and expended for ordinary parish purposes.

In 1891, by a scheme established under the City of London Parochial Charities Act, 1883, which incorporated the Charitable Trusts Acts, 1853 to 1867, the parish estates were vested in the Official Trustee of Charity Lands, and were thenceforward to be administered by the trustees of the London Parochial Charities. The bankers brought actions against the churchwardens to recover the moneys advanced as aforesaid, which actions were still pending. The churchwardens accordingly brought an action against the Official Trustee of Charity Lands and the trustees of the London Parochial Charities claiming to be indemnified out of the parish funds in respect of the advances.

**HELD**—that the churchwardens were merely annual officers and not a corporation, and were trustees only of the rents and profits of the parish estates which it was their duty to receive under the trust deed; that, having regard to sect. 29 of the Charitable Trusts Amendment Act, 1855, they could not themselves have created any mortgage or charge on the property without the consent of the Charity Commissioners; and that therefore their claim to be indemnified out of the future income of the charity could not be acceded to.

Decision of Romer, J., affirmed, but on different grounds.

*FELL v. CHARITY LANDS OFFICIAL TRUSTEE*, [1898] 2 Ch. 44; 62 J. P. 805, 67 L. J. Ch. 385; 78 L. T. 474, 14 T. L. R. 376—C. A.

7. *Question as to Person Entitled—Summons by Trustee—Consent of Charity Commissioners—Whether Necessary—Charitable Trusts Act, 1853* (16 & 17 Vict. c. 137), s. 17].—

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Where there is a doubt as to whether lands vested in a trustee are held by him on charitable trusts or not, the trustee may apply by summons to the Court to have the question determined, and it is unnecessary for him to first obtain the consent of the Charity Commissioners.

*Re St. Giles' and St. George Volunteer Corps* ((1858) 25 Beav. 313) followed.

*RE SHUM; PRICHARD v RICHARDSON*, (1904) 91 [L. T. 192—Farwell, J.

8. *Land—Registration—Entering Restriction on Register—Disposition of Land—Consent of Charity Commissioners—Incorporated Company—Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), ss. 24, 62, 66.]—The Church Army was incorporated under the Companies Acts, 1862 to 1890, the primary object of the army being to promote the welfare of the poor and the relief of distress by combined social and spiritual agencies. Other objects, as defined by the memorandum of association, were to acquire real or personal property by purchase, lease, or otherwise; to erect and maintain buildings upon any land held by them, and to sell, develop, lease, mortgage, exchange, dispose of, or otherwise deal with any property of the army. The army constantly appealed for donations and subscriptions for its general work and for special work from time to time. In 1903 the army obtained a long lease of certain land for the purposes of erecting thereon new headquarters, and from that time among the list of objects for which funds were required was "completion of new headquarters." A large sum was subscribed for that purpose. Upon an application to the Land Registry to register the lease under the Land Transfer Acts, the Registrar objected that the army was a charity, and could not dispose of its land without the consent of the Charity Commissioners, and that a restriction to that effect should be placed upon the register.

**HELD**—that, though the army was established for charitable purposes, the subscriptions and donations were given to the army as part of its general property; and that though the money subscribed for the particular object of building new headquarters would be applied to that purpose, there was nothing to prevent the army from selling this property, and therefore no restriction ought to be placed on the register.

Decision of Kekewich, J. (74 L. J. Ch. 624; 93 L. T. 230; 21 T. L. R. 681) affirmed

**EX PARTE THE CHURCH ARMY**, (1906) 75 [L. J. Ch. 467; 94 L. T. 559; 22 T. L. R. 428—C. A.

9. *Land—Sale of—Consent of Charity Commissioners—Hospital incorporated by Charter—"Scheme legally established"—Charitable Trusts Act*, 1855 (18 & 19 Vict. c. 124) s. 29.]—A Charter from the Crown in-

corporating a hospital is not a "scheme legally established" within the meaning of sect. 29 of the Charitable Trusts Act, 1855; such a hospital therefore cannot sell lands without the consent of the Charity Commissioners required by that section.

*In re Masons' Orphanage and L. & N. W. Ry. Co* ([1896] 1 Ch. 54, 596, 65 L. J. Ch. 32, 439; 44 W. R. 339; 74 L. T. 161—C. A.) followed.

**A.-G. v. NATIONAL HOSPITAL FOR THE PARALYSED [AND EPILEPTIC]**, [1904] 2 Ch. 252; 73 L. J. Ch. 677; 91 L. T. 63; 20 T. L. R. 592—

Kekewich, J.

10. *Land—Sale of—Endowment—Voluntary Contributions—Consent of Board of Education—Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), ss. 62, 66—*Charitable Trusts Act Amendment Act*, 1855 (18 & 19 Vict. c. 124), s. 29.]—A society incorporated under sect. 23 of the Companies Act, 1867, having acquired by voluntary subscriptions certain freehold premises for its general purposes, agreed to sell the same without obtaining the sanction of the Board of Education to the sale. On a summons taken out by the purchaser stipulating for such sanction being obtained as being necessary by reason of sect. 29 of the Charitable Trusts Amendment Act, 1855.

**HELD**—that the society could deal with and dispose of its freehold premises for its general purposes in any way it pleased. On the evidence the society was entirely supported by voluntary contributions. It was, therefore, non-endowed, and did not fall within the purview of the Charitable Trusts Acts. The consent of the Board of Education to the sale was, therefore, unnecessary.

**IN RE SOCIETY FOR TRAINING TEACHERS OF THE [DEAF AND WHITTLE'S CONTRACT]**, [1907] 2 Ch. 486; 76 L. J. Ch. 656; 71 J. P. 454; 97 L. T. 538; 23 T. L. R. 693—Neville, J.

11. *Land—Sale of—Endowment—Voluntary Subscriptions—Consent of Charity Commissioners—Charitable Trusts Acts*, 1853 (16 & 17 Vict. c. 137), ss. 62, 66, and 1855 (18 & 19 Vict. c. 124), s. 29.]—The property and funds of a charitable mission were formerly vested in a clergyman who carried on the mission. In 1884 a lady gave the clergyman a sum of money for the mission without any directions as to the manner of its application. The clergyman purchased a house for a school for the mission, and the house was conveyed to him without any declaration of trust. In 1885 a deed was executed by which trustees were appointed and all the property of the mission, including the house, was vested in them subject to specified charitable trusts, and the deed gave them a power of sale with a direction that they were to invest the net proceeds of sale as capital. The trustees having entered into a contract for the sale of the house:

**HELD**—that the house was an "endowment" within the definition of that term in

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sect. 66 of the Charitable Trusts Act, 1853, and the consent of the Charity Commissioners was required for its sale, inasmuch as, even assuming that the charity was maintained partly by voluntary subscriptions and partly by income arising from endowment, the deed of trust of 1885 prevented the proceeds of the sale of the house from being used as income, and therefore the exemption in sect. 62 of the Act did not apply.

A charity cannot be said to be "wholly maintained by voluntary contributions," and therefore within the exemption in sect. 62, where it has freehold premises used for the purposes of the charity, even though no income is derived therefrom.

In re *Clergy Orphan Corporation* ([1894] 3 Ch. 145; 64 L. J. Ch. 66; 71 L. T. 450; 43 W. R. 150—C. A.) distinguished.

ATTORNEY-GENERAL v. MATHIESON, [1907] 2 Ch. [383; 76 L. J. Ch. 682; 97 L. T. 450; 23 T. L. R. 754—C. A.]

12. *Land—Sale of Chapel—Consent of Charity Commissioners—Voluntary Contributions—Charitable Trusts Act, 1853* (16 & 17 Vict. c. 137), s. 62.—The trustees of the Welsh Calvinistic Methodist Connexion, sold a chapel which had been conveyed to them by an indenture dated the 31st October, 1879, to hold unto and to the use of themselves, their heirs and assigns, upon trust for the Connexion, and also upon trust to sell, exchange, mortgage, demise, or let the chapel; and it was declared that the trustees should hold the proceeds of sale upon trust for the Connexion. The consideration money of the conveyance of 1879 had been paid by the trustees out of moneys which they had borrowed on promissory notes signed by some of them, the principal and interest of which was afterwards paid off out of a fund formed by voluntary contributions subsequently made or collected by members of the congregation.

HELD—(it being admitted that the proceeds of sale were applicable as income), that the money raised for the purchase of the chapel was not a donation or bequest unto and in trust for the charity, but was raised by voluntary contributions, and as such came within the exceptions in sect. 62 of the Charitable Trusts Act, and the consent of the Charity Commissioners to a sale was unnecessary.

Re *Clergy Orphan Corporation* ([1894] 3 Ch. 145, 64 L. J. Ch. 66; 43 W. R. 150; 71 L. T. 450—C. A.) considered.

RE HARDING AND THE TRUSTEES OF THE WELSH [CALVINISTIC METHODIST CONNEXION, (1905) 92 L. T. 641—Buckley, J.]

13. *Industrial School—Endowment—Mortgage of Property—Words ejusdem generis—Charitable Trusts Act, 1853* (16 & 17 Vict. c. 137), ss. 62, 66—*Petition—Consent of Charity Commissioners—"Cathedral, Collegiate,*

*Chapter or other Schools."*—The proviso at the end of sect. 62 of the Charitable Trusts Act, 1853, that the "exemption" thereby conferred shall not extend to "any cathedral, collegiate, chapter or other schools," does not extend to all schools, but only to the schools there mentioned, and others of a similar description.

Decision of Stirling, J. ([1898] 1 Ch. 610; 67 L. J. Ch. 372; 46 W. R. 455; 78 L. T. 290), affirmed.

Government grants and contributions by school boards and other public bodies to an industrial school are not voluntary contributions within the meaning of sect. 62.

The trustees of an industrial school which possessed land and buildings occupied by the school, and was maintained partly by voluntary subscriptions and partly by a Government grant and contributions from public bodies, presented a petition under Sir Samuel Romilly's Act (52 Geo. 3, c. 101) asking for the consent of the Court to a mortgage of the school lands and buildings.

HELD—that the consent of the Charity Commissioners was required to the presentation of the petition and the proposed mortgage, the property to be mortgaged being a permanent endowment. Whether the Charity Commissioners have jurisdiction over the voluntary subscriptions of a charity which is maintained by voluntary subscriptions and possesses a permanent endowment yielding no income, *quære*.

Decision of Stirling, J. ([1898] 1 Ch. 610; 67 L. J. Ch. 372; 46 W. R. 455; 78 L. T. 290), reversed.

IN RE STOCKPORT RAGGED AND INDUSTRIAL [SCHOOLS, [1898] 2 Ch. 687; 68 L. J. Ch. 41; 47 W. R. 166; 79 L. T. 507—C. A.]

14. *School, National—Transfer of Interest to School Board—Claim by School Board—Not adverse to but under a Trust—Certificate of Charity Commissioners—Administration of Charitable Trusts Act, 1853* (16 & 17 Vict. c. 137), s. 17—*Elementary Education Act, 1870* (33 & 34 Vict. c. 75), s. 23.—If, under sect. 23 of the Elementary Education Act, 1870, an arrangement is made by the managers of an elementary school in the manner provided by the Act, whereby some interest in the endowment of the school is transferred to a school board, that body becomes a *cestui que trust* of the fund transferred. When, therefore, the board proceed against the persons who have possession of the fund to obtain payment of it, they are claiming not adversely to but under a charitable trust, and cannot do that without a certificate of the Charity Commissioners.

LLANBADARNFAWR SCHOOL BOARD v. OFFICIAL [TRUSTEES OF CHARITABLE TRUSTS, [1901] 1 Q. B. 430; 70 L. J. K. B. 307; 49 W. R. 363; 84 L. T. 311—C. A.]

15. *School—Trustees—Ecclesiastical Charity—National School—Local Government Act, 1894* (56 & 57 Vict. c. 73), s. 66.—J. S. by his will made in 1558 directed his executors to



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erect an almshouse for ten poor persons, and gave his executors the rents of certain real estate for five years after his death for the purpose of founding and maintaining the intended almshouse, and give his residue to his executors on condition that they procured the creation of a corporation to enable the corporators to take on themselves his real estate "for the finding of such poor persons." Some time after the death of the testator legal proceedings were taken, and the money recovered from the executors was invested in lands at M. A deed was executed declaring the trusts of the property to be for the relief of poor, lame, and impotent people dwelling within A., "or otherwise to employ the same for the raising and maintenance of a school according to the statute in that behalf made so as and where the same should be thought convenient by the greatest number of inhabitants being also the most chargeable to the relief of the poor" until a charter of incorporation should be obtained.

Until 1818 the income was applied in aid of the rates for the relief of the poor. In 1818 the vestry of A. resolved to erect a school, and since 1819 the rents of M. were applied in supporting the school which was then erected. The governors of the school, who were trustees, now retired, and the parish council appointed new trustees in their place. The churchwardens now petitioned against the decision of the Charity Commissioners that the parish council had power to appoint. They said in 1819 the income had been definitely appropriated to educational purposes, and trustees of the income of a permanent endowment of a school were in the same position as trustees of a school. Secondly, it was said that the charity was ecclesiastical.

**HELD**—that sect. 66 of the Local Government Act, 1894, did not include trusteeship of property temporarily devoted to the use of the school, and which had been for a long time devoted to the relief of the poor.

**HELD ALSO**—that the charity was not ecclesiastical.

**HELD ALSO**—that apart from sect. 66 there was nothing to take a national school out of the operation of the Act, and therefore the parish council were entitled to appoint new trustees of the charity.

RE SPENDLUFFE'S CHARITY, (1901) 65 J. P. 72; 83 [L. T. 498; 17 T. L. R. 62—Cozens-Hardy, J.

**(b) Schemes.**

**16. Charitable Gift—Bequest for Charitable Purposes—Bequest to Trustees—Charitable Purposes—No Definite Objects—Administration of Funds—Practice—Sign Manual.** A testatrix left her residuary estate to trustees "in trust for such charitable purposes and in such shares and proportions as may be hereafter set forth in any codicil or codicils to this my will." She never execu-

ted any codicil, and the question now arose whether a scheme by the Court was the proper mode of carrying out her charitable intentions.

**HELD**—that a scheme should be directed. Where there is merely a charitable intention with no trust interposed, the Crown disposes of the funds by sign manual, but when the property is bequeathed to trustees (or executors) for undefined charitable purposes, a scheme by the Court is appropriate.

Moggridge v. Thackwell (1803) 7 Ves. 36; 6 R. R. 76, and Paice v. Archbishop of Canterbury (1807) 14 Ves. 364 followed.

IN RE PYNE; LILLEY v. ATTORNEY-GENERAL, [1903] 1 Ch. 83; 72 L. J. Ch. 72; 51 W. R. 283; 87 L. T. 730—Byrne, J.

**17. Cy-près—Charity Gift of Maori Land for Religious School—Delay in Carrying out Purpose—Scheme for Administering the Accrued Income—Cy-près—General Charitable Purpose—Upon an Application for the Approval of a Scheme the Crown cannot Impeach the Validity of its Gift.**—In 1848 certain Maori chiefs gave certain land to Bishop Selwyn for the purpose of a college; the Government, as was necessary, sanctioned the gift, and the fact that they had waived their right of pre-emption was recorded by a formal grant, although really the Crown had no beneficial interest to pass; the words of the grant were: "in trust nevertheless to and for the use and towards the maintenance of the said school so long as religious education, industrial training, and instruction in the English language shall be given to the youth educated therein or maintained thereat."

Owing to changes in the neighbourhood the site has become unsuitable for a school, and no school has been, or is likely to be, built; but the land has been let for grazing purposes, and the trustees applied to the Court to sanction a scheme for administering the trust and expending the large accumulations. The Crown now claimed the land and funds, and judgment was given for the Crown on two grounds: (a) that the Crown was deceived in making the grant, and (b) that the duration of the trust had come to an end.

**HELD**—that neither of these grounds could be supported; and, further, that there was a general charitable purpose, to which the doctrine of *cy-près* was applicable, and not merely an intention to establish a specific school on a specified site. Such an immediate gift is not rendered invalid by the fact that the particular application directed cannot take effect immediately, or may never take effect at all.

**Practice**—It is contrary to the established practice of the Court to allow a defendant to an action for the administration of the trusts of a settlement, not void on the face of it, to impeach the settlement in his defence to the action. He must attack it

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openly and directly in an action or a counterclaim

Decision of the C. A. in New Zealand (19 N. Z. L. R. 665) reversed.

WALLACE AND OTHERS v. SOLICITOR-GENERAL  
[FOR NEW ZEALAND, [1903] A. C. 173; 72  
L. J. P. C. 36, 88 L. T. 65; 19 T. L. R. 230  
—P. C.

18. *Cy-près School—Church of England School—Closed for Want of Means—Used by Local Education Authority—Administration.*—In 1874 a school was built out of a parliamentary grant upon land vested in a vicar and churchwardens for the purpose of erecting thereon a Church of England school.

It had been closed for twenty years in consequence of lack of scholars, and the local education authority desired to use it as an infant school in relief of their own adjoining school.

HELD—that the trusts of the original deed should be administered under the direction of the Court; that an inquiry should be held as to whether it was now practicable to use the premises for a Church school, and that, if it were not, a scheme should be settled, it was suggested that in this event the best course would be to lease the school to the authority, reserving to the vicar the right to use it on Sundays and in the evenings.

ATTORNEY-GENERAL v. EDALJI, (1907) 71 J. P. [549, 97 L. T. 292, 5 L. G. R. 1085—Eady, J.

19. *Interpretation—"Parish"—Chapelries and Townships—Separate Overseers—Tithe—Church-rate.*—An originating summons was taken out to determine what persons were eligible, under the provisions of a scheme of November 28, 1887, regulating the Sandbach School and Almshouse Foundation, as satisfying the description "deserving poor of the parish of Sandbach," or the description of "inhabitants and parishioners of the parish of Sandbach." In the parish of Sandbach there were besides the parish church, two chapelries with chapels of ease, and thirteen townships, only six of which latter were privileged under the original foundation.

HELD—that "parish" meant the ecclesiastical parish or whole parish and parish proper; and that the parish of Sandbach included the two chapelries and thirteen townships although the townships had each paid poor-rates to their own overseers and had not paid rates to the overseers of the parish of Sandbach generally; and that the fact that the whole vicarial tithe was received by the vicar of the parish and the fact that persons living in the two chapelries had been in the habit of being married in the parish church was almost conclusive.

IN RE SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION; ATTORNEY-GENERAL v. CREWE (EARL OF), [1901] 317; 70 L. J. Ch. 604; 49 W. R. 647; 84 L. T. 815—Farwell, J.

20. *Petition—Consent of Charity Commissioners—Exemption—"Cathedral or Collegiate Church"*—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.]—The exemption in sect. 62 of the Charitable Trusts Act, 1853, of a "Cathedral or Collegiate Church," from the provisions of the Act, does not extend to an endowment for the benefit of a class of ministers or officers within a Cathedral or Collegiate Church over which endowment the Dean and Chapter have no control, and which does not form part of their capitular revenues.

Therefore an endowment for the minor canons of a cathedral, which is not given to the Dean and Chapter, and is not part of the Cathedral funds, is not within the exemption in sect. 62, and the consent of the Charity Commissioners is necessary to the presentation of a petition to the Court for a scheme.

IN RE MEYRICK'S CHARITY ((1855) 25 L. T. (O.S.) 92; 1 Jur. (N.S.) 438—Kindersley, V.-C.) followed.

IN RE DOD'S CHARITY, [1905] 1 Ch. 442; 74 L. J. [Ch. 260; 53 W. R. 314, 92 L. T. 260; 21 T. L. R. 242—Eady, J.

The consent of the Commissioners was asked for subsequently and refused: petition dismissed accordingly. See 21 T. L. R. 452.

21. *Power of Court to Settle Objects of Charity outside Jurisdiction—Trustees Within Jurisdiction.*—Although the objects of a charitable bequest are outside the jurisdiction, yet, if some of the trustees are resident within the jurisdiction, the Court has power to make a scheme for the administration of the charity, especially if the funds are to remain in England.

IN RE VAGLIANO; VAGLIANO v. VAGLIANO, (1906) [75 L. J. Ch. 119—Buckley, J.

22. *Preponderating Control in Management—Home for Nurses—Supply of Nurses for Hospitals and also for Private Nursing*

—In 1874, money was obtained by subscription "to establish in connection with the hospital a Training School for Nurses . . . not merely to increase the numbers, but to improve the quality of our trained nurses." There was no formal trust deed or constitution. Nurses were supplied to the hospital and also to private patients. Difficulties arose with the hospital as to the supply and efficiency of nurses; and, by permission of the Charity Commissioners, the hospital brought forward a scheme for the future management of the nurses' school, or home.

HELD—that, under the circumstances, the preponderating control ought to be given to the hospital.

IN RE WESTMINSTER TRAINING SCHOOL AND HOME [FOR NURSES, (1904) 20 T. L. R. 694—Kekewich, J.

23. *Schools Endowed Act, 1869 (32 & 33 Vict. c. 56), ss. 19, 39—Locus standi to appeal—Persons directly affected—Parents of chil-*

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*dren at school—Costs.*—The parents of children being educated at an endowed school at the time when a new scheme for the administration is approved by the Charity Commissioners are not persons "directly affected by such scheme" within sect. 39 of the Endowed Schools Act, 1869, so as to have a right of appeal against such scheme.

*Re Hemsworth School* (12 App. Cas. 444) followed.

Where a scheme is in conformity with the Act there is no right of appeal on the ground that if the scheme were remitted to the Commissioners they might change their view or matters within their competence to decide. The persons entitled to appeal under sect. 39 of the Act must be persons aggrieved not by an abstract decision of the Commissioners, but by some practical result of that decision embodied in the scheme.

Where a petition against a scheme is dismissed, the Judicial Committee will not give costs to the Commissioners.

*RE COLCHESTER GRAMMAR SCHOOL*, [1898] A. C. [477; 67 L. J. P. C. 86; 78 L. T. 509; 14 T. L. R. 409—P. C.

**24 School—Educational Endowment—Finality of Scheme—Endowed Schools Act, 1869** (32 & 33 Vict. c. 56), ss. 5, 30—*Board of Education Act, 1899* (62 & 63 Vict. c. 3), s. 2, sub-s. 2—The Charity Commissioners acting under sect. 2, sub-sect. 2, of the Board of Education Act, 1899, made an order establishing a scheme which determined that the income arising from certain charity funds should be applied to educational purposes. Upon a petition against the scheme upon the ground that its effect would be to devote those funds, which were not originally given for educational purposes, permanently to those purposes, even if circumstances should arise which would make it impossible in future to apply the income in accordance with the scheme:—

**HELD**—that the scheme could not and did not in any way restrict or alter the objects of the charity or prevent the funds from being at some future time applied under some other scheme to other than educational purposes, if circumstances should arise rendering that course expedient.

*IN RE BETTON'S CHARITY*, (1907) 24 T. L. R. [143—Eady, J.

**25. Settlement of—Inn of Chancery—Dependency of Inn of Court—Claim of Inn of Court to Intervene**—In proceedings connected with the settlement of a scheme relating to the funds produced by the sale of Clifford's Inn, the Inner Temple claimed to intervene and attend on the ground that Clifford's Inn was a dependency of the Inner Temple, and had for many years been under its control in educational matters.

**HELD**—(1) that the Inner Temple had no paramount right to be regarded as persons in the position of trustees of the fund with

power to administer it at will; and (2) that no good purpose would be served by the Court exercising its discretion in favour of the application.

*SMITH v. KERR*, (1905), 74 L. J. Ch. 763—Farwell, J.

**26. Trust Fund for Repair of Parish Church and Chapel of Ease—Chapel of Ease formed into a Separate Ecclesiastical District—Scheme.**—By a private Act of Parliament of 1832, surplus rents of an estate were to be applied for the repairing, upholding, and rebuilding of a certain parish church and chapel of ease. In 1894 the said chapel of ease was formed into a separate district and became known as St. Mary Magdalene.

**HELD**—that though St. Mary Magdalene was no longer an adjunct of the old church, it had not lost any rights by what had taken place

*IN RE CLOUDESLEY'S CHARITY*, (1901) 17 T. L. R. [123—Byrne, J.

**II. CHARITABLE GIFTS.****(a) Generally.**

**27. Charitable Objects—Gift of Impure Personality to Named Persons "or their Successors"**—*Charitable Uses Act, 1735* (9 Geo. 2, c. 36), s. 3.—A testator who died in 1886 by his will, after certain legacies to his wife, gave the rents of his freehold and leasehold estates to her during her life, and after her death he directed his trustees to sell the property, "and the proceeds to be divided in legacies as follows": (amongst others) to M. O., H. McA., and A. C., Nazareth House, Hammersmith, "or their successors," the sum of £400. To E. McH and M. L., of the Convent of the Assumption, Wellington Road, Bromley-by-Bow, "or their successors," the sum of £300. M. O., H. McA., and A. C. were at the date of the will and of the death of the testator members and holders of official positions in a religious community known as the "Poor Sisters of Nazareth." Both communities were societies of Roman Catholic ladies voluntarily living together in a state of celibacy for the purpose of sanctifying their own souls by prayer and pious contemplation. The former community had also the object of affording permanent homes for aged and infirm poor persons of both sexes without distinction of creed or nationality, and homes for incurable and orphan children, and the latter community had also the object of gratuitously nursing the sick of the poorest classes in their own homes. It was supported by voluntary contributions which were expended in lodging, boarding, and maintaining the members thereof

**HELD**—that the legacy to M. O., H. McA., and A. C. was given to them as holders of offices and for the benefit of the association in which they held office, and they were not intended to take any personal benefit, and that the objects of the association were

**Charitable Gifts—Continued.**

charitable; and that the gifts therefore failed

*Cocks v. Manners* ([1871] L. R. 12 Eq. 574; 40 L. J. Ch. 640; 19 W. R. 1055; 24 L. T. (n.s.) 869—V.-C. W.) followed.

**HELD ALSO**—that the legacy to E. McH and M. L. was indistinguishable from the Sister of Charity of St. Paul at Selley Oak in *Cocks v. Manners* (*supra*) and likewise failed.

**IN RE DELANY; CONOLEY v. QUICK**, [1902] 2 Ch. [642; 71 L. J. Ch. 811, 51 W. R. 27; 87 L. T. 46; 18 T. L. R. 741—Farwell, J

**28. Conditional Annuity to National Schools—Gift over to Residuary Estate—Perpetuities—Effect of Education Act, 1902** (2 Edw. 7, c. 42), ss. 5, 6 (2), 7, 11, 13.]—A testatrix bequeathed to her trustee such a sum as, invested in certain stocks, would produce a clear income or yearly sum of £20, and directed her trustees to pay such income or yearly sum to the treasurer, for the time being, of the National schools for the support of the said schools, so long as they should be carried on under the conditions contained in the deed of trust of the said schools, and the funds necessary for so carrying them on should be supplied by voluntary contributions, and she declared that the bequest should not take effect, but should be null and void if any of the three following events should happen in her lifetime:—(1) If a school board should be formed for B; (2) if the funds necessary for carrying on the said schools should be raised under powers for that purpose contained in any present or future Act or Acts of Parliament; or (3) if a trust should be created, and a sufficient fund should be set apart for the purpose of carrying on the said schools under the conditions of the deed of trust.

And the testatrix further declared that if either of the first two events should happen after her death, then, immediately on the happening of such one of these events as should first happen, the payment of the said income or yearly sum to such treasurer, under the directions aforesaid, should cease and determine, and the fund purchased to produce the same should fall into and form part of her residuary estate.

**HELD**—(1) that upon the coming into operation of the Education Act, 1902, the gift of the annuity ceased to take effect, and that the fund had fallen into residue; and (2) that the doctrine of perpetuities had no application because the testatrix directed the fund to go in the channel into which the law would have directed it.

**In re Randell** ((1888) 38 Ch. Div. 213; 57 L. J. Ch. 899; 36 W. R. 543; 58 L. T. 626—North, J.) followed.

**IN RE BLUNT; WIGAN v. CLINCH**, [1904] 2 Ch. [767; 74 L. J. Ch. 33; 53 W. R. 152; 91 L. T. 687; 68 J. P. 571; 20 T. L. R. 754; 2 L. G. R. 1,295—Buckley, J.

**29. Conditional Gift—Trustees to become Members of a Society—Failure of Gift.**]—A testator by his will gave his residuary estate to two trustees upon trust for sale, and to divide the proceeds among certain charitable institutions. The will contained the following clause:—“And I direct and declare that the bequests herein contained to any charity or charities shall be subject to my trustees or the survivor of them being made members or governors of such charities respectively, as if the said bequests had been gifts from them respectively, to the intent that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent.” One of the institutions (Dr. Barnardo’s Homes) admitted members upon signing a declaration that the member was in sympathy with a particular form of religious belief, but the members had very little power in the management of the institution. One of the trustees refused to sign the declaration, but the other was willing to do so. Another of the institutions (the Stockwell Orphanage) had no governors or members, the whole management of the charity being vested in trustees.

**HELD**—that the above condition was a condition precedent; that the gift to Dr. Barnardo’s Homes was valid, as the institution was prepared to “make” the trustees members; but that the gift to the Stockwell Orphanage failed, as it had no members or governors, and therefore the condition could not be complied with.

**IN RE EMSON, GRAIN v. GRAIN**, (1905) 74 L. J. [Ch. 565; 93 L. T. 105; 21 T. L. R. 623—Kekewich, J.

**30. Condition Precedent—Perpetuity—Statutes of Mortmain.**]—A testator, who died in March, 1894, by his will dated in July, 1893, after devising his residuary real estate to trustees upon trust for sale, and to hold the proceeds upon the trusts declared of his residuary personal estate, gave the sum of £10,000 to his trustees upon trust to transfer the same to trustees to be appointed by them, or the trustees for the time being of his will (such appointed trustees to be not less than three or more than six in number), to be held by them upon trust, “as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting almshouses” in a certain parish for the deserving poor of that parish, without regard to religious denomination, and in making weekly or other periodical allowances to the inmates of such almshouses; and he empowered the trustees so appointed, in conjunction with the trustees of his will, to make rules for the regulation and maintenance of such almshouses. And, after giving other charitable and general legacies, the testator gave all his residuary personal estate to his trustees upon trust for sale and conversion, and to pay debts and legacies, and hold the residue of the moneys upon trust, to pay or transfer the same to trustees to be nomin-

**Charitable Gifts—Continued.**

ated and appointed by the trustees of his will, upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting and maintaining" a certain orphanage or institution, and the will contained directions for the management and regulation of such institution.

HELD—that the language of the will did not constitute a condition precedent to the gifts, but was introduced for the purpose of mere machinery so as to avoid the provisions of the Statutes of Mortmain; and that the principle to be applied to the present case was that explained in *Chamberlayne v. Brockett* (L. R. 8 Ch. App. 206).

HELD—therefore, that, without prejudice to any question, if land could not be obtained, there must be a declaration that the sum of £10,000 and the residue were well given to charities; and that special trustees thereof must be appointed as directed by the will, and liberty given to apply

Decision of North, J., reversed.

RE GYDE, *WARD v. LITTLE*, (1898) 79 L. T. 261  
[—C. A.]

31. *Condition Precedent — Remoteness — Postponement of Enjoyment—Reserve Fund—Validity.*—A testator gave his real and personal estate to a trustee upon trust to form out of the personal estate "a reserve fund" to meet certain contingencies, and to pay the income of the realty (less outgoings) to his niece for her life, and after her death to pay 10 per cent. of such income to the reserve fund and the remainder to three annuitants for their lives, such annuitants to be poor inhabitants of M. He directed that "the said annuities shall not become payable until the said reserve fund shall amount to £400," at which figure it was to be maintained and only used in case of need; if, after the annuities became payable, it should exceed £400, the annuities were to be increased or a fourth annuity created.

There was in fact no personality left after paying his debts, and consequently no reserve fund existing at the date of the niece's death. At that date questions arose as to (1) whether the charitable annuities failed as being postponed till a reserve fund of £400 had been formed, which might not be done until a date beyond the limits of the Perpetuities Rule, and (2) whether there had been an effectual devotion of the reserve fund to charitable purposes.

HELD—that (1) the trust estate had (subject to the niece's life estate) been effectually devoted to charitable purposes as from the testator's death, the postponement of payment of the annuities being not a condition precedent to the charitable gift taking place, but merely a direction as to management; therefore the gift was valid;

*Chamberlayne v. Brockett* ((1872) L. R. 8 Ch. 206; 42 L. J. Ch. 368; 21 W. R. 299; 28 L. T. 248) followed.

And (2) that the reserve fund had also been effectually devoted to charitable purposes.

IN RE SWAIN; *MONCKTON v. HANDS*, [1905] 1 Ch. 669; 74 L. J. Ch. 354; 92 L. T. 715—C. A.

32. *Condition Subsequent—Insufficient Indication of a Charitable Intent.*—A testator bequeathed to the Vintners' Company "the portrait of my late friend and partner, Don Sebastian Gonzales Martinez, to be hung up by them in a conspicuous part of their common hall and always retained in that position, and, upon condition that they accept the said bequest of the said portrait with the obligation aforesaid, I bequeath to the said company the sum of £4,000 . . . enjoining the said company out of the income of the said sum of £4,000 to keep in due and proper repair the said portrait, cleaning and regilding its frame not less than once in every four years, the surplus of the said income to be applied by the master and wardens for the time being of the said company to the best of their discretion for the benefit of individuals who have been engaged in the wine trade."

HELD—that the condition was a condition subsequent and not a condition precedent, and therefore the gift of the picture was valid, that, with reference to the £4,000, the first part of the trust was admittedly bad, and the second part was also bad and failed, as there was no reference to the age or poverty of the recipients of the bounty, and there was no sufficient indication of a charitable intent to support the gift as a charitable gift.

IN RE GASSIOT; *FLADGATE v. VINTNERS' CO.*,  
[(1901) 70 L. J. Ch. 242; 17 T. L. R. 216—  
Cozens-Hardy, J.]

33. *Devise of Land upon Trust for Political and Religious Purposes.*—J. H. S. by his will devised to the vicar for the time being of B. I., a building known as "The Conservative Club and Village Reading-room," to be maintained "for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing." He also devised to such vicar a piece of land "one moiety of the income thereof . . . to be used for the maintenance of the aforesaid club and reading-room."

HELD—that the first gift being for the furtherance of religious and mental improvement, was a good charitable gift. That the gift of the moiety of the income must be read in conjunction with the former gift, and accordingly constituted a good charitable gift.

RE SCOWCROFT; *ORMROD v. WILKINSON*, [1898]  
[2 Ch. 638; 67 L. J. Ch. 697—Stirling, J.]

34. *Devise of Land—Will—Republication by Codicil—Death within Three Months—Validity of Devise—Charitable Donations and Bequests Act (Ireland), 1844 (7 & 8 Vict.*

**Charitable Gifts—Continued.**

c. 97) s. 16.]—A charitable devise of land is not invalidated by sect. 16 of The Charitable Donations and Bequests Act (Ireland), 1844, merely by the fact that the will is confirmed by a codicil made less than three months before the testator dies.

IN RE MOORE, [1907] 1 Ir. R. 315—Barton, J.

35. *Devise to Parish Priest "for a Roman Catholic School or for whatever Other Purpose he pleases"—Beneficial Gift.*—A testatrix, entitled to real estate, by her will provided as follows: "I give and bequeath my dwelling-house, yard, and garden to the Rev T L., parish priest, for a Roman Catholic School, or for whatever other purpose he pleases." Testatrix died within three months of the date of the execution of her will.

HELD—that there was no trust created for a charitable purpose, and that the Rev. T. L. was entitled beneficially to the gift.

IN RE HARBISON; MORRIS v. LARKIN, [1902] 1 Ir. R. 103—M. R.

36. *Direction to Trustees to apply a specific part of the Testator's Estate to such Charitable Institutions as they might determine.*—9 Geo 2, c. 36.]—A testator, by his will dated in 1883, devised and bequeathed all his real and personal estate to trustees upon trust to sell and convert, and to apply one-tenth of his estate, over and above £110,000, to such charitable institutions and objects as his trustees might determine. He died in 1888, prior to the passing of the Mortmain and Charitable Uses Act, 1888, leaving realty and impure personalty, as well as pure personal estate

HELD—that the trustees had the power to direct that the impure personalty and proceeds of sale of realty should go to such charities as could properly receive the same, and that, until the Court knew what the trustees did in exercise of that power, it could not be said that the disposition conferring the power was bad.

*Lewis v. Allenby* (L. R. 10 Eq. 668) considered and approved.

RE PIERCY, WHITWHEAM v. PIERCY, [1898] 1 Ch. 565, 67 L. J. Ch. 297, 78 L. T. 277; 46 W. R. 503—C. A.

37. *Gift for Building Church—Church to be Conveyed on Completion to Bishop—Bishop Declining to Accept—Cy près.*—A testator directed his trustees to spend two sums of £20,000 each or such smaller sums as might be needed in building two churches; any part of the £40,000 not so expended was to revert to his estate. He also provided £10,000 for the endowment of one of the churches.

He directed his trustees to convey the churches when completed to certain Bishops upon certain conditions. The latter, however, stated their inability to accept them

owing to the want of any endowment which would enable the conditions to be observed.

HELD—that the trustees should not build the churches, that they could not accumulate the funds until such funds were sufficient to both build and endow, nor could the funds be applied in accordance with a scheme approved by the Court. The legacies must be deemed to have lapsed and the £40,000 fell on to residue.

BUTE'S TRUSTEES v. BUTE (MARQUESS OF), (1905) 7 F. 49—Ct. of Sess.

38. *Gift to Corps of Commissionaires to aid in Purchase of their Barracks—"Or any other Way beneficial to that Corps"—Perpetuity—Validity.*—A testator's will contained the following gift: "The remainder of my share of my father's property I give, devise, and bequeath to the committee for the time being of the Corps of Commissionaires in London, to aid in the purchase of their barracks, or in any other way beneficial to that corps." Such share was about £5,000. The Corps of Commissionaires was a voluntary association for the benefit of able-bodied and disabled soldiers and sailors, mainly supported by the subscriptions of the members and intended for their benefit. There were funds appropriated to the benefit of the corps which, taken separately, might be considered as charities.

HELD—that apart from the funds which might be construed as charities, there was not to be found upon the face of the rules and regulations an intention that the association should be permanent; that the gift did not tend to a perpetuity, that the words "or in any other way beneficial to that corps" gave a discretion to the committee for the time being when they got the money to apply the fund as they should consider to be beneficial. They might put it into the building fund or into the general funds of the corps, or deal with it in any way they pleased for the benefit of the corps, and that the gift was therefore good

*In re Dutton* ((1878) 4 Ex. D. 54, 48 L. J. Ex. 350; 27 W. R. 398); *In re Clark's Trust* ((1875) 1 Ch. D. 497; 45 L. J. Ch. 194; 24 W. R. 233—Hall, V.-C.); *Thomson v. Shakespeare* ((1860) 1 D. F. & J. 399; 29 L. J. Ch. 276, 8 W. R. 265), and *Carne v. Long* ((1860) 1 D. F. & J. 75; 29 L. J. Ch. 503; 6 Jur. (N.S.) 639; 8 W. R. 570; 2 L. T. (N.S.) 552) distinguished.

*Cocks v. Mannors* ((1871) L. R. 12 Eq. 574; 40 L. J. Ch. 640; 19 W. R. 1055; 24 L. T. (N.S.) 869—Wickens, V.-C.); *Morrow v. M'Conville* ((1883) 11 L. R. Ir. 236; *In re Wilkinson's Trusts* (1887) 19 L. R. Ir. 531); and *Bradshaw v. Jackman* ((1887) 21 L. R. Ir. 12) discussed and principle followed.

IN RE CLARKE; CLARKE v. CLARKE, [1901] 2 Ch. 110; 70 L. J. Ch. 631; 49 W. R. 628; 84 L. T. 811; 17 T. L. R. 479—Byrne, J.

39. *Gift for Masses—Gift in Perpetuity*

*Charitable Gifts—Continued.*

—*No Direction for Celebration in Public.*—A bequest for masses in perpetuity is a good charitable gift, whether there be a direction that the masses be celebrated in public or not.

*Attorney-General v. Delaney* ((1876) 1 R. 10 Ch. 104) overruled.

*O'HANLON v. LOGUE*, [1906] 1 Ir. R. 247—C. A.

40. *Gift for Religious Purposes.*—A testator bequeathed to his trustees a sum of money upon trust to invest it, and apply the income for such religious purposes as his trustees and the Bishop of C. for the time being should, in their uncontrolled discretion, think fit. By the preceding clause he had bequeathed a like sum of money to his trustees for the benefit of such charitable institutions connected with the counties of C. and D., as his trustees and the Bishop of C. for the time being should in their uncontrolled discretion think fit, irrespective of creed.

HELD—that the words “religious purposes” meant religious purposes which were charitable, and that the bequest was not void for uncertainty.

*White v. White* ([1393] 2 Ch. 41; 62 L. J. Ch. 342; 41 W. R. 683; 68 L. T. 187—C. A.) followed.

*Grimond v. Grimond* ([1905] A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477; 21 T. L. R. 323—H. L. (S.), No. 67, *infra*), distinguished as being a decision on Scotch law

*ARNOTT v. ARNOTT*, [1906] 1 Ir. R. 127—M. R.

41. *Gift for Repairs of Burial Grounds—Burial Grounds Restricted to a Particular Sect—Advancement of Religion—Valid Charitable Legacy.*—A testator gave a legacy to a branch of the Society of Friends for the sole purpose of maintaining their existing burial grounds, and in particular his wife's grave.

HELD—(1) a good charitable legacy as being connected with the advancement of religion (2) that the direction as to the wife's grave did not create a second trust, but only imposed a second and ancillary obligation.

*IN RE MANSEY; ATTORNEY-GENERAL v. LUCAS*, [1905] 1 Ch. 68; 74 L. J. Ch. 95; 53 W. R. 261; 92 L. T. 79—Warrington, J.

42. *Gift to Rector of Jesuit Order in Aid of a School—Validity—Roman Catholic Relief Act, 1824* (10 Geo. 4, c. 7)—*Bequest on Condition—Keeping Grave in Order.*—A testatrix by her will made the following bequest: “I leave to the rector of the Jesuits at M., in aid of the school there, for the training of pupils intended for the Church, the sum of £500.” The school at M. was the property of, and managed by, the Jesuit Order. It was divided into two parts, one of which was a lay boarding school, and the other was an apostolic school, where students were educated for the Jesuit or other Order, all

these apostolic students being intended to act as missionaries in foreign parts. There was no pecuniary profit to the Jesuit Order from the apostolic portion of the school.

HELD—that the gift was not invalid as being contrary to the policy of the Roman Catholic Act, 1824, or as directly tending to train up students to be Jesuits.

Bequest of £500 to the treasurer of the Society of St. Vincent de Paul, at L., for the benefit of the poor at L., “on condition that the committee of said society shall undertake in writing to my executors to have the railing and ironwork of the two vaults in St. L.'s cemetery . . . painted once in every three years.”

HELD—a valid bequest.

*ROCHE v. M'DERMOTT*, [1901] 1 Ir. R. 394—M. R.

43. *Gift for “Roman Catholic purposes”—Gift for a Monastic Order “for teaching purposes.”*

HELD—that, bequests to trustees “for such Roman Catholic purposes in the parish of C. and elsewhere as they deem fit and proper,” and for the establishment in C. of “a community of Christian brothers” (a Monastic order) “for teaching purposes” were void

*M'LAUGHLIN v. CAMPBELL*, [1906] 1 Ir. R. 588—[M. R. and C. A.]

44. *Gift to Church Bell-ringers—Erection and Maintenance of Headstones in Churchyard—“Public Charities and Institutions.”*

—A testatrix by her will gave (1) £200 to the vicar and churchwardens of a parish to be invested by them in the names of the official trustees of charitable funds and directed that £1 from the income was to be given to the ringers for the time being of the parish church who should ring a peal of bells on May 29th in commemoration of the happy restoration of the monarchy to England; (2) £700 to the vicar and churchwardens to be similarly invested and the income thereof to be applied in or towards the erection and maintenance of headstones to the graves of persons who were resident as pensioners in certain almshouses, and who should be buried in the parish churchyard; and (3) the residue of her estate upon trust to distribute the same “to and amongst such public charities and institutions or for such charitable purposes for the public advantage or benefit” as the trustees should in their absolute discretion think fit.

HELD—that the gifts were good charitable gifts.

*Mansey, In re; Attorney-General v. Lucas* ([1905] 1 Ch. 68; 74 L. J. Ch. 95; 53 W. R. 261; 92 L. T. 79—Warrington, J., No. 41, *supra*; and *Grimond v. Grimond* [1905] A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477; 21 T. L. R. 323—H. L. Sc., No. 67, *infra*) followed.

*IN RE PARDOE; M'LAUGHLIN v. THE ATTORNEY-GENERAL* [1906] 2 Ch. 184; 75 L. J. Ch. 455; 54 W. R. 561; 94 L. T. 567; 22 T. L. R. 452—Kekewich, J.

*Charitable Gifts—Continued.*

45. *Gift to Hospital—“Rebuilding and Equipment”*—“To the satisfaction and under the directions of my Executors”—*Hospital nearly Rebuilt at Testatrix's Death.*—A testatrix by her will, made three years before her death, gave £20,000 “towards the rebuilding and equipment, to the satisfaction and under the direction of my executors, of” a certain hospital, “the enlargement of which has been recommended, and which charity I have long desired to benefit.” At the death of the testatrix the hospital was almost rebuilt, but it was only partially plastered, and it was neither painted, furnished, nor equipped. Neither of the executors had at any time directed the rebuilding or equipment of the hospital.

**HELD**—that, notwithstanding the difficulty in determining what expenditure, if any, could be sanctioned, the gift was not an absolute gift to the hospital, but a gift for a specified object.

No limit of time being fixed, the discretion of the executors remained exercisable till the hospital was fully “equipped,” i.e., furnished with everything required to convert an empty building into a hospital.

*IN RE UNITE, EDWARDS v. SMITH, (1906) 75 [L. J. Ch. 163; 22 T. L. R. 242—*  
*Kekewich, J.*

46. *Gift to Institute—Institute really Private Property—Good Charitable Bequest—Scheme.*—A testatrix, in memory of her father, built a village institute of the ordinary kind, but she never conveyed the building to trustees, or executed a declaration of trust. By her will she left £3,000 to her trustees, “to be applied by them in such manner as they shall consider most expedient for the benefit of the M. Institute.”

**HELD**—that, though the building might be subject to no trust, there was a good charitable bequest for the same purposes as those for which the institute was built, viz., the benefit of the inhabitants; and that a scheme must be framed.

*IN RE MANN; HARDY v. ATTORNEY-GENERAL, [1903] 1 Ch. 232; 72 L. J. Ch. 150; 51 W. R. 165; 87 L. T. 734—Farwell, J.*

47. *Gift to Institution—Identity of Institution—Change in Methods of attaining Objects.*—A bequest was made to a Ragged Industrial School established in 1857 to “rescue” destitute children and give them a good education. In consequence of the provision of free State education, the members of the society, who had power to alter its constitution, had sold their school and devoted its funds under an amended constitution to providing children with the clothes, &c., necessary to enable them to attend the board schools.

The legacy did not vest until a date subsequent to these changes.

**HELD**—that the legacy had not lapsed, for

the institution had not lost its identity, but had merely changed its methods of attaining its objects.

*PLAYFAIR v. KELSO RAGGED INDUSTRIAL SCHOOL, [1905] 7 F. 751—Ct. of Sess.*

48. *Gift to Institution—Institutions for Benefit of Inhabitants of a Parish.*—Personalty was bequeathed by will to trustees upon trust “for such charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal, or any of the inhabitants thereof, as my trustees shall in their absolute, uncontrolled discretion think fit.” The testator desired his trustees to consider in the distribution three specified institutions in Kendal—namely, a hospital, a grammar school, and a free public library.

**HELD**, that the gift was for public purposes for the town of Kendal, and persons dwelling there, and was therefore a good charitable gift.

*IN RE ALLEN; HARGREAVES v. TAYLOR, [1905] 2 [Ch. 400; 74 L. J. Ch. 593; 54 W. R. 91; 21 T. L. R. 682; 93 L. T. 597—Eady, J.*

49. *Gift of Leasehold House to Trustees to Carry on School—House for Storage and Distribution of Books to Publishers.*—A testatrix bequeathed to trustees a leasehold house, where she had established a school for religious teaching and elementary education, the expenditure on which exceeded the fees, with a direction to the trustees to carry on the school.

**HELD**—to be a good charitable gift.

She also bequeathed to them a leasehold house, which had been used by her, and was to be used by them for the storage of books, written by certain persons, the house being in the occupation of a person who lived there rent free in consideration of his distributing the books to the publishers when required for sale, with a direction to the trustees to pay the rent of the house.

**HELD**—not to be a good charitable gift.

*IN RE HAWKINS; WALROND v. NEWTON, (1906) 22 [T. L. R. 521—Eady, J.*

50. *Gift of Money to Found a School—Validity of Gift—Acquisition of Land.*—A testator by his will directed his trustees to lay out and employ the residue of his estate in founding at a certain town a school for all trades connected with the building and fitting out of steam and sailing ships. He died five days later.

**HELD**—that the gift involved the acquisition of land and the building thereon of a school house, and was therefore void.

*Hopkins v. Phillips (3 Giff. 182) followed.*  
*RE VERE; CARTER v. BROWN, (1906) 22 T. L. R. [273—Eady, J.*

51. *Gift of pure Personalty to Vicar and Churchwardens “for any Purpose to which they think proper to apply it.”*—A testator



**Charitable Gifts—Continued.**

gave one-fourth of his pure personality to a vicar and churchwardens "for any purpose to which they think proper to apply it."

HELD—that the case was near the line, but on the construction of the whole will there was a devotion of the pure personality to charitable objects; and a scheme might be prepared.

IN RE HURLEY; NICHOLS v. PARGITER, (1901)  
[17 T. L. R. 115—Cozens-Hardy, J.]

53. *Gift Limited to Old and Worn-out Clerks of Firm—Amalgamation of Firm.*—A gift to form a fund for the purpose of pensioning off the "old and worn-out clerks" of a firm is a good charitable bequest, and the Court will direct a scheme for its administration.

IN RE GOSLING; GOSLING v. SMITH, (1900) 48  
[W. R. 300; 16 T. L. R. 152—Byrne, J.]

54. *Gift of Sum to Vicar "for the Charitable Purposes agreed upon between us"*—*Evidence of Vicar—Admissibility.*—A testatrix by her will bequeathed to her friend C., a vicar, the sum of £4,000 "for the charitable purposes agreed upon between us." An affidavit was put in by C., in which he stated that the charitable purposes agreed on came to an end with his own lifetime.

HELD—that the will fixed absolutely the subject-matter of the gift, namely £4,000, and not merely the income of the £4,000, and that C.'s affidavit might be referred to for one purpose only, namely, to ascertain what were the charitable purposes agreed upon, and those the affidavit clearly defined; and that a scheme should be settled in chambers.

Decision of Farwell, J. ([1902] 1 Ch. 214; 71 L. J. Ch. 168; 50 W. R. 185; 85 L. T. 516), affirmed in part and reversed in part.

IN RE HUXTABLE; HUXTABLE v. CRAWFORD, [1902]  
[2 Ch. 793; 71 L. J. Ch. 876; 87 L. T. 415;  
51 W. R. 282—C. A.]

55. *Gift to Vegetarian Society—Food Reform.*—A gift by will of a sum of money to certain persons, to be applied as they might in their absolute discretion think best "in furtherance of the principles of food reform as advocated by the Vegetarian Societies of Manchester and London."

HELD—a good charitable gift.

In re Cranston ([1898] 1 Ir. R. 431) followed.

IN RE SLATTER; HOWARD v. LEWIS, (1905) 21  
[T. L. R. 295—Joyce, J.]

56. *Gift to Vicar and Churchwardens to be Applied as they think fit—Validity—"Sick and Poor Fund."*—A testatrix gave £400 to the vicar and churchwardens for the time being of K., "to be applied by them in such manner as they shall in their sole discretion think fit."

HELD—a good charitable legacy for the

benefit of the parish of K. for ecclesiastical purposes.

She also gave money to the "sick and poor fund of the parish church."

HELD—a good charitable gift

IN RE GARRARD; GORDON v. CRAIGIE, [1907]  
[1 Ch. 382; 76 L. J. Ch. 240; 76 L. T. 357; 23  
T. L. R. 256—Joyce, J.]

57. *Gift for Indefinite Purpose—No Apportionment.*—Where a bequest is made for charitable purposes, and also for an indefinite purpose not charitable, and no apportionment is made by the will, so that the whole may be applied for either purpose, the whole bequest is void.

Decision of C. A. ([1897] 2 Ch. 105; 66 L. J. Ch. 545; 45 W. R. 610; 76 L. T. 725) reversed; and the decision of Romer, J. ([1897] 1 Ch. 518), restored.

HUNTER v. ATTORNEY-GENERAL, [1899] A. C.  
[309; 68 L. J. Ch. 449; 47 W. R. 673; 80  
L. T. 732; 15 T. L. R. 384—H. L. (E.)]

58. *"Home of Rest for Lady Teachers."*—A bequest for the provision of a "Home for lady teachers in need of rest" is not only charitable in the ordinary sense of the word, but is also a good charitable gift in the eye of the law.

IN RE ESTLIN; PREITCHARD v. THOMAS, (1903) 72  
[L. J. Ch. 687; 89 L. T. 88—Kekewich, J.]

59. *Lapse—Object of Gift Ceasing to Exist after Testator's Death—Period of Distribution—Cy près—Scheme.*—A testator by his will bequeathed a sum of money to trustees, to pay the income thereof to a person for life, and after his death the money was to be given to the Drapers' Company for the benefit of their school at Tottenham. After the death of the testator and during the lifetime of the tenant for life the school ceased to exist.

HELD—that there had been no lapse of the bequest, and that the fund should be applied *cy près* for charitable purposes in accordance with a scheme to be settled.

In re Slevin; Slevin v. Hepburn ([1891] 2 Ch. 236, 60 L. J. Ch. 439; 39 W. R. 578; 64 L. T. 311—C. A.) followed.

IN RE SOLEY; GROVER v. DRAPERS' COMPANY,  
[1901] 17 T. L. R. 118—Byrne, J.]

60. *Object of, Non-Existent—General Charitable Intention—Lapse—Cy près—"Charitable Institution."*—If there is a gift to a charitable institution which existed, but has ceased to exist, there is a lapse.

Where there is a gift to a charitable institution which never existed at all, the Court, which always leans in favour of a general charitable purpose, is more ready to infer a general charitable intention than to infer the contrary, and will accept even a small indication of the testator's intention as sufficient to show that a purpose, and not a person, was intended.

A testatrix gave by her will several charit-

*Charitable Gifts—Continued.*

able gifts, the objects of which might be summarised as follows. First, the blind; secondly, orphans; thirdly, "The Home for the Homeless," 27, Red Lion Square, London; fourthly, a hospital, fifthly, orphans again, sixthly, deaf and dumb; seventhly, fever and small-pox hospitals, and lastly, epilepsy and paralysis. The testatrix declared that "In the event of any question arising as to the designation of any of the charitable institutions hereinbefore mentioned, or of any doubt existing as to which one or two or more of such institutions it is intended to benefit, the decision shall rest absolutely with my executor." The residue was given "to be divided rateably among the various charitable institutions which are beneficiaries under this instrument." At the date of her will there was not, and there never had been in London, any charitable institution known as the "Home for the Homeless."

**HELD**—that there was no lapse; that there was an indication of a general charitable intention so that effect could be given to the gift, although the legatee named was non-existent, that the authority whoever it was, that would have to give effect to the general charitable purpose, was within the words "charitable institutions which are beneficiaries under this instrument," and was entitled to the share of residue which would have gone to the "Home for the Homeless" if existent

**IN RE DAVIS, HANNEN v. HILLYER**, [1902] 1 Ch. 459; 71 L. J. Ch. 459; 50 W. R. 378; 86 L. T. 292.—Buckley, J

**61. Pious Purposes—Perpetual Gift to Dominican Convent for Masses to be offered up in Convent Chapel—No Direction to Celebrate in Public—Invalidity**—A testator gave the income of freehold and leasehold property, share and share alike, to the parish priest of K. and to the convent of E. for the celebration of the Mass for the repose of the souls of his parents and his own, and a solemn High Mass to be offered up annually on the anniversary of his death, both in the parish chapel of K. and in the chapel of the convent of E. The convent of E. was a convent of the Dominican Order. There was evidence that it was kept open for public worship

**HELD**—that the gift, as regards the convent, was not charitable, and was accordingly void as a perpetuity.

*Kehoe v. Wilson* ((1880) 7 L. R. Ir. 10, with respect to supposed decision, as a general proposition, that gifts for Masses for the souls of the dead, though to be celebrated in public, are not charitable) observed upon and explained.

**HEALY v. ATTORNEY-GENERAL**, [1902] 1 Ir. R. 342 [—V.-C.

**62. School — Denominational Teaching under Trust Deed—Discontinued on Week**

*Days—Continued on Sundays—No Failure of Gift.*—In 1869 W. founded a school for the education of poor children, the religious part of the teaching to be in accordance with Church of England principles. It was used accordingly as a Church of England elementary day school on week days, and as a Sunday school in connection with the parish church on Sundays. It was so used in 1897, when W.'s sister made a will leaving £400 to the school.

In 1900 the week day school was discontinued, the school-house not being regarded as suitable by the Board of Education, but the Sunday school was continued.

In 1905 W.'s sister died, without having altered her will

**HELD**—that, as the Sunday school still survived, there was no failure of the gift to the school.

**IN RE WARING, HAYWARD v. ATTORNEY-GENERAL**, [1907] 1 Ch. 166, 76 L. J. Ch. 49, 95 L. T. 859—Kekewich, J.

**63. Trust for Conversion—Trust to Purchase Land for Erection of Model Dwellings—Continuing Trust to Let such Model Dwellings at Low Rents to the Poor—"Charitable Use"—Validity—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 7, 8—Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16), s. 1, sub-s. 1.]—A testator, who died on 20th May, 1900, devised and bequeathed all his real estate and the residue of his personal estate to executors and trustees upon trust for sale and conversion and to stand possessed of the net residue thereof after payment of debts and funeral and testamentary expenses upon trust to purchase lands for the erection of model dwellings and houses, and the testator declared a trust for building upon the sites so to be purchased or acquired. The testator in his will said: "It being my will, desire, and intention by the means aforesaid to create a continuing trust for the purpose of supplying the poor in London and other populous places or towns in England with proper and sufficient dwelling-houses or lodgings at such rents (however low) as my trustees shall in each case in their discretion consider the tenants can afford to pay and see fit to charge them."**

**HELD**—that "charitable use" was the same thing as "charitable purpose," and in this case it was the devotion of the buildings when erected to the housing of people of small means at rents below the rack rental of the property, and it was a good disposition, that the Court might sanction the acquisition of the land under sects. 7 and 8 of the Mortmain and Charitable Uses Act, 1891; and that the Working Classes Dwellings Act, 1890, did not deal with charitable matters, and therefore did not apply to the case.

**IN RE SUTTON; LEWIS v. SUTTON**, [1901] 2 Ch. 640, 70 L. J. Ch. 747; 85 L. T. 411; 17 T. L. R. 703; 66 J. P. 39—Buckley, J.

*Charitable Gifts—Continued.*

64. *Trust of Income for Repair of Tombs—Remainder to Charitable Purposes—Whole Fund goes to Charitable Purposes*—A testator directed that £1,000 out of his personal estate should be invested in the names of a vicar and churchwardens of a named church "in trust that they the said vicar and churchwardens for the time being do and shall out of the proceeds or annual income of such investment in the first place maintain yearly and keep in good repair and condition annually in all respects the two tombs . . . and in the next place to divide and distribute the remainder of such annual income or dividend unto and equally among the poor recipients, &c."

HELD—that the provision for the tombs was made a charge on the bequest, and was invalid, that the whole income went to the vicar and churchwardens for the purposes of the charitable bequest, and the fund must be invested in the name of the Official Trustee of Charitable Funds.

*Fisk v. Attorney-General* ((1867) L. R. 4 Eq. 521; 17 L. T. (N.S.) 27), *Dawson v. Small* ((1874) L. R. 18 Eq. 114; 43 L. J. Ch. 406; 22 W. R. 514; 30 L. T. (N.S.) 252—Bacon, V.-C.), and *In re Birkett* ((1878) 9 Ch. D. 576, 47 L. J. Ch. 846; 39 L. T. 418—Jessel, M. R.) followed.

*IN RE ROGERSON; BIRD v. LEE*, [1901] 1 Ch. 715, 70 L. J. Ch. 444; 84 L. T. 200—Joyce, J.

65. *Gift of Sum to Build within Three Years—Gift Over on Failure to Build within the Period—Repugnancy*—The substance of a gift to the Royal Hospital for Incurables was a sum of £6,000, to be laid out within three years in the erection of a building in a certain place, and if the hospital failed to comply with the terms imposed then over.

HELD—that the gift involved that the money should be expended before the expiration of the period limited, and the gift over was therefore repugnant; but that the hospital must submit a contract to the trustees for the erection of the buildings proposed to be erected within three years, and the legacy would be paid by such instalments as the work proceeded as might be required.

*IN RE RESTELL; ROYAL HOSPITAL FOR INCURABLES v. RESTELL*, (1901) 17 T. L. R. 395—Buckley, J.

66. *Uncertainty—Gift of Residue—"To be applied for such Charitable or Public Purposes as my Trustee thinks proper."*—According to the law of Scotland a man may in the disposition of his property select particular classes of individuals and objects, and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select.

A testatrix by a codicil to her will directed that—in an event which happened—one-half

of the residue of her estate should be applied for such "charitable or public purposes" as the testamentary trustee nominated in her will should think proper. It was not disputed that if the word "charitable" had stood alone the devise would have been sufficiently definite and valid.

HELD—that the words "charitable or public" being used disjunctively the disposition was too vague and uncertain to be administered, and was therefore invalid equally by the law of Scotland and of England.

*BLAIR v. DUNCAN*, [1902] A. C. 37; 71 L. J. P. C. [22; 50 W. R. 369, 86 L. T. 157; 18 T. L. R. 194—H. L. (Sc.)

67. *Uncertainty—"Charitable or Religious Institutions and Societies."*—A testator, who was a domiciled Scotsman, by his trust, disposition, and settlement directed his trustees to divide, pay, and convey one-third of the residue of his estate "to and amongst such charitable or religious institutions and societies . . . as my trustees, or the survivors or survivor of them, may select, and in such proportions to each or any as they may fix."

HELD—that the bequest was void for uncertainty.

Decision of the Court of Sessions (6 Fraser, 285) reversed.

*GRIMOND (or MACINTYRE) AND OTHERS v. [GRIMOND AND OTHERS]*, [1905] A. C. 124; 74 L. J. C. P. 35; 92 L. T. 477, 21 T. L. R. 323—H. L. (Sc.)

**(b) Mortmain Acts.**

68. *Bequest of Testator's Interest in Remainder in Settled Funds—Part of Settled Funds then Invested on Mortgage—Change of Investment to Consols—Failure of Gift pro tanto*—A. left to charity (*inter alia*) his interest in remainder in certain settled funds, to which, subject to his parents' life interests, he was absolutely and solely entitled.

At the date both of his will and of his death, £500 of the settled funds was properly invested upon mortgage, but this sum was subsequently paid off, and stood invested in Consols at the date of the determination of the last life interest.

HELD—that in giving this £500 the testator was giving an interest in land, and that therefore the gift failed.

*RE PRITCHARD'S SETTLEMENT; PLAYNE v. [TWISDEN]*, (1903) 88 L. T. 197—Joyce, J.

69. *Bequest of Tyne Improvement Bonds—Dues and Rates—General Charge on Revenues or Fruits of Undertaking*—The Mortmain Acts do not apply to a general charge upon the revenues of an undertaking.

A bequest of Tyne Improvement bonds to an infirmary was contested on the ground that the bonds savoured of realty, and that therefore the Mortmain Acts applied. The bonds were a charge on "The Tyne Improve-

## Charitable Gifts—Continued.

ment Fund" composed of river, ballast and bridge dues, tonnage, mooring and dock rates.

HELD—that the charge was not one on specific property, in which case the Acts would apply if such property savoured of realty; but was a general charge on revenues and fruits of an undertaking, and was therefore not within the Acts.

Judgment of Lord Davey in *In re Pickard* ([1894] 3 Ch. 704; 64 L. J. Ch. 92; 71 L. T. 558—C. A.) applied.

IN RE DEANE; *GOODWIN v. BROCKLEHURST*, (1903) [19 T. L. R. 26—Eady, J.

70. *Devise of Land for Ultimate Sale—Share of Rents given to Charity during Life of Widow—Total Proceeds of Sale given to Charity after Death of Widow—"Land"—No Sale within a Year—Vesting in Official Trustee of Charity Lands—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73) ss. 3, 5, 6.*—A testator gave all his real and personal estate to trustees upon trust for conversion, subject to a proviso that during his widow's lifetime her consent should be necessary for the sale of any of his freeholds or leaseholds. During the widow's life she was to receive one-fourth of the total rents and income, and the remaining three-fourths were to be distributed amongst certain charities, who, upon the widow's death, were to take the whole of the corpus.

HELD—that under the will the charities took two distinct interests.—

(1) A reversionary interest in the proceeds of the sale of land, to be effected immediately on the determination of the preceding life interest, and that such interest was not "land" within the meaning of the Mortmain Act, 1891.

In *re Sidebottom* ([1902] 2 Ch. 389; 71 L. J. Ch. 662; 50 W. R. 641; 87 L. T. 57; 18 T. L. R. 682—C. A. No. 72, *infra*) applied.

(2) An immediate terminable interest in the income of "land".

And that as regards the latter interest, the land not having been sold within a year of the testator's death, and the time for sale not having been extended, the life estate in three-fourths of the landed property had become vested in the Official Trustee of Charity Lands under sect. 6.

IN RE RYLAND; *ROPER v. RYLAND*, [1903] 1 Ch. [467; 72 L. J. Ch. 277; 51 W. R. 345; 88 L. T. 456; 19 T. L. R. 184—Byrne, J.

71. *Gift for Maintenance of Churchyard—Sum exceeding £500—Gifts for Churches Act, 1803 (43 Geo. III., c. 108), s. 1—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 7.*—The Gifts for Churches Act, 1803, s. 1, which authorised a gift by will of personalty not exceeding £500 for the maintenance of a churchyard, has, so far as it placed restrictions upon the amount of

the gift, been impliedly repealed by the Mortmain and Charitable Uses Act, 1891.

HELD—therefore, that a residuary gift of personalty exceeding £500 for the maintenance of a churchyard is a valid charitable gift.

IN RE DOUGLAS; *DOUGLAS v. SIMPSON*, [1905] 1 [Ch. 279; 74 L. J. Ch. 196; 92 L. T. 78; 21 T. L. R. 140—Kekewich, J.

72. *Land Assured to Trustees on Trust for Sale—Bequest of Proceeds to Charity—Postponement of Sale for Reasonable Time—"Personal Estate arising from Land"—Jurisdiction—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 3, 5.*—Land was assured by will to trustees upon a valid and effective trust for sale, and under the sale the charity took no interest except in the proceeds of sale. So far as concerned any rents or profits derived from the land before sale, they would only pass by implication to the charity as mixed with, and so as to be inseparable from, the proceeds of sale when the land was in fact sold.

HELD—that this was not a case where land had been "assured by will to or for the benefit of any charitable use" within the meaning of those words as used in sect. 5 of the Mortmain and Charitable Uses Act, 1891, and accordingly sects. 5 and 6 of that Act had no application; that it was a gift to a charity of "personal estate arising from the land" within the exception to sect. 3 of the Act; and that the trustees were bound to carry out the trust for sale within a reasonable time from the death of the testator, unless they obtained the direction and authority of the Court under its general jurisdiction as to trusts.

Decision of Buckley, J. ([1901] 2 Ch. 1, 70 L. J. Ch. 448; 85 L. T. 366), reversed.

IN RE SIDEBOTTOM; *BEELEY v. WATERHOUSE*, [1902] 2 Ch. 389; 71 L. J. Ch. 602; 50 W. R. 641; 87 L. T. 57; 18 T. L. R. 682—C. A.

73. *Land Devised upon Trust to Sell—Power to Trustees to Postpone Sale—Residue of Proceeds of Sale Appropriated to founding a Charitable Institution—"Personal Estate Arising from or Connected with Land"—Sale within One Year—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 3, 5.*—A testator devised his real and personal estate to trustees upon trust to sell with power to postpone such sale for such period as they might think proper, and after bequeathing certain legacies and annuities, he directed his trustees to appropriate the residue of the money as a fund for founding a charitable institution. The trustees were desirous of retaining some of the real estate unsold, and the question arose whether they had power to do so, having regard to the provisions of the Mortmain and Charitable Uses Act, 1891.

HELD—that construing the will strictly, there was a conversion directed, which the charity might stop; but still, it was a con-

**Charitable Gifts—Continued.**

version so as to give to the charity the personal estate which arose from the sale of land which by sect. 3 of the Act of 1891 is excepted from the definition of "land," and therefore was not land within sect. 5, and was not affected by the Act, and that the land need not be sold within one year from the testator's death.

IN RE WILKINSON, *ESAM v. ATTORNEY-GENERAL*, [1902] 1 Ch. 841, 71 L. J. Ch. 663, n., 87 L. T. 40—Kekewich, J.  
N.B. Decided Jan. 12, 1900.—Ed.

**(c) Uncertainty.**

**74. Uncertainty—Charitable and Benevolent Institutions—Not Void for Uncertainty.**—A testator gave the residue of his real and personal estate upon trust, after conversion, for "such charitable and benevolent institutions as his trustees should in their discretion determine."

HELD—a good charitable gift, and not void for uncertainty.

*In re Sutton* ((1885) 28 Ch. D. 464; 54 L. J. Ch. 613; 33 W. R. 519—Pearson, J.) followed.

IN RE BEST; *JARVIS v. BIRMINGHAM CORPORATION*, [1904] 2 Ch. 354, 73 L. J. Ch. 808; 53 W. R. 21—Farwell, J.

**75. Charitable and Benevolent Purposes—"Discretion of Trustees."**—A testatrix gave property to be applied by the trustees "at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of A. as they themselves shall institute or direct."

HELD—that the gift was void for uncertainty.

*SHAW'S TRUSTEES v. ESSON'S TRUSTEES*, (1906) [8 F. 52—Ct. of Sess.

**76. Charitable or Emigration Uses—Validity.**—A gift by will for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as the executors should, in their absolute and uncontrolled discretion, think fit, is too vague and indefinite, and not a good charitable gift.

IN RE SIDNEY; *HINGESTON v. SIDNEY*, (1907) 24 [T. L. R. 34—Eady, J.

**77. Charitable Purposes—Selection by Legatee—"For the Repose of Souls."**—A testator bequeathed the residue of his estate to the Roman Catholic Bishop of Dublin for the time being "to be applied by him in such charities as he shall select for the repose of the souls of myself, my wife and my parents."

HELD—a valid charitable gift, and not void for uncertainty.

*RICHARDSON v. MURPHY*, [1903] 1 Ir. R. 227 [—M. R.

**78. Charitable Purposes—To be applied in B.D.—VOL. I.**

"Charity or Works of Public Utility"—Bequest "for the Benefit or Hospitality of a Company."—A testator bequeathed to the company of C. and the company of A. the sum of £5,000 each, to be invested in such securities as the master and court of assistants of such companies might select, the revenue to be expended at the option of the master and court of such companies as to two-thirds "in charity or works of public utility," and as to the remaining one-third "for the benefit or hospitality" of the respective companies.

HELD—that "or" was used disjunctively, and that the whole of the two-thirds might be applied for purposes which were not charitable, and, therefore, that the gift failed as to two-thirds by reason of its indefiniteness.

*Blair v. Duncan* ([1902] A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 158—(H. L. Sc. No. 66, *supra*) followed.

But held, the gift of one-third was a gift of income not for charitable purposes, but for the absolute benefit of the companies, and that they were absolutely entitled to one-third.

*LANGHAM v. PETERSON*, (1903) 67 J. P. 75; 87 [L. T. 744; 19 T. L. R. 157—Eady, J.

**79. "Missionary Objects"—Power of Selection—Evidence of Intention.**—K. directed her trustees to pay money to M., to be applied by him "for such missionary object or objects at home, abroad, or in the colonies, as he shall in his absolute discretion select." M. was well known to her as engaged in aiding Christian missions abroad.

HELD—that, having regard to the nature of M.'s work, the gift was not void for uncertainty.

*Scott v. Brownrigg* ((1883) 9 L. R. Ir. 246) not followed.

RE KENNY, *CLODE v. ANDREWS*, (1907) 97 L. T. [130—Warrington, J.

**80. Trust for Relief of Persons who have shown Sympathy in Pursuit of Science.**—A testator directed his trustees to employ the residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shown practical sympathy, either as amateurs or professionals, in the pursuit of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted for that purpose."

HELD—(1) that the bequest was charitable; and (2) that it was not void for uncertainty.

*MURDOCH'S TRUSTEES v. WEIR*, [1907] S. C. 185 [—Ct. of Sess.

**81. Trust for Support and Education—Objects to have Specified Surnames.**—L. devised all his estate to trustees upon trust

**Charitable Gifts—Continued.**

"to pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty, being between the ages of eleven years complete and twenty-three years complete, until such boy or man shall have obtained a trade or profession, such sums as said trustees may think proper." Absolute discretion was given to the trustees as to the selection of recipients and the discontinuance of any payment to them for their "support or education." They were also empowered to accumulate and invest the interest, the profits of which were to be applied "in the same manner as those of the original shares or funds—viz. for the support of boys or men of the above-mentioned surnames, under the circumstances beforementioned."

HELD—not to be a good charitable gift.

LAVERTY v. LAVERTY, [1907] 1 Ir. R. 9—  
[Barton, J.]

**CHARTER PARTY.**

See SHIPPING AND NAVIGATION.

**CHEQUES.**

See BANKERS AND BANKING; CONFLICT OF LAWS.

**CHILDREN.**

See BASTARDY, CRIMINAL LAW AND PROCEDURE, EDUCATION; FACTORIES AND WORKSHOPS; INFANTS

**CHOSES IN ACTION.**

See also AUCTIONS, 13; BANKRUPTCY, 222, 233, 237, CONFLICT OF LAWS; CONTRACTS, 1—3.

1. *Assignment of—Construction—Claim for Damages—“Debts”—“Effects”—“Contracts”—“Engagements.”*—A person having a claim against the defendants for unliquidated damages in respect of a breach of contract became bankrupt. His trustee in bankruptcy assigned to the plaintiff his businesses and goodwill together with the "plant, stock-in-trade, book and other debts, securities, moneys, credits, effects, contracts and engagements to which the vendor as such trustee is entitled in connexion with the said respective businesses or either of them."

HELD—that the claim for damages passed under the assignment

Decision of C. A. (93 L. T. 729; 23 T. L. R. 58) affirmed.

OGDENS, LD. v. WEINBERG, (1906) 95 L. T. 567; [22 T. L. R. 729—H. L. (E.)]

2. *Assignment of—Assignee for Value—Receiver—Priorities.*—An assignee for value of a debt has priority over a person who, after the assignment, but before receiving notice thereof, obtains an order appointing him receiver by way of equitable execution over such debt.

IN RE BRISTOW, [1906] 2 Ir. R. 215—Boyd, J.

3. *Assignment of Debt—Absolute Assignment—What amounts to—Letter to a Debtor Authorising Payment of his Debt to a Creditor—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).*—To constitute a good equitable assignment of a debt it is sufficient to cause the debtor to understand that the creditor has made over the debt to a third person.

It was arranged between the plaintiffs and K. & Co. that the former should accept K. & Co.'s bills given in payment for goods, and that persons to whom K. & Co. resold the goods should be directed to remit the invoice price to the plaintiffs. On January 6th, K. & Co. wrote to the plaintiffs, enclosing a printed document, which they requested the plaintiffs to forward to the defendants for their signature. This document consisted of two detachable parts; one part was signed by K. & Co., and was addressed to the defendants, and requested them to sign the attached letter and to forward the same to the plaintiffs; the other part (the attached letter) was addressed to the plaintiffs, and was in these terms: "Herewith we beg to confirm that we shall remit, subject to the approval of the goods, the amount of invoices—viz.:—£369 and £3,263, for 75 packages of raw rubber received to-day from K. & Co. when due direct to your good selves for account of K. & Co." The plaintiffs on January 7th forwarded this printed document to the defendants, and it was signed by their manager and returned to the plaintiffs. The defendants, whose manager forgot that he had signed any such letter, paid the sum of £3,263 to K. & Co. instead of to the plaintiffs, who brought an action to recover it after the bankruptcy of K. & Co.

HELD—that K. & Co.'s letter of January 6th, together with the printed document enclosed, amounted to an assignment of the debt due from the defendants to K. & Co. and that the plaintiffs were entitled to succeed.

Decision of C. A. ([1904] 1 K. B. 387; 73 L. J. K. B. 247; 52 W. R. 501; 90 L.T. 106; 20 T. L. R. 195; 9 Com. Cas. 149) reversed.

BRANDT, SONS & Co. v. DUNLOP RUBBER Co., [1905] A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495; 21 T. L. R. 710; 11 Com. Cas. 1—  
H. L. (E.)

4. *Assignment of Debt—Absolute Assignment in Writing—Conditional Assignment—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s 6*—An assignment in writing of

**Choses in Action—Continued.**

a debt was made in the following form "In consideration of money advanced from time to time we hereby charge the sum of £1,080, which will become due to us from . . . on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be paid to you."

**HELD** (reversing the judgment of Wills, J.)—that this was not an "absolute assignment" within sect. 25, sub-s. 6, of the Judicature Act, 1873.

**DURHAM BROTHERS v. ROBERTSON**, [1898] 1 Q. B. 765; 67 L. J. Q. B. 484; 48 L. T. 438—C. A.

**5. Assignment of Debt—Future Income—Absolute Assignment—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 25, sub-s. 6.]—For certain considerations a debtor assigned, sold, and transferred so much and such part of his income to the plaintiff coming from the defendant to which he then was or might at any time thereafter become entitled as should be necessary to pay the sum of £22 10s.

**HELD**—that there was no absolute assignment within sect. 25 (6) of the Judicature Act, 1873.

**JONES v. HUMPHREYS**, (1901) 85 L. T. 488; 18 [T. L. R. 54; [1902] 1 K. B. 10; 71 L. J. K. B. 23; 50 W. R. 191—Div. Ct.

**6. Assignment of Debt—Notice Giving Date of Assignment Inaccurately—Invalidity—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 25, sub-s. 6.]—The plaintiff gave written notice to the defendants of an assignment of a debt, but by a clerical error the date of the assignment was stated inaccurately.

**HELD**—that notice of the actual assignment of the debt had never been given, and the provisions of sect. 25 of the Judicature Act, 1873, not having been complied with, the plaintiff was not entitled to recover.

**STANLEY v. ENGLISH FIREWORK INDUSTRIES, LD.** [1899] 68 L. J. Q. B. 839—Ridley, J.

**7. Assignment of Debt—Notice in Writing—Notice Given after Assignee's Death—Validity—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 25.]—After the death of an assignee of a debt or legal chose in action it is not too late to give the notice in writing required by sect. 25 (6) of the Judicature Act, 1873; his executor may give such notice and sue.

**BATEMAN AND ANOTHER v. HUNT AND OTHERS**, [1904] 2 K. B. 530; 73 L. J. K. B. 782; 52 W. R. 609, 91 L. T. 331; 20 T. L. R. 628—C. A.

**8. Assignment of Debt—Security—Power to sue in Name of Assignor—Assignment pro tanto—Absolute Assignment—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 25, sub-s. 6.]—The plaintiffs brought an action to recover

the sum of £100, being the amount contracted to be paid by the defendant to one C. G. V. under an agreement. The plaintiffs sued as assignees of the agreement from C. G. V., under a document by which C. G. V. assigned the whole of his rights and interest under the agreement as security for the repayment on demand of £200, and by which C. G. V. appointed the plaintiffs his irrevocable attorneys.

**HELD**—that there was no absolute assignment within the meaning of sect. 25, sub-s. 6, of the Judicature Act, 1873, but merely an assignment *pro tanto*.

Decision of Bruce, J. (79 L. T. 496; 15 T. L. R. 82), reversed.

**MERCANTILE BANK OF LONDON v. EVANS**, [1899] 2 Q. B. 613; 68 L. J. Ch. 921; 81 L. T. 376; 15 T. L. R. 535—C. A.

**9. Assignment of Debt—Security—Absolute Assignment not Purporting to be by Way of Charge Only—Instrument Passing all the Rights of Assignor—Assignor's Right of Action—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 25, sub-s. 6.]—In November, 1899, the plaintiff, a builder, entered into a contract with the defendants to execute extensive building works. On March 7th, 1901, by an instrument, signed by the plaintiff and given to his bankers, in consideration of their continuing a banking account with him and by way of continuing security to them for all moneys due or to become due to them from him alone or possibly with others either on the said account or otherwise, the plaintiff assigned to them all moneys due, or to become due, to him from the defendants under the building contract, and he thereby empowered his bankers to settle and adjust accounts, to give effectual receipts for the moneys thereby assigned, and if necessary to sue for such moneys.

On March 7th, 1901, notice of the assignment was given to the defendants, and an authority was sent to them by the plaintiff requesting them to pay to the bank all sums payable under the contract. When the work was completed, a dispute arose between the plaintiff and the defendants as to the balance payable in respect of the price of the work and for extras, and in respect of that balance the action was brought.

**HELD**—that the instrument might be properly described as an absolute assignment because it was one under which all the rights of the assignor in respect of the moneys payable under the building contract were intended to pass to the assignees, and not one which purported to be by way of charge only, and the instrument was an absolute assignment within the meaning of sect. 25, sub-s. 6, of the Judicature Act, 1873; and that, therefore, the plaintiff had no right of action.

**Mercantile Bank of London v. Evans** ([1899] 2 Q. B. 613; 68 L. J. Ch. 921; 81 L. T. 376; 15 T. L. R. 535—C. A., No. 8, *supra*) distinguished.

**Choses in Action—Continued.**

**HUGHES v. PUMP HOUSE HOTEL Co.**, [1902] 2 K. B. 190; 71 L. J. K. B. 630; 50 W. R. 660; 86 L. T. 794, 18 T. L. R. 654—C. A.

10. *Assignment of Interest on Contract—Contract to Sell Reversionary Interest—Right of Assignee to sue Vendor for Breach of Contract*—“*Legal Chose in Action*”—*Judicature Act*, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.]—The defendant contracted to sell R. a reversionary interest in some stocks and shares. The contract should have been completed on May 8th, 1901. It was not completed on that date, but it was agreed that time was not of the essence of the contract, and the parties continued to negotiate on the footing that the contract was still in force. On June 10th, whilst matters were still in this condition, R. by deed assigned his interest in the contract to the plaintiff, and notice in writing of the assignment was given to his vendor, the defendant. At the trial in the Mayor's Court, the Common Sergeant found that there had been a breach of contract by the defendant; but he gave judgment for the defendant, on the ground that the plaintiff could not sue in his own name. The Div. Ct. reversed this decision, holding that the executory contract of purchase was assignable by sub-s. 6 of sect. 25 of the *Judicature Act*, 1873, as a “legal chose in action” within the meaning of that sub-section, as the plaintiff might, before the *Judicature Act*, by going first to the Court of Equity and then going, in the name of the assignor, to the Court of Common Law, have got his damages.

On appeal the point of law was discussed, but no decision given, as the Court held on the facts that there had been no breach of contract, and allowed the appeal on that ground.

Decision of Div. Ct. ([1902] 2 K. B. 427; 71 L. J. K. B. 712; 87 L. T. 304; 18 T. L. R. 703) reversed on the facts.

**TORKINGTON v. MAGEE**, [1903] 1 K. B. 644; 72 [L. J. K. B. 336; 88 L. T. 443; 19 T. L. R. 331—C. A.

11. *Equitable Assignment—Agreement to Indorse and Hand Over Cheques as Received—Liability of Insolvent Estate*.]—J. W. N. made the following contract with the plaintiffs: “The Deaf and Dumb Contract.—In reference to above, my tender being accepted, I accept your offer of flour at prices, in quantities of about eight to ten sacks per week, payment in one month. I also agree to indorse the cheques from the asylum, and hand over to you as received by me in payment of the accounts.” A sum of £29 0s. 6d. was due to the plaintiffs in March, 1899, when J. W. N. died. The defendant became administratrix with the will of J. W. N. annexed. In May, 1899, the plaintiffs showed the contract to the defendant, and later in the same month, a cheque for £44 16s. 3d. was paid by the committee of the asylum to the defendant. The plain-

tiffs claimed the right to have the cheque indorsed to them, but the defendant refused to hand it over and held it for the benefit of the testator's creditors.

**HELD**—that the contract constituted an equitable assignment of the moneys as and when received from the asylum committee. The contract was not an undertaking to pay out of the cheques received, but was an undertaking to pay over the very fund itself.

*In re Irving, Ex parte Brett* ((1877) 7 Ch. D. 419; 47 L. J. Bank. 38; 26 W. R. 376; 37, L. T. (N.S.) 507—Bacon, C.J.), followed.

**WEST AND WRIGHT, v. NEWING**, (1900) 82 L. T. [260; 16 T. L. R. 177—Bucknill, J.

12. *Equitable Assignment—Collateral Security for Debt—Directing Agent to Collect a Debt and Hand it Over to Third Party, to whom the Principal owes Money—Principal's Subsequent Deed of Assignment for Creditors—Title of Trustee under Deed of Assignment*.]—F. wrote to his creditors, C. B. & Co., inclosing all the collateral security he could then give them, and saying that W. & Sons' debt was good. F., at that time, had a claim against W. & Sons on bills accepted by them, and F. had instructed his solicitors, A. C. & Co., to take proceedings to sue W. & Sons for the amount due on the bills, and to hold the proceeds to the disposal of C. B. & Co. C. B. & Co. next day forwarded a copy of their letter from F. to A. C. & Co. Afterwards F. executed a deed of assignment to a trustee for his creditors. C. B. & Co. agreed to execute this deed, which contained a clause that nothing therein was to prejudice the rights of any creditor of any securities held by him, or as against any person other than the debtor. A. C. & Co. received part of the sum due on the bills before the execution of the deed by C. B. & Co., and the remainder afterwards.

**HELD**—that F. had created an equitable liability binding upon himself, and any interest that the trustee took under the deed of assignment was subject to the equities which affected it in F.'s hands; and that C. B. & Co. were entitled to the money received by A. C. & Co. in respect of the bills.

**PALMER v. CULVERWELL, BROOKS & Co.**, (1902) [85 L. T. 758—Bruce, J.

13. *Equitable Assignment—Negotiable Instrument—Retention of, by Creditor—Notice of Assignment—Effect of*.]—Notice to a debtor who has given a negotiable instrument in payment of his debt, that the debt has been assigned by the creditor, while retaining the negotiable instrument in his possession, can be disregarded by the debtor.

Decision of Kekewich, J., reversed.

**BENCE v. SHEARMAN**, [1898] 2 Ch. 582; 67 L. J. [Ch. 513; 78 L. T. 804—C. A.

14. *Equitable Assignment—Voluntary Gift—Banker's Deposit—Receipt—Indorsement and Delivery—Donee an Executor of Donor*.] In order to render a voluntary settlement



**Choses in Action—Continued.**

valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. A father indorsed a banker's deposit receipt "Pay my son" and signed his name to the indorsement, and then handed the document so indorsed to his son, saying, "Here you are, my lad, this is yours." The father appointed this son one of his executors

**HELD**—that there was a complete gift or equitable assignment of the amount on deposit at the bank.

**IN RE GRIFFIN**, [1899] 1 Ch. 408; 68 L. J. Ch. [220, 79 L. T. 442; 15 T. L. R. 78—Byrne, J.

**15. Equitable Assignment—Voluntary Gift—Purchase of Stocks and Shares on Stock Exchange—Passing Wife's Name as Transferee—Complete Gift.**—A testator a few days before his death bought, through a broker on the Stock Exchange, certain stocks and shares. On the day before his death, this being also the name-day on the Stock Exchange, in accordance with the testator's instructions, his wife's name was passed as the transferee of the stocks and shares. The testator died before the transfers were executed.

**HELD**—that the gift of the stocks and shares was complete, as the testator had left nothing undone which he could have done to complete the transaction in favour of his wife.

**Brereton v. Day** ([1895] 1 Ir. Rep. 518) followed.

**IN RE SMITH; BULL v. SMITH**, (1901) 84 L. T. [835; 17 T. L. R. 588—Byrne, J.

## **CHURCHES, CHURCH- WARDENS, AND CLERGY,**

*See* ECCLESIASTICAL LAW.

## **CHURCHYARD.**

*See* BURIAL AND CREMATION.

## **CLEARING HOUSE.**

*See* BANKERS, 31.

## **CLERK OF THE PEACE.**

*See* PUBLIC OFFICERS.

## **CLUBS.**

*And see* GAMING AND WAGERING; INTOXICATING LIQUORS, 77, 88; *for* **SHOP CLUB** *see* INDUSTRIAL SOCIETIES, 5.

**1. Expulsion of Member—Institute of Chartered Accountants—Non-payment of Subscription—Exclusion from Membership—Notice to Member—"Opportunity of being Heard"—Notice sent by Post.**—By a clause in the charter of the Institute of Chartered Accountants, if any member fails to pay his subscription for six months after the same has become due, he is liable to be excluded from membership by a resolution of the council passed at a meeting specially convened for the purpose, the member having first an opportunity of being heard. The members' annual subscriptions become due in January of each year. The plaintiff forgot to pay his subscription for more than six months after it became due, and notices calling his attention to it were sent to him by post to his address as registered in the books of the institute. The plaintiff had in fact changed his address, but had not given notice of the change to the institute or to the Post Office, and in consequence he did not receive the notices, the letters being returned through the Dead Letter Office. The council having passed a resolution excluding him from membership,

**HELD**—that the posting of the notices to him to his address as registered in the books of the institute was a proper means of communicating them to him, and that personal service was not necessary; that therefore the plaintiff had an opportunity of being heard, and the resolution excluding him was duly passed.

**JAMES v. THE INSTITUTE OF CHARTERED ACCOUNTANTS**, (1907) 24 T. L. R. 27—C. A.

**2. Liability of Members—Trustees Acquiring Onerous Property—Right to Reimbursement from Members.**—The essential feature of a club, tacitly understood by everyone and judicially recognised in numerous decisions, is that no member, *quâ* member, incurs any liability beyond the amount of the periodical subscription required by the rules of the club. This feature renders inapplicable to the relationship between club trustees and the various members (their *cestuis que trustent*) the principle affirmed in **Hardoon v. Belilios** ([1901] A. C. 118; 70 L. J. P. C. 9, 49 W. R. 209; 83 L. T. 573) as to the right of trustees to be indemnified by their *cestuis que trustent* against liabilities incurred by them in holding trust property. The trustees can only look to the actual property of the club, upon which their lien as trustees extends.

To what extent a member may, by acts of "assent and ratification," make himself liable to indemnify a trustee, who *e.g.* acquires for the club a lease of premises with onerous covenants, is doubtful: it is, at any rate, not sufficient merely to show that he was a member at the time when the lease was taken, and knew that it had been taken, and might entail liability upon the holders of it.

Decision in **Minnett v. Lord Talbot** ((1881) L. R. Ir. 7 Ch. 407) queried.

*Clubs—Continued.*

Judgment of the Supreme Court of New South Wales reversed.

WISE *v.* PERPETUAL TRUSTEE CO., LD., [1903]  
[A. C. 139; 72 L. J. P. C. 31; 51 W. R. 241;  
87 L. T. 569; 19 T. L. R. 125—P. C.]

3. *Omission to Return Particulars for Register in January—Change of Secretary in January—Liability for Omission—Licensing Act, 1902* (2 Edwd. 7, c. 28), ss. 25, 30, 32.]—The appellant was in 1903 the secretary of a club registered under the Licensing Act, 1902, and the appellant's name appeared in the register required by the Act as the secretary of the club. No return of particulars for the register was furnished during the month of January, 1904, to the clerk to the justices by the secretary of the club, as required by sect. 25 (3) of the Act. On February 1st the appellant called at the office of the clerk to the justices for forms in which such particulars might be inserted, and on his being told that he had committed an offence under the Licensing Act, 1902, stated that he had retired from the secretaryship, and a successor had been elected. It appeared that the appellant vacated his office on January 22nd, 1904. On February 4th a return was made, in which the appellant's successor was named as secretary of the club. By sect. 32 of the Licensing Act, 1902, the expression "secretary," for the purposes of that part of the Act, includes any officer or other person performing the duties of secretary. The appellant was convicted by a Court of summary jurisdiction under sects. 25 and 30 of the Licensing Act, 1902, for that he, then being the secretary of a registered club, had omitted to make a return of particulars as required by that Act.

HELD—on appeal, that the conviction was wrong. There was no liability under sects. 25 and 30 for omitting to make a return until the end of the month of January, at which time the appellant was not the secretary of the club.

BOOTH *v.* WEIGHTMAN, (1904) 68 J. P. 467; 20  
[T. L. R. 651; 91 L. T. 532; 20 Cox C. C.\*  
724—Div. Ct.]

4. *Proprietary Club—Company Carrying on a Club—Sale of Liquors and Tobacco—Some Shareholders not Members of the Club—Licence.*—The proprietor of an ordinary proprietary club, where the refreshments and liquors sold to the members are the property of the proprietor, and where the proprietor gets the profit from such sales, cannot sell intoxicating liquors to the members of the club without having the necessary licences.

A limited company, incorporated under the Companies Acts, carried on the business of a club. Most of the shareholders of the company were members of the club, but there were a few outside shareholders who were not members. The refreshments and

liquors were the property of the company, and the profits (if any) from the sale of such refreshments went to the company, and not to the club.

HELD—that the company, being a legal entity distinct from the club, and being composed of different members, could not sell intoxicating liquors or tobacco to members of the club without the requisite licences.

NATIONAL SPORTING CLUB, LD., *v.* COPE, (1900)  
[64 J. P. 310; 48 W. R. 446; 82 L. T. 352;  
16 T. L. R. 158—Div. Ct.]

5. *Rules—Alteration—Fundamental Rule—Excluding Pigeon Shooting.*—By rule 2 of the Hurlingham Club it was stated that the club was instituted for the purpose of providing a ground for pigeon shooting, polo, and other sports, surrounded with such accessories and so situated as to render it an agreeable country resort. The rules gave power to the committee to call an extraordinary general meeting for the purpose of altering any rule; and all the concerns of the club were to be conducted by the committee, who might make such byelaws as they thought necessary to the well-being of the club. The byelaws so made contained a provision that the shooting ground should be such portion of the club premises as the committee for the time being should determine. At an annual general meeting a resolution was duly passed by the requisite majority, "that pigeon shooting be discontinued at the Hurlingham Club after December 31, 1905."

HELD—that no one of the objects named in rule 2 was a more fundamental object of the club (in the sense that it could not be abandoned) than any other object so mentioned; and that there was nothing in the rules to prevent the members of the club, acting *bonâ fide* by resolution duly passed, and with appropriate amendment if necessary, of the rules, discontinuing the practice of any particular sport.

Decision of Joyce, J. ([1906] 1 Ch. 480; 75 L. J. Ch. 368; 54 W. R. 369; 94 L. T. 468; 22 T. L. R. 319), affirmed.

THELLUSSON *v.* VISCOUNT VALENTIA, [1907] 2  
[Ch. 1; 76 L. J. Ch. 465; 96 L. T. 657; 23  
T. L. R. 455—C. A.]

6. *Rules—Power to Alter—Increasing Annual Subscription—Annual Meeting to be held for "General Purposes"—Right of Dissident Member to Injunction.*—The rules of a club stated that every member would upon payment of his entrance fee and subscription, become entitled to the benefits and privileges of the club, and such payment would be considered as a declaration of his submission to the rules and regulations. One of the rules fixed the annual subscription, and rule 23 provided that an annual meeting of the club should be held for "general purposes" in May each year. The rules contained no provision for making

**Clubs—Continued.**

amendments or alterations therein. At an annual meeting the majority of the members present decided to increase the annual subscription. The rules had in fact been altered from time to time, and the subscription had been increased on three former occasions. On an application by a member for an injunction restraining the committee from expelling him for non-payment of the increased subscription,

**HELD**—that the majority had no power to raise the annual subscription against the will of, and so as to bind, the dissentient minority, the words "general purposes" in rule 23 not being wide enough to include an alteration of the rules or construction of the club.

**HARRINGTON v. SENDALL AND OTHERS**, [1903] 1 [Ch. 921, 72 L. J. Ch. 396; 51 W. R. 463; 88 L. T. 323; 19 T. L. R. 302—Joyce, J.

**7. Working Men's Club—Sale of Intoxicating Liquor—Sale to Agent of Member—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3.]**—The appellant was a waiter employed at a *bonâ fide* club, duly registered under the Friendly Societies Act, 1875. A member's wife asked the appellant for a bottle of stout, and handed to him a ticket which had been filled in and signed by her husband, who was at home, and she returned home with the stout and handed it to her husband, who drank it. It was agreed that in all that she did the wife was acting as her husband's agent.

**HELD**—that as a member of such a club may by his lawful agent carry out a transaction which is legal when done by the member himself, no offence was committed against sect. 3 of the Licensing Act, 1872.

**DAVIES v. BURNETT**, [1902] 1 K. B. 666; 71 [L. J. K. B. 355; 66 J. P. 406; 50 W. R. 391; 86 L. T. 565; 18 T. L. R. 354; 20 Cox C. C. 193—Div. Ct.

**COAL.**

*See* MINES.

**COINS AND COINAGE.**

*See* CRIMINAL LAW.

**COLLISIONS AT SEA.**

*See* SHIPPING AND NAVIGATION

**COLLECTING SOCIETIES.**

*See* INDUSTRIAL SOCIETIES.

**COLLEGES.**

*See* CHARITIES; EDUCATION.

**COMBINATIONS AFFECTING TRADE.**

*See* TRADE AND TRADE UNIONS.

**COMMISSION.**

*See* AGENCY; COMPANIES, 20.

**COMMISSION TO EXAMINE WITNESSES.**

*See* EVIDENCE. PRACTICE AND PROCEDURE.

**COMMONS.**

*See also* COMPULSORY PURCHASE, 33 34; EVIDENCE.

**1. Inclosure Acts—Allotment to Churchwardens for Rights of Turbary—Ownership of the Soil—Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 73 and 76.]**—By an award made under sect. 76 of the Inclosure Act, 1845, the valuer set out, allotted, and awarded unto the churchwardens and overseers of the poor of the parish a piece of land, till then part of the common of the manor, for the purposes of the exercise of rights of turbary by the occupiers of certain ancient cottages in the parish.

**HELD**—that by the award the ownership of the soil became vested in the churchwardens and overseers.

**SIMCOE v. PETHICK**, [1898] 2 Q. B. 555; 67 [L. C. Q. B. 919; 79 L. T. 432—C. A.

**2. Scheme for Regulation—Land Comprised in Scheme—Claim to Ownership of Part—Laches—Metropolitan Commons Acts, 1866, 1869 (29 & 30 Vict. c. 122; 32 & 33 Vict. c. 107) — Metropolitan Commons (Mitcham) Supplemental Act, 1891 (54 & 55 Vict. c. xxvi.).]**—An Act of Parliament confirming a scheme under the Metropolitan Commons Act, 1866, and the Metropolitan Commons Amendment Act, 1869, provided by sec. 17 that the conservators should maintain the commons as delineated on a plan free of all encroachment. Sect. 37 was a saving clause as regards estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the commons as could or might have been enjoyed if the scheme had not been confirmed by Act of Parliament.

*Commons—Continued.*

**HELD**—that, where land was delineated on the plan, it could not be denied that it was subject to the provisions of the scheme of the Act; and that it was, after the passing of the Act confirming the scheme, too late for any person to set up for the first time a claim of ownership in fee to such land or any part thereof.

**COOK v. MITCHAM COMMON CONSERVATORS**, [1901]  
[1 Ch. 387; 70 L. J. Ch. 223; 49 W. R. 201;  
83 L. T. 519; 17 T. L. R. 63—Farwell, J.]

## COMMONWEALTH OF AUSTRALASIA.

*See* DEPENDENCIES AND COLONIES.

## COMMUTATION OF TITHES.

*See* ECCLESIASTICAL LAW.

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See also BANKRUPTCY, BILLS OF EXCHANGE; BUILDING SOCIETIES; CONFLICT OF LAWS, CONTEMPT; CONTRACTS; DEPENDENCIES AND COLONIES; FRIENDLY SOCIETIES. 6, 19; LANDLORD AND TENANT, 138, 142, 179, 184; LIMITATION OF ACTIONS, 42, PRACTICE AND PROCEDURE, 23, 155, 239, 240; REVENUE, 50—51; WILLS, 356.

## I. AMALGAMATION.

See also Sect. XXXIII. WINDING-UP (m) Reconstruction.

1. *Sale—Consideration—Distribution—Severable Contract—Meeting—Closure—Meeting to Confirm Resolution—Amendment—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.*—The word “amalgamate” in a memorandum of association has no very precise meaning in law.

A company sold all its assets to another company, except certain shares in the purchasing company, in consideration of further shares in the purchasing company. The objects of the vendor company, as stated in the memorandum of association, were (*inter alia*) to sell any portion of the assets of the company in consideration of shares in another company, and also to amalgamate with any company.

HELD (affirming the decision of Stirling, J.) that the transaction was within the powers of the company.

WALL v. LONDON & NORTHERN ASSETS CORPORATION, LD., [1898] 2 Ch. 469; 79 L. T. 249; 14 T. L. R. 547—C. A.

2. *Amalgamation by Statute of Railway and Dock Company—Land Acquired for Railway Purposes—Water Therefrom Used for Dock Purposes—Ultra Vires—North Eastern Railway (Hull Docks Act, 1893 (56 & 57 Vict. c. xcvi.), ss. 4, 7 (i), (iv)—Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), ss. 36, 37, 39.*—A dock company was amalgamated by a special Act of Parliament with a railway company, and became one undertaking with it. The amalgamating Act provided, however, that none of the provisions of the Acts which would have related respectively to the dock company and the railway company exclusively, if the amalga-

mation had not taken place, were to apply to any portion of the undertaking of the other company. Before the amalgamation the dock company had obtained its water supply from the waterworks of a neighbouring corporation. The railway company had a supply of water from land which it had obtained for railway purposes before the amalgamation. After the amalgamation it ceased to use the corporation's water and supplied the docks with water from its own land. The corporation sought to restrain the railway company from so doing.

HELD—that since the amalgamation it was not *ultra vires* of the railway company to use its water for the supply of the dock.

Decision of Joyce, J. ([1906] 1 Ch. 310; 75 L. J. Ch. 166; 70 J. P. 33, 54 W. R. 212; 94 L. T. 13; 22 T. L. R. 119) affirmed.

ATTORNEY-GENERAL (AT THE RELATION OF THE [HULL CORPORATION] v. N. E. RY. CO., [1906] 2 Ch. 675; 70 J. P. 473; 95 L. T. 512; 22 T. L. R. 695; 76 L. J. Ch. 5—C. A.

## II. ARTICLES OF ASSOCIATION.

## (a) General.

3. *Article Limiting Right to Transfer Shares—Will—Construction—Capital and Income—Declaration that Shares Bequeathed shall carry Dividend accruing at Death of Testator—Stipulation that no Apportionment shall take place—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 5, 7.*—Any company which is formed and registered under the Companies Act, 1862, as a public company is a public company within sect. 5 of the Apportionment Act, 1870, although the right to transfer the shares to persons who are not already members of the company is restricted by the articles.

A testator bequeathed a large number of shares in a company to trustees upon certain trusts for tenants for life and remaindermen, and declared that every share thereby bequeathed should carry the dividend accruing thereon at his death.

HELD—that it was “expressly stipulated” that no apportionment should take place within sect. 7 of the Apportionment Act, 1870, and that the accruing dividend must be treated by the trustees as income, and not as capital.

Decision of Kekewich, J., reversed.

RE LYSAGHT, LYSAGHT v. LYSAGHT, [1898] 1 Ch. [115; 67 L. J. Ch. 65, 77 L. T. 637—C. A.

4. *Agreement—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 162.*—The articles of association of a company do not constitute an agreement within sect. 162 of the Companies Act, 1862.

IN RE AN ARBITRATION BETWEEN F. BARING—[GOULD AND THE SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE, [1899] 2 Ch. 80; 68 L. J. Ch. 429; 47 W. R. 564; 80 L. T. 739; 15 T. L. R. 366; 6 Manson, 430—C. A.

**Articles of Association—Continued.**

5. *Mistake in Articles—Rectification of, by the Court—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 50.*—Where a blunder has been made in the articles of association of a limited company it may be corrected under sect. 50 of the Companies Act, 1862.

*Semble*—the general jurisdiction of the Court to rectify instruments has no application to an instrument of that kind, which has only statutory effect

EVANS v. CHAPMAN, (1902) 86 L. T. 381, 18 [T. L. R. 506—Joyce, J.]

6. *Shares — Shareholder Compelled by Articles to Sell his Shares to Particular Persons at a Particular Price—Repugnancy to Absolute Ownership — Rule against Perpetuity—Fraud on Bankruptcy Law—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 16.*—The articles of a limited company compelled a shareholder at any time during the continuance of the company to sell his shares to particular persons at a particular price, to be ascertained in the manner prescribed by the articles. The question arose whether (1) such articles were not repugnant to absolute ownership, (2) or did not tend to perpetuity, (3) or constituted a fraud on the bankruptcy law.

**HELD**—that (1) a share is not a sum of money settled subject to executory limitations which are to arise in the future, but it is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, yet also consisting of a series of mutual covenants entered into by all the shareholders *inter se*, in accordance with sect. 16 of the Companies Act, 1862; (2) the rule against perpetuity had no application whatever to personal contracts, and the articles were nothing more or less than a personal contract between an individual shareholder and the other shareholders, under sect. 16 of the Act of 1862; (3) there was no idea of fraudulently preferring any one person to another; the provisions were *bonâ fide*, and constituted a fair agreement for the purpose of the business of the company, and the price was fixed for all persons alike, consequently there was nothing repugnant to the bankruptcy law.

BORLAND'S TRUSTEE v. STEEL BROTHERS & Co., [Ld., [1901] 1 Ch. 279; 70 L. J. Ch. 51; 49 W. R. 120; 17 T. L. R. 45—Farwell, J.]

7. *Power to "Lend Money"—Loan to Officer of Company.*—Directors of a company were authorised by its articles of association to "lend money" and undertake such other financial operations as might in their opinion be incidental or useful to its general business.

**HELD**—to authorise a loan to a confidential servant of the company.

RAINFORD v. JAS. KEITH & BLACKMAN Co., LD., [1905] 2 Ch. 147; 74 L. J. Ch. 531; 92 L. T. 786; 12 Manson, 162, 54 W. R. 189—C. A.]

8. *Winding up—Right to Petition—Limitation by Article of Association—Shareholder—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82*—An article of association limiting or excluding the right of a shareholder to petition for the winding-up of the company is invalid.

Decision of Byrne, J. (77 L. T. 434; 4 Manson, 302, 14 T. L. R. 25), affirmed.

RE PEVERIL GOLD MINES, LD., [1898] 1 Ch. 122; 67 L. J. Ch. 27; 77 L. T. 505; 4 Manson, 398; 14 T. L. R. 86; 46 W. R. 198—C. A.]

**(b) Alteration.**

9. *Alteration of Articles as to Lien—Retrospective Effect on Non-consenting Member—Vendor's Fully Paid-up Shares—Company's Lien—Special Contract—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 50.*—A limited company formed with articles which confer no lien on fully paid-up shares has, under the Companies Act, 1862, s. 50, power to alter the articles so as to impose a lien and restrictions on the transfer of those shares by members indebted to the company, and such lien and restriction can be imposed in respect of debts contracted before and existing at the time of the alteration of the articles, as well as in respect of debts subsequently contracted.

In the absence of a special bargain, there is no distinction between fully-paid shares allotted to the vendor by the company and any other fully-paid shares; and, consequently the altered articles apply to vendor's shares.

JAMES v. BUENA VENTURA NITRATE GROUNDS SYNDICATE ([1896] 1 Ch. 456; 65 L. J. Ch. 284; 44 W. R. 372; 74 L. T. 1—C. A.) and ANDREWS v. GAS METER CO. ([1897] 1 Ch. 361; 66 L. J. Ch. 246; 45 W. R. 321; 76 L. T. 132—C. A.) considered.

Order of Kekewich, J. ([1899] 2 Ch. 40; 68 L. J. Ch. 540; 47 W. R. 558, 80 L. T. 750; 6 Manson, 449), varied.

ALLEN v. GOLD REEFS OF WEST AFRICA, LIMITED, [1901] 1 Ch. 656; 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210; 16 T. L. R. 213—C. A.]

And see No 200, *infra*.

10. *Participation in Profits—Life Assurance Company—Power of Company to Alter Rights of Policy-holder—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 50, 209—Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1.*—The settlement deed of an insurance company provided for a division of the profits in the manner directed by the bye-laws for the time being in force.

By a bye-law made in 1854 the profits of its Mutual Life Assurance department were to be divided triennially among the policy-holders in that department.

### Articles of Association—Continued.

In 1862 the company was registered with unlimited liability under sect. 209 of the Companies Act, 1862.

In 1886 the plaintiff (who was now suing on behalf of the policy-holders in the Mutual Life Assurance department) applied for and received a policy in that department; he did so in reliance upon a statement in a prospectus to the effect that the entire profits of the department were divided among the policy-holders without any deduction for a reserve fund.

In 1903 it was proposed, under sect. 1 of the Companies (Memorandum of Association) Act, 1890, to register the company with limited liability, and substitute for the settlement deed a memorandum and articles, one of which provided that 5 per cent. of the profits of the mutual department should be put to a reserve.

HELD—that the company had power to do so.

Decision of C. A. ([1904] 1 Ch. 374; 73 L. J. Ch. 240; 52 W. R. 549, 90 L. T. 335; 20 T. L. R. 242, 11 Manson, 169) reversed.

BRITISH EQUITABLE ASSURANCE CO. v. BAILY,  
[1905] 22 T. L. R. 152—H. L. (E.).

11 *Power to Alter—Interference with existing Contract—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 50.]—Although a company cannot with impunity break a contract by altering its articles, it cannot contract itself out of its statutory right to alter its articles.

This principle applies not only to a case between the company and a shareholder where the contract is contained in the articles, but also to the case of a separate contract between the company and a stranger.

*Allen v. Gold Reefs of West Africa* ([1900] 1 Ch. 656, 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210—C. A., No. 9, *supra*) applied.

PUNT v. SYMONS & CO., LD., [1903] 2 Ch. 506,  
[72 L. J. Ch. 768, 52 W. R. 41; 10 Manson,  
415—Byrne, J.

### III. ASSOCIATIONS NOT FOR PROFIT.

12. *Alteration of Memorandum of Association—Approval of Board of Trade—Confirmation by Court—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 23—*Companies (Memorandum of Association) Act, 1890* (53 & 54 Vict. c. 62), s. 1.]—A college was incorporated under the Companies Acts, 1862 to 1890, as an association formed as a limited company for purposes not for gain, and was authorised by licence of the Board of Trade under sect. 23 of the Companies Act, 1867, to be registered with limited liability without the addition to its name of the word "limited." A petition under the Companies (Memorandum of Association) Act, 1890, asked the Court to confirm certain alterations in the memorandum of association.

HELD, that the college should in the first instance make an application to the Board of Trade, and submit to them the memorandum showing all the proposed alterations, and if the Board approved of the alterations the Court would entertain the application, but if the Board did not approve, the Court must either refuse to sanction any alteration beyond what the Board approved, or direct that the company should alter its name by adding to it the word "limited."

IN RE ST. HILDA'S INCORPORATED COLLEGE,  
[CHELTENHAM, [1901] 1 Ch. 556; 70 L. J. Ch.  
266; 49 W. R. 279; 8 Manson, 430—  
Buckley, J.

### IV. AUDITORS.

13. *Accounts—Articles of Association—Duty of Auditors not to Disclose to Shareholders—Ultra Vires—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 23.]—A trading company passed a special resolution altering their articles of association by inserting a provision that the directors might, in addition to the ordinary reserve fund, set aside (without disclosing the fact) out of the profits sums to form an internal or secret reserve fund; that the fund need not be shown on the balance-sheet, and no information as to it need be given to the shareholders; that the directors might invest it as they thought fit, and might apply it for any purposes which they considered would advance the interests of the company; and that, while the particulars as to the fund were to be disclosed to the auditors, it was to be the auditors' duty not to disclose any information with regard to it to the shareholders or otherwise.

HELD—that the last clause, that the auditors should be bound not to disclose any information with regard to the fund to the shareholders or otherwise was *ultra vires* as being inconsistent with the provisions of sect. 23 of the Companies Act, 1900, as to the duty of auditors in making their report to the shareholders as to the accounts, if they thought that the true state of the company's affairs was affected by facts relating to the internal reserve fund.

NEWTON v. BIRMINGHAM SMALL ARMS CO., LD.,  
[1906] 2 Ch. 378; 75 L. J. Ch. 627; 54 W. R.  
621; 95 L. T. 135; 22 T. L. R. 664; 13  
Manson, 267—Buckley, J.

### V. BORROWING.

See also Sect. IX. DEBENTURES.

14. *Powers—Limited to Mortgages on its Undertaking—Charge on—Surplus Lands—Ultra vires.*]—It is not *ultra vires* for a company incorporated by statute with express powers of borrowing upon mortgage limited to mortgages on its undertaking, to offer to the mortgagee, when the debt becomes payable, its surplus lands as additional security.

**Borrowing—Continued.**

A company had, in the exercise of its statutory powers, borrowed money upon its "undertaking"; upon the mortgage debt becoming due, the company not wishing to pay it off, a third person agreed to take a transfer of the mortgage, provided he received a charge upon the company's surplus lands as a further security.

**HELD**—that such a charge was not *ultra vires*. It was not really a borrowing transaction, but rather an arrangement with a creditor, who could obtain a judgment, and then take the lands in question in execution under an *elegit*.

Decision of Swinfen Eady, J. ((1902) 50 W. R. 446) affirmed.

*Gardner v. London, C. & D. Ry. Co.* ((1867) L. R. 2 Ch. 201; 36 L. J. Ch. 323, 15 W. R. 325; 15 L. T. 552) followed and extended.

*STAGG v. MEDWAY (UPPER) NAVIGATION CO.*, [1903] 1 Ch. 169, 72 L. J. Ch. 177; 51 W. R. 329; 87 L. T. 705, 19 T. L. R. 143—C. A.

**15 Statutory Canal Company—Power to Mortgage "undertaking" — Mortgage of Barges—Medway (Upper) Navigation Act, 1892 (55 & 56 Vict. c. lxxxvii.), ss. 13, 15.]—**The Medway (Upper) Navigation Co., a company formed under a private Act for the maintenance of the navigation of a river, had power to own barges for carrying goods; it also had power to borrow money on mortgage of its "undertaking."

**HELD**—that it had power to mortgage its barges.

*Stagg v. Medway (Upper) Navigation Co.* ([1903] 1 Ch. 169; 72 L. J. Ch. 177; 51 W. R. 329; 87 L. T. 705; 19 T. L. R. 143—C. A., No. 14, *supra*) followed.

*REEVE v. MEDWAY (UPPER) NAVIGATION CO.*, [(1905) 21 T. L. R. 400—Joyce, J.]

**16. Unauthorised Borrowing—Overdrawn Banking Account—Interest on Successive Debenture Stocks—Subrogation of Lender to Rights of Creditors—Secured Creditors—Priorities.]—**A railway company having power to borrow money by the creation of three classes of debenture stock, A, B and C, had exhausted its borrowing powers and then applied to its bankers for a loan in order to pay the half-yearly interest then due on the debenture stocks. The bank made the requisite advance. Shortly afterwards a judgment creditor of the company petitioned for and obtained the appointment of a receiver. The A stock had priority over the B and C stock, and the B over the C stock. It subsequently came to the knowledge of the bank that the income of the company in the receiver's hands was sufficient to pay the next half-year's interest on the A stock, and part of the interest on the B stock.

**HELD**—on the application of the bank, that the bank was not entitled to be repaid in priority to the B stockholders, even to the extent of the interest on the A stock paid out of the bank's money. If a lender advances

money to a company which has exhausted its borrowing powers, he is only entitled to have that portion of the advance actually expended in payments of debts of the company treated as a valid advance. No right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers can be justified in principle.

Decision of Romer, J. ([1899] 1 Ch. 205; 68 L. J. Ch. 115, 47 W. R. 172), affirmed.

*IN RE WREXHAM, MOLD, AND CONNAR'S QUAY [RAILWAY CO.]*, [1899] 1 Ch. 440; 68 L. J. Ch. 270, 47 W. R. 464; 80 L. T. 130; 15 T. L. R. 122; 6 Manson, 218—C. A.

**17. Unauthorised Application of Funds—Notice to Lender—Knowledge of a Director of Lending Company.]—**Where a limited company has by its articles and memorandum power to borrow money, and money is borrowed within the limits of such power, the lender need not inquire to what purpose the borrowing company intends to put it.

If the lender in such a case is a limited company, it is not affected by the knowledge of one of its directors acquired by him in another capacity.

*IN RE PAYNE & CO., LD; YOUNG v. PAYNE & [Co., LD.]*, [1904] 2 Ch. 608; 73 L. J. Ch. 849; 20 T. L. R. 590; 91 L. T. 777; 11 Manson, 437—C. A.

**VI. CAPITAL.**

**18. Increase of, by Special Resolution—Required Majority—Article of Association conflicting with Statutory Provision—Invalidity—Validity of Proxies—Presumption of Validity—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51, Sch. I., Table A., Art. 26.]—**A company's articles of association provided that capital should only be increased by a resolution passed by a four-fifths majority, and purported to modify Art. 26 of Table A., accordingly.

In 1896 resolutions were passed to increase the capital. In 1904 this increase was impugned on the ground that, by reason of the invalidity of certain proxies, the resolutions were not passed by the required majority.

Kekewich, J., held that the proxies were invalid; but he held that the provision in the articles was invalid as conflicting with the statutory provision in Table A. on the same point; that therefore Table A. applied and only a three-fourths majority was required, and that, as this had been obtained by valid proxies, the resolutions were duly passed.

On appeal held—that upon the evidence, aided by presumption from the lapse of time, the proxies in question must be deemed valid; and that therefore the resolutions were duly passed even assuming a four-fifths majority to be necessary.

Decision of Kekewich, J. (20 T. L. R. 587), affirmed on other grounds.

*AYRE v. SEELSEY'S ADAMANT CEMENT CO., LD.*, [(1905) 21 T. L. R. 464—C. A.]



**Capital—Continued.**

19. *Loss of—Preference Shares—Capital or Revenue—Fixed or Circulating Capital.*—A limited company had sustained a permanent loss owing to the depreciation of one of their investments, and a question arose between them and the holder of some of their preference shares, on which the dividend was limited to 5 per cent. on the amount paid up, out of the yearly profits, and was not cumulative, as to whether such loss should be treated as a loss of capital or of revenue. The Court held that, provided the investment was part of the company's fixed capital, it should be treated as a loss of capital; but if, on the other hand, it was part of its circulating capital used in its business, it must be considered as a loss of revenue; and that in the circumstances the investment must be taken as coming under the latter heading, and that the company could treat the loss as one of revenue.

CITY PROPERTY INVESTMENT TRUST CORPORATION  
[v THORBURN, (1898) 25 R. 361; 35 Sc. L. R. 249—Ct. of Sess.]

**VII. COMMISSION ON ACCEPTANCE OF SHARES.**

20 *Sale of Company's Undertaking to Guarantors—Sale by Guarantors to New Company for Shares and Cash—Guarantors to accept all Shares not taken by Members of Old Company—Commission, or Profit on Resale—Offer of Shares to Public—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8 (1) (2).*—A reconstruction was to be carried through as follows: the undertaking of the "old company" was to be sold to "guarantors," who were to pay for it by issuing (to such members as would accept them) partly paid shares of the same face value in the "new company"; the "new company" was formed, and agreed to purchase the undertaking from the "guarantors," and pay for it by shares and £12,300 cash, the "guarantors" agreeing to accept the shares not taken up by the shareholders of the "old company."

**HELD**—that though the £12,300 was spoken of as the balance of consideration for the sale by the guarantors, it was really a commission paid to them for accepting the shares within the terms of sect. 8 (2) of the Companies Act, 1900, and, also, that there had been no "offer of shares to the public" so as to bring the transaction within sect. 8 (1), and therefore that it was illegal.

*Quære*, whether the offer of a few shares to the public will bring a company within sect. 8 (1) and so allow a commission to be paid to a person who is willing to take up the rest of the shares.

Decision of Swinfen Eady, J. (19 T. L. R. 35), affirmed.

BOOTH v. NEW AFRICANDER GOLD MINING CO.,  
[Ld., [1903] 1 Ch. 295; 72 L. J. Ch. 125; 51 W. R. 193; 87 L. T. 509; 19 T. L. R. 67; 10 Manson, 56—C. A.]

**VIII. CONTRACTS.****(a) Pre-incorporation Contracts.**

21. *Adoption—Payment of Shares in Cash—Set-off—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25*—The adoption and confirmation by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company does not create any contractual relation whatever between the company and the other party to the contract, or impose any obligation whatever on the company towards that party. Where a sum is payable by a shareholder in cash to a company it is sufficient to satisfy the requirements of the 25th section of the Companies Act, 1867, if the company agrees with the shareholder to accept as a set-off and discharge a like sum then payable by the company to the shareholder.

*In re Johannesburg Hotel Co.* ([1891] 1 Ch. 119; 60 L. J. Ch. 391; 39 W. R. 260; 64 L. T. 61; 2 Meg. 409) approved.

NORTH SYDNEY INVESTMENT AND TRAMWAY COMPANY v. HIGGINS, [1899] A. C. 263; 68 L. J. P. C. 42; 47 W. R. 481; 80 L. T. 303, 15 T. L. R. 232; 6 Manson, 321—P. C.

22. *Agreement on Behalf of a Company Intended to be Formed—Adoption of Agreement by Company when Formed—Privity of Contract—Liabilities Attaching to Patent or Licence to Use Patent—Right of Action by Grantors of Licence—Profits Available for Dividend.*—By an agreement of 3rd March, 1897, the plaintiff company agreed to grant to T. C. P. an exclusive licence to use some patents belonging to them, the terms of which were set out in the schedule, and he, on the other hand, entered into certain contracts with them. On the face of the agreement, T. C. P. was not buying for his own benefit, or agreeing to take the licence for his own benefit, but was intending to do it on behalf of a company intended to be formed. The consideration was to be provided by the company—viz., the company should pay to the plaintiff company in each year out of their remaining profits available for dividend a sum equal to 8 per cent. upon a fixed capital of £150,000, and a further sum equal to one-half of the balance (if any) of net profits of the company available for dividend in each year. T. C. P. then entered into an agreement with E. P., the representative of the defendant company, then near incorporation. A few weeks later the then incorporated company adopted the agreement. The licence, though used to some extent by the defendants, was never actually assigned to them by T. C. P. In issuing a balance-sheet showing profits, the defendants carried to the reserve fund a certain sum, and another sum of £3,000 was written off as depreciation and towards the extinction of the "cost of licences and contracts." The plaintiffs sought to enforce the provisions of the agreement of 3rd March, 1897, against the defendant company.

**HELD**—that there was no direct contract

**Contracts—Continued.**

between the plaintiffs and the defendants which would enable the former to sue the latter; that there was no privity of contract; that the fact that the defendants were equitable assignees by contract with T. C. P. did not of itself give the plaintiffs any special right to sue the defendants.

*Cox v. Bishop* ((1857) 8 D. M. & G. 815; 26 L. J. Ch. 389; 3 Jur. (n.s.) 499; 5 W. R. 437—Knight Bruce, L.J.) followed.

*Wederman v. Société Générale d'Electricité* ((1881) 19 Ch. D. 246; 30 W. R. 33; 45 L. T. 514—C. A.) explained and distinguished.

**HELD**, by Romer, L.J.—that the defendant company were justified in writing off £3,000 in respect of depreciation in the value of licences, &c.

Decision of *Kekewich, J.* ([1901] 1 Ch. 196, 70 L. J. Ch. 128, 49 W. R. 265; 83 L. T. 667, 17 T. L. R. 117), affirmed.

*BAGOT PNEUMATIC TYRE CO. v. CLIPPER PNEUMATIC TYRE CO.*, [1902] 1 Ch. 146; 71 L. J. Ch. 158; 50 W. R. 177; 85 L. T. 652; 18 T. L. R. 161; 19 R. P. C. 69; 9 Manson, 56—C. A.

**23. Company unable to Ratify or Adopt.]—**A company cannot by ratification or adoption obtain the benefit of a contract purporting to have been made on its behalf before its incorporation.

In such a case it is necessary to prove that the company after its incorporation itself entered into a new contract upon the terms of the old one.

*Kelner v. Baxter* ((1866) L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 W. R. 278; 15 L. T. 313) approved.

*NATAL LAND AND COLONISATION CO., LD. v. [PAULINE COLLIERY AND DEVELOPMENT SYNDICATE, LD.]*, [1904] A. C. 120; 73 L. J. P. C. 22; 89 L. T. 678; 11 Manson, 29—P. C.

**24. Company having Benefit of Contract—Liability—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 17.]—**Where services are rendered on behalf of a company about to be formed, the mere fact that the company when formed takes the benefit of those services will not make it liable at law or equity to pay for those services.

By the articles of association of a company the directors might pay all such expenses of and preliminary and incidental to the formation, establishment and registration of the company as they might think fit. Certain persons who afterwards became directors of the company instructed solicitors in relation to the formation and registration of the company, and the solicitors did the necessary work and paid the necessary fees on registration. The company did not pass any resolution for the payment of the solicitors. Buckley, J., having held that the company was by virtue of sect. 17 of the Companies Act, 1862, liable to the solicitors for the amount of the fees paid on registration, but not for the other costs, though it had had the

benefit of the work done; upon appeal against the latter part of the judgment only:—

**HELD**—that the judgment on that point was right.

*In re Hereford and South Wales Wagon and Engineering Co.* ((1877) 2 Ch. D. 621; 45 L. J. Ch. 461; 24 W. R. 953; 35 L. T. 40—C. A.) explained.

*IN RE THE ENGLISH AND COLONIAL PRODUCE CO.*, [LD., [1906] 2 Ch. 435; 75 L. J. Ch. 831; 95 L. T. 85, 580, 22 T. L. R. 669; 13 Manson, 337—C. A.

**(b) Provisional Contracts.**

**25. Contract made before date of Right to Commence Business—Company never Entitled to Commence Business—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 6, sub-s. 1, 3.]—**By sect. 6, sub-s. 1, of the Companies Act, 1900, "A company shall not commence any business" unless certain conditions are fulfilled; and by sub-sect. 3, "any contract made by a company before the date at which it is entitled to commence business shall be provisional only and shall not be binding on the company until that date, and on that date it shall become binding."

The claimant, at the request of the directors, bought furniture for the purposes of furnishing offices on behalf of a company which was registered, but which had not fulfilled the conditions necessary to entitle it to commence business. The company subsequently went into liquidation, never having been entitled to commence business.

**HELD**—that the contract was not binding on the company, and that the claimant was not entitled to recover from the company the sums paid for the furniture.

Such a "provisional" contract, whether preliminary or final or made in the course of carrying on the company's business, cannot bind the company if it never becomes entitled to commence business.

*IN RE THE "OTTO" ELECTRICAL MANUFACTURING [CO., LD.]*, [1906] 2 Ch. 390; 75 L. J. Ch. 682; 54 W. R. 601; 95 L. T. 141; 22 T. L. R. 678; 13 Manson, 301—Buckley, J.

**(c) Ultra Vires.**

**26. Amalgamation Agreement.]—**A company formed to build a pier on the Thames, take tolls, and divide the profits, built its pier. It subsequently entered into an agreement with a society owning a floating pier at the same place whereby the society agreed to abandon its pier and accept as compensation a fixed proportion of the net profits of the company's pier.

**HELD**—that the agreement was in the nature of an amalgamation agreement, and was unauthorised by the company's Act of Parliament and *ultra vires*.

*GREENWICH PIER CO. v. THAMES CONSERVATORS [AND OTHERS]*, (1905) 21 T. L. R. 669—Buckley, J.

## Contracts—Continued.

27 Directors—Breach of Trust—Parties to Sue—Laches—Statute of Limitations—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8—Manchester, Sheffield, and Lincoln (Various Powers) Act, 1891 (54 & 55 Vict. c. cxiv.), ss. 45, 47.]—In July, 1890, the plaintiffs contracted with the Railways and General Company, Ltd., for the sale of certain stock in the Wrexham, Mold, and Connah's Quay Railway. The real purchaser, however, was the Manchester, Sheffield, and Lincoln Railway, and the money was paid by that company in two sums, the larger on the 5th August and the smaller on the 10th October, 1890. These payments were then *ultra vires*. But by their Act of 1891 they were authorised to subscribe towards the undertaking of the Wrexham Company, and to hold shares therein, and a resolution authorising the Manchester Company to so subscribe was agreed to the day after the Act passed. The books of the Manchester Company did not accurately represent the facts. The writ was issued on the 6th August, 1896, claiming against three of the directors repayment to the company of these sums.

HELD (1)—that the purchase was not a subscription within the meaning of the Act of 1891, and was therefore *ultra vires*; (2) that, as to the larger sum, the writ not having been issued within six years, and no fraud being alleged, the Statute of Limitations afforded a good defence; (3) that, as to the smaller sum, the evidence showed that the plaintiffs had purchased shares to enable them to bring the action, and that they were aware of the purchase by the Manchester Company before October, 1890, and that, under the circumstances, therefore, the action ought to have been brought by the company and not by the plaintiffs.

Action accordingly dismissed with costs.

WHITWAM v. WATKIN, (1898) 78 L. T. 188; 14 [T. L. R. 288—Stirling, J.

29. Consent Judgment—Lien.]—A judgment against a company obtained by consent, upon a contract which was *ultra vires*, has no more validity than the contract upon which it is founded, but is impeachable to the same extent as the contract.

In such a case the contract cannot be maintained as to matters admitted to be lawful while matters *ultra vires* are disallowed, but it must be wholly set aside.

GREAT NORTH-WEST CENTRAL RAILWAY v. [CHARLEBOIS, [1899] A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35—P. C.

## IX. DEBENTURES.

## (a) General.

And see BANKERS AND BANKING, 32–34; BANKRUPTCY, 186; BILLS OF EXCHANGE, 32.

30 Alteration of Rights of Debenture Holders—Voting—Sum “secured by” Debentures—“Face Value”—Debentures Issued as Security for Debt—Power to Issue Debentures in place of those Paid Off—Alteration in Trust Deed.]—A company issued debentures which were to rank *pari passu* with each other, and which were secured by a trust deed. By the deed the registered holders of the debentures were entitled to vote at any meeting of debenture-holders, and each voter at a poll was entitled to one vote in respect of every principal sum of £10 secured by his debentures. The deed also gave power to a meeting, by extraordinary resolution, to modify the rights of debenture-holders and the provisions of the deed; and extraordinary resolution was defined as meaning a resolution passed by a majority consisting of holders of not less than three-fourths in value of the debentures represented at the meeting. At a meeting of debenture-holders called for the purpose of modifying the trust deed so as to enable the directors (*inter alia*) to reissue paid off debentures, a bank, to whom the company had issued debentures for £55,000 as security for an overdraft of £25,000, voted in respect of the face value of their debentures.

HELD—that the bank were entitled to do so under the provisions of the trust deed; and that the trust deed might be modified so as to empower the company to issue debentures in the place of those paid off in such a way as to make them rank *pari passu* with the outstanding debentures.

Decision of Parker, J. (23 T. L. R. 407), affirmed.

IN RE THE KENT COLLIERIES, LD; DAY v. THE [Co., (1907) 23 T. L. R. 559—C. A.

31. Charge on Present and Future “Property” of the Company—Uncalled Capital—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 38, 75.]—A company created and issued debentures which charged with the payment of principal and interest “the undertaking of the said company and all the property to which it now is or shall at any time hereafter become entitled, and all the estate, right, title, and interest of the company in, to, and upon the said premises”

HELD—that the uncalled capital of the company was not included in the charge under the word “property.”

Re The Streatham and General Estates Company, Ltd. ((1897) 1 Ch. 15; 75 L. T. R. 574), approved.

Decision of Stirling, J., affirmed.

RE RUSSIAN SPRATT'S, LD.; JOHNSON v. RUSSIAN [SPRATT'S, LD., [1898] 2 Ch. 149; 67 L. J. Ch. 381; 78 L. T. 480; 46 W. R. 514—C. A.

32. Charge on Property in Foreign Country—Receiver—French Debt—Locality of Debt—Enforcing French Rights—Interference with Receiver's Possession—Contempt of Court.]—According to English law, debenture-holders had by contract with a company

**Debentures—Continued.**

a charge upon all the assets of the company, including a French debt.

**HELD**—that (1) the existence of the charge did not entitle the debenture-holders to prevent the claimants, who were unsecured creditors and not debenture-holders, from asserting and enforcing the rights that were given to them by French law against the French debt, and there was no equity in favour of the debenture-holders as against the claimants.

*Liverpool Marine Credit Co. v Hunter* ((1868) L. R. 3 Ch. 479; 37 L. J. Ch. 386; 16 W. R. 1090, 18 L. T. N. S. 749) followed.

(2) The debenture-holders having, according to English law, a good assignment of the French debt, but having according to French law no such assignment, and the claimants having, according to French law, a good inchoate charge or assignment, the claimants had a better title than the debenture-holders, because a debt has a locality or quasi-locality and an assignment of it giving a good title thereto according to the *lex situs* of the debt is valid.

(3) A receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the foreign law any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject.

*IN RE MAUDSLAY, SONS AND FIELD, MAUDSLAY v. [MAUDSLAY, SONS AND FIELD, [1900] 1 Ch. 602; 69 L. J. Ch. 347; 48 W. R. 568; 82 L. T. 878; 16 T. L. R. 228—Cozens-Hardy, J.*

**33. Company Purchasing its Own Debentures—Subsequent Transfer to Purchaser for Value.]**—A company issued the whole of a series of debentures, authorised by its articles and memorandum as a first charge *pari passu* on its assets. Subsequently it purchased sixteen of these in the market and took transfers to itself. Its name was inserted in the register as the owner of these debentures. At a later date it transferred these debentures to various purchasers.

**HELD**—that the result of the transfer to the company was that the debt was extinguished and the security ceased to exist. The transferees had, therefore, acquired nothing by the transfers to them, and were not entitled to demand new debentures ranking *pari passu* with the original series.

*RE ROUTLEDGE & SONS, LD.; HUMMEL v. THE CO., [1904] 2 Ch. 474; 73 L. J. Ch. 843; 53 W. R. 44; 91 L. T. 288; 11 Manson, 404—Buckley, J.*

**34. Compromise or Arrangement—Scheme—Debenture-holders—Acceptance of Fully-paid Shares for Debentures—Joint Stock Arrangement Act, 1870 (33 & 34 Vict. c. 104),**

s. 2.]—By a trust deed to secure debenture stock in a company the stock holders had power to sanction any compromise or arrangement proposed to be made between the company and the stock holders provided it was one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, if the company were being wound up and the requisite majority agreed thereto, and also power generally to sanction any modification or compromise of the rights of the stock holders against the company or its property. A scheme of reconstruction proposed to make over the undertaking of the company to a new company, and to give £1 fully-paid preference shares in the new company for each £1 of debenture stock to the debenture stock holders, with power to the new company to create an issue of debentures.

**HELD**—that the debenture stock holders had power to sanction the scheme so as to bind dissentient stock holders.

*IN RE LABUAN AND BORNEO, LD.; PEIRSON v. [LABUAN AND BORNEO, LD., (1902) 18 T. L. R. 216—Joyce, J.*

**35. Condition in Debenture—Money Becoming Payable if Goods of Company Seized under a Distress—What Amounts to Seizure.]**—A debenture issued by a company contained a condition that the principal moneys should become payable if any of the property of the company should be seized under a distress. A bailiff called at 10 a.m. at the company's shop with a warrant to collect a sum of £10 due for rent. The secretary of the company tendered a cheque for £20, which was refused. The secretary then said that he would go and pay some rates and thus obtain change. While he was gone the bailiff and his man remained in the shop. The secretary returned in a few minutes, saying that the collector would not take the cheque, and he left again to get it cashed at the bank. During his absence the bailiff went home, leaving his man in the shop. The bailiff returned at 2 p.m., and was paid the £10. He did not ask for any expenses.

**HELD**—that there had been no seizure under a distress, and therefore the principal moneys secured by the debentures had not become due.

*THE CENTRAL PRINTING WORKS, LD. v. WALKER [AND NICHOLSON, (1907) 24 T. L. R. 88—Eady, J.*

**36. Covenant to Pay—Condition Precedent—Notice of Trustees.]**—Debentures were issued subject to a condition that: "The holder thereof shall not commence any action or take any proceedings to enforce the security hereby created, or to procure the appointment of a receiver, or to procure a sale to be ordered of the property subject thereto or for foreclosure, unless" he had served a notice upon the trustees requiring

**Debentures—Continued.**

them to do certain acts, which they had neglected to comply with for six months. Action was brought on the covenant to pay the principal and interest.

**HELD**—That, as no notice had been given to the trustees, the condition precedent had not been complied with, and the action was premature.

**ROGERS & Co. v. BRITISH AND COLONIAL COLLIERY [SUPPLY ASSOCIATION, (1899) 68 L. J. Q. B. 14; 79 L. T. 494, 6 Manson, 305—Bruce, J.]**

**37. Debentures Ranking pari passu—Fiduciary Power—Power to Appoint Receiver.**—A power to appoint a receiver conferred on debenture-holders by the debentures issued by a company, and declared to be entitled to rank *pari passu*, is a fiduciary power which must be exercised *bonâ fide* for the common benefit and protection of all the debenture-holders; and if it is shown to have been exercised otherwise than in their interests, the jurisdiction of the Court to appoint as receiver its own officer is not ousted, and it can interfere in order to carry out the bargain with the debenture-holders.

**RE MASKELYNE BRITISH TYPEWRITER, LD.; STUART [v. MASKELYNE BRITISH TYPEWRITER, [1898] 1 Ch. 133; 67 L. J. Ch. 125; 77 L. T. 579, 14 T. L. R. 108, 46 W. R. 294—C. A.]**

**38. Deposit by registered Holder with Bank—Right of Set-off by Company against registered Holder—Equities disregarded.**—The registered holder of debentures issued by a limited company deposited them with a bank to secure advances, but no transfer was executed, nor any notice of the deposit given to the company. At the date of the deposit and of the winding-up the registered holder was indebted to the company in a larger sum than the amount of the debentures, and was also indebted to the bank in a less sum for advances. The conditions of the debentures provided that the registered holder would be regarded as exclusively entitled to the benefit of the debentures, and that all persons might act accordingly; that the company should not be bound to enter in the register notice of any trust, or to recognise the right of any other person, save as therein provided; that the money secured by the debentures would be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of a registered holder for such money should be a good discharge to the company.

**HELD**—that the company was entitled to set off the amount due to it from the registered holder as against the amount of the debentures payable to him, and that the company was not bound to have regard to the claim of the bank as against the registered holder.

**IN RE SMITH & Co., [1901] 1 Ir. R. 73—M. R.**

**39. Free from any Equities—Assignee of Debentures—Trustee for Creditors—Rights B. D.—VOL. I.**

*of Company in respect of Debt due from Original Holder.*—A firm held debentures in a company which provided that the moneys thereby secured should be paid without regard to any equities between the company and the original or any intermediate holder. The firm assigned such debentures to P. as trustee of a creditor's deed, and he was registered as the holder.

In a debenture-holder's action it appeared that the firm owed to the company a debt of £1,666, and that the debentures comprised such debt, but P. claimed to share equally with the other debenture-holders in the assets already realised without first bringing into account the £1,666 due to the assets from his transferors, the firm.

**HELD**—that P. was in no better position than his transferors, being simply an assignee in trust for creditors, and not a purchaser for value; and that the conditions of the debentures did not prevent the company or other debenture-holders from requiring him to bring into account the £1,666 before sharing in the distribution.

**In re Goy & Co. ([1900] 2 Ch. 149; 89 L. J. Ch. 481; 48 W. R. 425, 83 L. T. 309—Stirling, J., No. 68 *infra*) distinguished.**

**IN RE BROWN AND GREGORY, LD.; SHEPHEARD v. [THE Co., and ANDREWS v. THE Co., [1904] 1 Ch. 627; 73 L. J. Ch. 430; 52 W. R. 412; 11 Manson, 218—Byrne, J.]**

**On appeal:** Appeal dismissed on fresh evidence, [1904] 2 Ch. 448; 73 L. J. Ch. 770—11 Manson, 402—C. A.

**40. Free from any Equities—Registered Holder—Transferee for Value—Equities of Company against Transferor—Transfer not Registered—Rights of Transferee.**—B. obtained from a company by misrepresentation certain debentures, for which he in fact paid nothing: by them the company covenanted to pay the principal moneys to B., or the registered holder for the time being, subject to the endorsed conditions. One condition was to the effect that the money should be paid without regard to any equities between the company and the original or any intermediate holder.

The company passed a winding-up resolution, whereby the moneys secured became at once payable: B. then transferred the debentures for value to C., who had no notice of any defect in B.'s title.

C. gave notice of the transfer to the liquidator, but made no demand to have it registered. Subsequently the defect in B.'s title was discovered.

**HELD**—that the condition above referred to did not apply before the transfer had been registered, and that C. was not entitled to the benefit of the debentures.

**In re Goy & Co. ([1900] 2 Ch. 149, No. 68, *infra*) distinguished.**

**IN RE PALMER'S DECORATION AND FURNISHING [Co., LD., [1904] 2 Ch. 743; 73 L. J. Ch. 828; 53 W. R. 142; 91 L. T. 772—Buckley, J.]**

**Debentures—Continued.**

**41. Interest out of Capital—Tramway—Cost of Conversion of Electric Traction—Issue of Debentures—Interest on.]**—A tramway company entered into an agreement with a similar company for the conversion of the two tramway systems into a tramway system worked by electric traction, and for that purpose each company was to issue a certain amount of debenture stock and with the proceeds to effect the conversion. The agreement did not specify whether the interest on the debenture stock should be charged to capital account during the conversion or paid out of revenue. The directors proposed to charge against each mile of tramway converted the cost of its conversion, and to treat the interest upon that cost as part of the cost of conversion until that particular section was completed, and thereafter to charge it to revenue.

**HELD**—that the cost of conversion per mile *plus* the interest on that cost during construction was the total cost of conversion per mile, and that the company was at liberty to charge that total cost to capital.

**HINDS v. THE BUENOS AYRES GRAND NATIONAL [TRAMWAYS Co., LD., [1906] 2 Ch. 654; 23 T. L. R. 6; 76 L. J. Ch. 17; 95 L. T. 780; 13 Manson, 411—Warrington, J.**

**42. Irredeemable Debentures—Power to Issue—Winding-up—Repayment.]**—A company, which was incorporated under the Companies Acts, 1862 to 1880, for the construction and working of a railway abroad under a concession for a term of years from a foreign Government, had power, by its memorandum of association, to "borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations of the company." By clause 17 of the articles of association "the board" might "create and issue" debenture stock, bonds, or debentures which should be redeemable or irredeemable as the board should determine. The board passed resolutions purporting to create irredeemable debenture stock, giving neither party the right to have any stock paid off. The company subsequently went into voluntary liquidation for the purpose of selling its undertaking, and a scheme of arrangement was sanctioned by the Court, which, however, did not affect the rights of creditors. A debenture-holder claimed the amount of his stock at par, and a further sum as a condition of the redemption of the stock.

**HELD**—that the company had only power to "borrow" money, which necessarily implied repayment, and that, therefore, they had no power to raise money by issuing irredeemable debenture stock; that clause 17 of the articles of association did not extend the powers in the memorandum as it only defined the persons who might, and the manner in which they might, exercise the power; and that, therefore, the debenture-holder was only entitled to be paid the par value of his stock.

**IN RE SOUTHERN BRAZILIAN RIO GRANDE DO SUL [Ry. Co., LD., [1905] 2 Ch. 78, 74 L. J. Ch. 392; 53 W. R. 489; 92 L. T. 598; 21 T. L. R. 451; 12 Manson, 323—Buckley, J.**

**43. "Issue"—Agreement to Issue Debentures as Security for Loan.]**—A company by trust deed assigned their assets to trustees to secure a series of 500 debentures of £100 each, of which 360 were issued. The trust deed gave a form of debenture in which it was specified that each debenture of the series was to be under seal and to be issued to a person to be specified therein as a creditor for £100, and the names and addresses of the registered holders were to be kept by the company. The directors of the company passed a resolution for borrowing £2,000 on the security of twenty further debentures of the series, and that number were accordingly signed and sealed and were deposited with the company's bank as security for a loan. Neither the name of any holder nor any date was inserted in the debentures, nor were the debentures registered in the name of the bank. The loan having been paid off, the debentures were returned to the company, who subsequently issued them to other persons without resealing them. The company had no power to re-issue debentures which had been paid off.

**HELD**—that there had been a contract to issue the debentures to the bank as security for money actually advanced, which in equity amounted to an "issue" of them, and that therefore the company had no power to re-issue any of those debentures.

**Re Tasker, Hoare v. Tasker ([1905] 2 Ch. 587; 74 L. J. Ch. 643; 54 W. R. 65; 93 L. T. 195; 21 T. L. R. 736—C. A., No. 79 *infra*) applied.**

**IN RE PERTH ELECTRIC TRAMWAYS, LD., LYONS [v. TRAMWAYS SYNDICATE, LD., [1906] 2 Ch. 216, 75 L. J. Ch. 534; 54 W. R. 535; 94 L. T. 815; 22 T. L. R. 533; 13 Manson, 195—Eady, J.**

**44. Leaseholds Sub-demised to Trustees of Debenture Trust Deed—Liability of Receiver Appointed in Debenture-holder's Action to Pay Rent and Dilapidations to Superior Landlord—Privity of Estate.]**—A company being the lessees of certain business premises at a rent sub-demised them to trustees by way of security for the payment of a debenture debt and interest. The company got into difficulties and passed a resolution for a voluntary winding-up, whereupon the trustees of the debenture trust deed duly appointed P. a receiver and manager of all the company's assets. P. was afterwards by an order made in a debenture-holder's action appointed by the Court receiver and manager, and entered into possession of the demised premises, and carried on the company's business there. P. under an order of the Court sold all the company's stock-in-trade and effects that were upon the pre-

**Debentures—Continued.**

mises, and by March 24th, 1900, had cleared off the whole of the goods. The question arose whether or not it was right and proper that the receiver should be ordered to pay the rent for the period from March 25th, 1900, down to May 7th, when the lease was put an end to, and also to pay dilapidations out of moneys in his hands to the superior landlord.

HELD—that the receiver was appointed in right of the mortgagees, and the mortgaged property involved no liability to the superior landlord whatever, that the appointment of the receiver did not take away from the mortgagors their primary liability, that there was nothing in the nature of honesty and common justice requiring the Court to interfere, and that the order to pay ought not to be made.

Decision of Stirling, J. ((1900) 82 L. T. 750), affirmed.

HAND v. BLOW, [1901] 2 Ch. 721; 70 L. J. Ch. 687; 50 W. R. 5, 85 L. T. 156; 17 T. L. R. 635; 8 Manson, 156—C. A.

45. *Loan by First Mortgage Debenture-holder on Security of Promissory Note, and Undertaking by the Company at any Time when called upon to Issue to him Debentures of Second Series for the Amount—Debenture-holder's Action, in which he Joined as Plaintiff, and only Claimed to be Holder of Debenture of First Series—Judgment—Claim for Debentures of Second Series for Amount of Loan—Debenture-holder in equity.*—In 1882 a director and first mortgage debenture-holder of a tramways company in want of money to pay off debentures falling due, advanced the sum of £300, part of the amount required, on the security of a promissory note for that sum, bearing interest at 5 per cent., and of an undertaking by the company at any time when called upon to issue to him debentures of a second series then being issued by the company, and forming a second charge on its property, to the amount of the loan; and in 1884 he advanced to the company the further sum of £100 on similar security. He then joined as plaintiff in a debenture-holder's action against the company, in which he claimed to be holder of one debenture of the first series, but did not make any other claim, and obtained judgment against the company in January, 1895. In 1896 he carried in a claim in the action for the issue to him of debentures of the second series to the amount of the sums advanced by him in accordance with the undertakings of the company when the advances were made; but the chief clerk disallowed his claim. He had received interest on his promissory notes down to the date of the judgment in the debenture-holder's action. The debentures of the second series had not all been issued. The company's assets were sufficient only for payment of the debentures

of the first series in full and of the second series in part, but no other claims. On a summons to vary the chief clerk's certificate.

HELD—that, on the authority of the decision in *Re Queensland Land and Coal Company, Limited, Davis v. Martin* (71 L. T. Rep. 48; (1894) 3 Ch. 181), he was entitled in equity to rank as holder of debentures of the second series for the amount of the sums advanced by him, and that his claim must be allowed.

PEGGE v. NEATH TRAMWAYS CO., LD., [1898] 1 Ch. 183; 67 L. J. Ch. 17, 77 L. T. 550; 14 T. L. R. 62; 46 W. R. 243—North, J.

46. *Paying off—Conditions—Notice by Advertisement—Time for—General Notice to Pay off Part of Issue—Sufficiency.*—A company had issued debentures for £100,000, which were repayable on July 1st, 1903, or on such earlier day as might be notified by the company by advertisement in accordance with the conditions indorsed on the debentures.

The conditions provided that two months after such advertisement had been given the principal moneys secured by the debentures should become payable, and that the company should have the option of paying either in cash, or in other debentures.

On April 28th, 1903, the company advertised their intention of paying off such of the debentures "forming part of the issue of £50,000 falling due on the 1st July" as had not previously been redeemed, and their intention of issuing in exchange therefor new debentures on 1st July.

HELD—that the debenture-holders were not bound to accept such new debentures, for (1) the notice did not correctly specify their debentures, which formed part of an issue of £100,000, not £50,000; and (2) their debentures became due and payable on June 28th, at the expiration of the two months, and the company did not intend to issue substituted debentures on that date.

FIRST NATIONAL BANK OF CHICAGO v. ORINOCO [SHIPPING, & Co., (1905) 21 T. L. R. 39—Farwell, J.

47. *Properties—Sinking Fund—Construction.*—The term "sinking fund" does not necessarily imply accumulation.

The C. company in 1889 issued a prospectus inviting subscriptions for 1,200 6 per cent. debenture bonds of £100 each, therein described as "redeemable within seventeen years by half-yearly drawings on the 1st January and 1st July in each year, at £110 per bond, by the application of a sinking fund of £5,000 per annum." The conditions upon the bonds issued provided: "A sinking fund for the redemption of bonds of this issue shall be established, and to the credit thereof the company shall, in each half-year, carry the sum of £2,500, which shall be applied in redeeming at a premium of £10, on the 1st January and the 1st July in each year, so many of the said debentures as the

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sum from time to time standing to the credit of such sinking fund shall suffice to pay off." Until the 1st July, 1897, the company in each half-year carried to the sinking fund account £2,500, and also a sum equivalent to a half-year's interest on the bonds already redeemed. Afterwards they refused to carry more than £2,500 to that account per half-year. It was shown that if they pursued this course the debentures would not all be redeemed within seventeen years.

**HELD**, in a debenture-holders' action to compel them to carry over the interest as at first—that, even if the prospectus could be looked at in construing the contract between the company and the debenture-holders, the words "redeemable within seventeen years" did not mean that all would be redeemed within that time, but that the company would have an option to redeem them; that neither the prospectus nor the bond contained a contract to form an accumulating sinking fund, but that the contract was contained in the debenture bond only, and the prospectus could not be looked at to decide its construction.

**MORRISON v. CHICAGO AND NORTH-WESTERN [GRANARIES Co., LD., [1898] 1 Ch. 263; 67 L. J. Ch. 109; 77 L. T. 677—North, J.**

**48. Realisation—Assets Insufficient to Pay in full—Whether Payments made on Account of Principal or of Overdue Interest—Liability for Income Tax**—The debenture trust deed of a company provided that, in the event of default and subsequent realisation, the assets should be applied first in payment of arrears of interest, and secondly in payment of the principal moneys secured. The assets, in fact, proved insufficient to pay the whole of the debenture-holders' claims, but certain payments were from time to time made pursuant to orders of the Court.

**HELD**—that the provision in the deed was one inserted for the benefit of the holders, and could be waived by them if the company did not object; and that, therefore, the holders could elect to treat all payments as made on account of principal, in which case they would escape liability for income tax, except where they were bound as between themselves and third parties (*e.g.*, beneficiaries) to apportion the salvage between *corpus* and income; and, further, that the orders made by the Court from time to time, directing payment of dividends "on account of interest in arrear," were not intended to affect the rights of the holders.

Judgment of **Byrne, J.** [[1904] 1 Ch. 500; 73 L. J. Ch. 233; 20 T. L. R. 25; 90 L. T. 659; 11 *Mansons*, 179], affirmed.

**SMITH v. LAW GUARANTEE & TRUST SOCIETY, LD., [1904] 2 Ch. 569; 73 L. J. Ch. 733; 20 T. L. R. 789; 71 L. T. 545; 12 *Mansons*, 66**  
—C. A.

**49. Debentures Issued for Loan—Re-issue—Paying Off Loan—Keeping Debentures**

**Alive—Power of Company**—A company issued a series of debentures for £500,000 to rank *pari passu*. £100,000 of the debentures were issued to a firm of bankers as security for advances which were not to exceed £150,000. This latter sum was advanced to the company. The indebtedness of the company to the bankers was subsequently reduced to £85,560, and by an agreement between the company and the bankers the latter then advanced to the company a further sum of £500 upon the security of the debentures, and the £85,560 was then paid off. The intention was to avoid the debentures being freed from all charges in favour of the bankers. **Warrington, J.**, upon the application of the other holders of the debentures of the same series, granted an injunction to restrain the company from issuing the debentures or charging them for any sum in excess of the £500.

**HELD**, on appeal—that the debentures were dead when the £150,000 was paid off, and could not be re-issued for a further sum.

*In re Tasker & Sons* ([1905] 2 Ch. 587; 74 L. J. Ch. 643; 54 W. R. 65; 93 L. T. 195; 21 T. L. R. 736; 12 *Mansons*, 302—C. A., No. 79, *infra*) followed.

*Semble*—the company had no power to charge the debentures with the £500.

**THE LONDON GENERAL INVESTMENT TRUST, LD. [v. THE RUSSIAN PETROLEUM AND LIQUID FUEL Co., LD., [1907] 2 Ch. 540; 97 L. T. 564; 23 T. L. R. 746—C. A.**

**(b) Debenture-holders' Action.**

*See also* Sect. XXII. RECEIVERS.

**50. Appointment of Manager—Form of Debenture—Appointment of Director as Receiver and Manager**—In a debenture-holder's action, where the debentures were to become payable if (*inter alia*) "any writ be issued against the company at the instance of a creditor," the Court sanctioned the appointment of a director as receiver and manager, subject to the production of an affidavit showing the assent of all the debenture-holders.

**BUDGETT v. IMPROVED PATENT SYNDICATE, [1901] [W. N. 23—Farwell, J.**

**51. Appointment of Manager—Goodwill of Business charged by Debentures—"Property"—"Effects."**—The plaintiff, on behalf of himself and all other holders of debentures issued by the defendant company, brought an action (*inter alia*) for the appointment of a receiver and manager. By the debentures the company charged "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future."

**HELD**—that good will was "property" and assets, and it was also "effects," and therefore the goodwill passed under the debentures, and the Court, therefore, had jurisdiction to appoint a manager.



**Debentures—Continued.**

*Jennings v Jennings* ([1898] 1 Ch. 378; 67 L. J. Ch. 190, 46 W. R. 314; 77 L. T. 786—Stirling, J., see *PARTNERSHIP*, 35) and *In re David and Matthews* ([1899] 1 Ch. 378; 68 L. J. Ch. 185; 47 W. R. 313; 80 L. T. 75—Romer, J., see *PARTNERSHIP*, 33) applied.

*IN RE LEAS HOTEL CO. SALTER v. LEAS HOTEL CO.*, [1902] 1 Ch. 332, 71 L. J. Ch. 294, 50 W. R. 409, 86 L. T. 182; 18 T. L. R. 236, 9 Manson, 168—Kekewich, J.

**52. Appointment of Receiver and Manager—Leave to Receiver to Prosecute Appeal and Pay into Court £200 as Security for Costs—Payment out of the £200 to Receiver—Application by Litigants for Payment of Costs by Receiver or to Pay the £200—Jurisdiction to make Order**—In 1898 the defendants brought an action against H. & Co., and judgment was given by Phillimore, J., for H. & Co. In 1899 the Court of Appeal reversed the decision of Phillimore, J. In 1901 the House of Lords reversed the decision of the Court of Appeal, awarding all costs to H. & Co. in the Courts below.

In 1899 this action was brought on behalf of the debenture-holders against the defendants and a receiver and manager was appointed. The receiver obtained leave to prosecute the appeal to the Court of Appeal in the action against H. & Co., above referred to, and to pay into Court as security for costs the sum of £200. This £200 was paid out by the order of the Court of Appeal on reversing the decision of Phillimore, J. above mentioned. H. & Co. (being debenture-holders in the defendant company) applied for payment by the receiver of the costs incurred in the House of Lords, or, in the alternative, for payment to the applicants of the £200 paid out under the order of the Court.

**HELD**—that the Court had no jurisdiction to make the order; and that if it had jurisdiction it ought not to exercise it in this case.

Decision of Joyce, J. ([1901] 85 L. T. 675), affirmed.

*IN RE GRIFFITHS CYCLE CORPORATION, LD., [DUNLOP PNEUMATIC TYRE CO., LD., v JOHN GRIFFITHS CYCLE CORPORATION, LD., (1902) 85 L. T. 776—C. A.*

**53. Costs**—A mortgagee plaintiff is only entitled to party and party cost of action, and it makes no difference that he asks for sale and not foreclosure. Nor does it make any difference that the plaintiff is suing on behalf of himself and all others of the same rank.

So, too, a plaintiff in a debenture-holders' action suing on behalf of all holders of debentures for realisation of their security, is only entitled to party and party costs of action.

*IN RE QUEEN'S HOTEL COMPANY, CARDIFF, LD., [IN RE VERNON TIN PLATE COMPANY, LD.,*

[1900] 1 Ch. 792, 69 L. J. Ch. 414; 48 W. R. 567, 82 L. T. 675—Cozens-Hardy, J.

**54. Costs—Insufficient Property—Plaintiff's Costs—Solicitor and Client's Costs.**—A plaintiff who brings an action on behalf of himself and all other holders of debentures issued by a company for the purpose of realising the property on which the debentures are charged is entitled, when that property proves insufficient for payment of the debentures in full, to costs as between solicitor and client.

*Thomas v. Jones* ((1860) 1 Dr. & Sm. 134, 136; 29 L. J. Ch. 570, 571, 8 W. R. 328) principle applied.

*In re Queen's Hotel Co., Cardiff, Ltd.*, ([1900] 1 Ch. 792; 69 L. J. Ch. 414; 48 W. R. 567; 82 L. T. 675—Cozens-Hardy, J., *supra*), distinguished.

Decision of Kekewich, J. ([1901] W. N. 105), reversed.

*IN RE NEW ZEALAND MIDLAND RAILWAY CO.; [SMITH v. LUBBOCK, (1901) 2 Ch. 357, 70 L. J. Ch. 595, 49 W. R. 529; 84 L. T. 852; 8 Manson, 363—C. A.*

**55. Costs—Company and Trustees for Debenture-holders appearing by same Solicitor—Taxation—Right of Trustees to full Set of Costs.**—In a debenture-holders' action brought to enforce the security—the debentures being protected by a covering deed—the defendants were the company, the trustees for the first mortgage debentures of the company, and the trustees for the second mortgage debentures of the company. The available funds of the company were insufficient for payment of the first mortgage debentures in full. The company and trustees appeared by the same solicitor.

**HELD**—that all the costs of the defendants should be paid out of the funds before distribution between the debenture-holders, because the costs must be treated as incurred on behalf of the trustees; and that in taxing the costs of the defendants other than the company the Taxing Master ought to allow to the said defendants a full set of costs, notwithstanding the said defendants and the defendant company appeared by the same solicitor.

*MORTGAGE INSURANCE CORPORATION, LD. v. [CANADIAN AGRICULTURAL COAL AND COLONISATION CO., LD., (1901) 2 Ch. 377; 70 L. J. Ch. 684; 84 L. T. 861—Kekewich, J.*

**56. Creditors Scheduled to Company's Purchase Agreement—Whether Entitled to Priority.**—An agreement between a vendor and a company for the sale of a business provided that the company should pay all the vendor's debts in relation to the business, set out in a schedule (which also contained the names of the creditors), and that the property forming the subject of the contract should vest in the company "subject to the debts and liabilities set out in the

**Debentures—Continued.**

schedule." At the same sale the company issued debentures charged on the whole undertaking and assets. In a debenture-holder's action, the scheduled creditors claimed to be incumbancers prior to the debenture-holders.

**HELD**—that the creditors, being no parties to the contract, there was no trust express or implied in their favour, and that they were not entitled to a charge.

**IN RE HARDEN STAR, LAVIS & SINCLAIR CO., LD.,**  
[*MORRIS v. THE CO.*, [1903] W. N. 64—  
Joyce, J.]

**57. Issue of Part of Series of Debentures—Further Issue of Series—Fixing of Security.**—A company issued a portion only of a series of debentures as a floating security. The interest on the debentures fell into arrear, and a debenture-holder's action was brought. After the issue of the writ and before a receiver was appointed in the action, the company issued more debentures of the same series.

**HELD**—that the issue of the writ did not so fix the security as to deprive the company of the power to issue more debentures of the same series.

The judgment of Jessel, M.R., in *In re The Colonial Trusts Corporation, Ex parte Bradshaw* ([1879] 15 Ch. Div. 465), and Lindley, L.J., in *The Government Stock Investment, &c., Co. v. The Manila Railway Co.* ([1895] 2 Ch. 551; 64 L. J. Ch. 740; 44 W. R. 166; 72 L. T. 886; 2 Manson, 435; 12 R. 409—C. A.) followed.

**IN RE HUBBARD & CO., LD., HUBBARD v**  
[*HUBBARD & CO., LD.*, (1899) 68 L. J. Ch. 54; 79 L. T. 665, 5 Manson, 360—Wright, J.]

**58. Judgment for Debenture-holder—Plaintiff's Right to Discontinue after Judgment.**—The Court, in giving judgment in a debenture-holder's action, does not undertake the administration of the assets, as it does in a creditor's administration action. Therefore, if the plaintiff in a debenture-holder's action has no notice that any other debenture-holder claims the benefit of his action, and requires him to proceed with it, he is at liberty to discontinue it even after judgment. In this particular case no debentures had been created except those held by the plaintiff (which had been paid off since judgment by the receiver), but the rule was laid down as being of general application.

**IN RE ALPHA CO., LD., WARD v. ALPHA CO., LD.,**  
[1903] 1 Ch. 203; 72 L. J. Ch. 91; 51 W. R. 201, 87 L. T. 646; 10 Manson, 237—  
Kekewich, J.]

**59. Other Incumbancers—Joinder.**—The fact that a judgment proposed to be taken in a debenture-holder's action contains an inquiry as to other incumbancers and their priorities does not enable the plaintiff to dispense with the presence of known existing subsequent incumbancers as parties.

**RE WILCOX & CO., LD., HILDER v. THE COM-**  
[*PANY*, (1903) W. N. 64—Buckley, J.]

**60. Practice—Counsel's Minutes of Order.**—On motion for judgment in an ordinary debenture-holder's action counsel's minutes must always be left with the judge, even if the common form judgment is all that is asked for.

**IN RE AUTOMATIC WEIGHING MACHINES CO.,**  
[*GRAAFE v. AUTOMATIC MACHINES, LD.*, [1902]  
W. N. 236—Eady, J.]

**61. Practice—Motion for Judgment—Necessity for Pleadings—R. S. C. Ord. xvi., r. 9.**—A debenture-holder's action came on for hearing on motion for judgment as a short cause. It was brought against the company, the trustee for the first debenture-holders, and a representation of the holders of the second debentures. The notice of motion asked for judgment in the terms of an agreed minute.

**HELD**, following the practice adopted in *In re Pringle & Co., LD.* ([1903] W. N. 207, see *PRACTICE*, 121), that a statement of claim was unnecessary.

**IN RE CADOGAN AND HANS PLACE ESTATE (No 2),**  
[1906] W. N. 112; 121 L. T. Jo. 89; 50 Sol.  
Jo. 499, 41 L. J. N. C. 353—Buckley, J.]

**62. Practice—Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), ss. 2, 3.**—Judgments in debenture-holders' actions, where the debentures constitute a floating charge on the assets of a company, ought to contain an inquiry as to preferential creditors, and this inquiry will then be worked out in chambers before the Registrar. Then on the certificate of the result of such inquiry being filed, the order on further consideration will direct payment to the preferential creditors so ascertained of their debts.

**IN RE MEABY & CO., LD., CLARKE v. MEABY &**  
[*CO., LD.*, (1899) 6 Manson, 303—Wright, J.]

**63. Property in Jeopardy—Immediate Sale—Motion for Judgment upon Admissions—R. S. C. Ord. 51, r. 1 (b).**—If property comprised in debentures is in jeopardy, an immediate sale may be ordered under Ord. 51, r. 1 (b), in a debenture-holders' action upon motion for judgment on admissions in the pleadings.

If all debenture-holders subsequent to the plaintiffs are not parties, the order will be for sale subject to the Judge's approval, so that absent holders may be brought in on the application for approval.

**IN RE CRIGGLESTONE COAL CO., STEWART v. THE**  
[*CO.*, (1906) 1 Ch. 523; 75 L. J. Ch. 307; 54  
W. R. 298; 94 L. T. 471; 13 Manson, 181—  
Eady, J.]

**64. Security in Jeopardy—Motion for Judgment on Admissions in Pleadings—Verification by Affidavit—R. S. C. Ord. 51, r. 1**

**Debentures—Continued.**

b.]—The Court on motion for judgment on admissions in the pleadings in a debenture-holders' action, in which the plaintiff sued on behalf of himself and all other debenture-holders, and the debenture-holders were entitled to a charge on the property of the company—directed a sale of the property of the company under Ord. 51, r. 1 b, upon proof of the insolvency of the company, and the jeopardy of the property comprising the debenture-holders' security, although the principal moneys secured by the debentures were not due, no interest thereon being in arrear for six months, and no resolution having been passed, or order made for the winding-up of the company.

In such a case the admitted allegations of the statement of claim shall be verified by affidavit.

IN RE DAY AND NIGHT ADVERTISING CO., (1900)  
[48 W. R. 362—Cozens-Hardy, J.]

65 *Set down as Short Cause—Practice—Pleadings.*]—Where a debenture-holders' action is set down as a short cause on motion for judgment, there should be a statement of claim inasmuch as there are no affidavits before the Court.

IN RE DUPONT, DUPONT v. DUPONT, [1906] W. N.  
[14—Eady, J.]

66. *Sale by Order of Court—Purchase-money paid into Court—Trustees' Remuneration*]—Trustees for debenture-holders who, by the terms of their trust deed, are entitled to remuneration, to be paid by the company, are not, in the absence of express provision in the trust deed, entitled to be paid such remuneration in priority to the debenture-holders, out of proceeds paid into Court of a sale of the mortgaged property, in a debenture-holders' action.

IN RE ACCLES, LD, HODGSON v. ACCLES, (1902)  
[51 W. R. 57; 18 T. L. R. 786—Farwell, J.]

67. *Second Mortgage Debenture-holders Made Defendants—Whether Entitled to Costs.*]—Second mortgage debenture-holders having been made defendants in a debenture-holders' action, they applied for costs. The assets were not sufficient to satisfy the first mortgage debentures.

Held—that, according to the general rule in mortgage actions, where subsequent incumbrancers are made defendants, the defendants were not entitled to costs.

*Mortgage Insurance Corporation, Ltd. v. Canadian Agricultural Coal, Etc., Co., Ltd.* ([1901] 2 Ch. 377, No. 55, *supra*) followed.

IN RE CLAYTON ENGINEERING AND ELECTRICAL COMPANY, LD., BODDINGTON v. THE COMPANY, [1904] W. N. 28—Eady, J.]

68. *Winding-up of Company—Transferee for Value—Judgment in Debenture-holder's Action—Dividends—Cross-claim by Company against Transferor—Companies Act, 1862* (25

& 26 Vict. c. 89), s. 131.]—Where debentures are issued subject to the condition that the principal and interest were to be paid without regard to any equities between the company and the original, or any intermediate holder thereof, a transferee for value in good faith, after judgment in a debenture-holder's action, is entitled to payment of dividends in respect of his debentures, although the company had an equitable claim against the transferor notwithstanding the voluntary winding-up of the company.

IN RE GOY & CO., LD., FARMER v. GOY & CO., [Ld., [1900] 2 Ch. 149; 69 L. J. Ch. 481; 48 W. R. 425; 83 L. T. 309; 16 T. L. R. 310—Stirling, J.]

Distinguished in *In re Brown and Gregory, Ld*, *supra*, No. 39.

**(c) Floating Security.**

See also under (d) PRIORITY.

69. *Equitable Mortgage — Priorities — Possession of Title Deeds—Negligence.*]—C. and B. Limited was a company formed in Dec., 1884; and in May, 1885, issued, in pursuance of its borrowing powers, debentures to the amount of £28,000, each of which purported to charge all the property of the company whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, and was indorsed with conditions, the first of which provided that such charge was to be a floating security, "but so that the company is not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debenture."

No legal mortgage of the freehold or leasehold hereditaments was ever made to the debenture-holders, and the title deeds remained in the possession and under the control of the company.

The title deeds were in 1892 deposited by the company with the U. Bank of L. to meet overdrafts on an account opened by the company there. A first overdraft was paid off, but in Aug., 1895, the title deeds still remaining in the custody of the bank, the company was allowed a second overdraft on its giving a memorandum of equitable charge on the deeds, and an undertaking that the company and all other necessary parties would on demand make and execute valid legal mortgages in favour of the bank.

In Feb., 1897, the bank was served with notice of a judgment appointing a receiver, and directing inquiries as to the charges and their priorities, in an action which had been brought by the debenture-holders against the company, the interest on their debentures having fallen into arrear. The overdraft on the amount at the bank at that date amounted to some £220, and the bank stated this notice was the first they had of the company's having issued any debentures or created any charge on the property comprised in the title deeds deposited with the bank.

*Debentures—Continued.*

The company was insolvent, and was being voluntarily wound-up under the supervision of the Court.

The bank claimed to have a prior charge for £220 and interest, and to retain the deeds until their debt was paid.

**HELD**—that, the bank being in possession of the title deeds without any negligence on their part, and the restriction on the creation by the company of mortgages or charges in priority to the debentures being a mere private arrangement between the company and the debenture-holders, which could not be set up as against the equitable mortgage to the bank which had taken the deeds without any notice of it, the bank had the stronger equity, and was entitled to priority over the debenture-holders.

**RE CASTELL AND BROWN, LD., ROPEY v. CASTELL [AND BROWN, LD., [1898] 1 Ch. 315; 67 L. J. Ch. 169; 78 L. T. 109; 14 T. L. R. 194; 46 W. R. 248—Romer, J.**

**70. Execution against Goods of Company—Execution Creditors—Debenture-holders—Priority of Rights.**—Mortgage debentures issued by a limited company were secured by a floating charge on all the property of the company, subject to the conditions that no part of the property should be dealt with except in the ordinary course of the business, and that the debenture-holders should be entitled to the benefit of a trust deed which vested in the trustee for the benefit of the debenture-holders the leasehold property and uncalled capital, and gave him the right to call upon the company to vest in him all other property of the company except chattels within the meaning of the Bills of Sale Act; but the company was left free to carry on the business and deal with the assets until the debenture-holders or the trustee took action on the happening of certain events, by one of which the security constituted by the trust deed became enforceable if any execution were sued out against the property of the company. Before the due date for the payment of the debentures had arrived execution was issued against the company under a judgment obtained for trade goods supplied to them, and goods of the company charged by the debentures were seized by the sheriff under a writ of *fi. fa.* No winding-up resolution had been passed, no receiver had been appointed, and the trustee had not put in force his powers under the trust deed. In an interpleader issue between the execution creditors and the debenture-holders:

**HELD**—that the rights of the debenture-holders prevailed over those of the execution creditors, as the goods seized were validly charged with the payment of the debentures, and the rights of the debenture-holders could not be affected by the seizure of goods in which the judgment debtors had no interest

available to satisfy the judgment debt; and also as the security constituted by the trust deed had become enforceable by reason of the execution against the company, the seizure under the execution not being a dealing by the company in the ordinary way of its business.

**DAVEY & Co. v. WILLIAMSON & SONS, LD. [(RICHARDS, claimant), [1898] 2 Q. B. 194; 67 L. J. Q. B. 699; 78 L. T. 755; 46 W. R. 571—Div. Ct.]**

**71. Mortgage—Foreclosure—Debenture-holders—Parties.**—An action was brought by first mortgagees seeking, in addition to a judgment on a personal covenant for payment, a foreclosure decree against the mortgagors, who were trustees of a limited company. Subsequent to the mortgage the company issued debentures. None of the events upon which the principal moneys were to become payable had happened. The debenture-holders were made parties to the action.

**HELD**—that the debenture-holders had a charge upon the property from the moment the debentures were issued and were properly made defendants, and that the working out of the foreclosure decree in the absence of the debenture-holders could not be considered a dealing by the company with the property of the company in the ordinary course of its business.

The ordinary meaning of the term “floating security” is that the company shall, notwithstanding the debentures, be at liberty to carry on its business, and in the ordinary course of such business to dispose of the property, as if the debentures did not exist.

**WALLACE v. EVERSHED, [1899] 1 Ch. 891; 68 [L. J. Ch. 415; 80 L. T. 523; 6 Manson, 351 —Cozens-Hardy, J.]**

**72. Nature of “Floating Charges” Discussed—Power Reserved to Specifically Mortgage or Charge in Priority to Debentures—Subsequent Assignment—Held to be Floating Charge and not a Specific Mortgage—Void as being Unregistered—Companies Act, 1900 (61 & 62 Vict. c. 26), s. 14.**—A debenture trust deed empowered the company “to sell or specifically mortgage or charge or otherwise deal with and dispose of the property and assets” included in the deed in priority to the debentures. In 1902 the company assigned to certain persons the book and other debts then owing, and also all future and other debts, all of which were included in the debenture-holders’ floating charge.

**HELD**—that the assignment of 1902 was a floating charge, and not such a specific mortgage as was contemplated by the provision in the trust deed; and also that it was void as against the debenture-holders on the further ground that being a floating charge it ought to have been registered under sect. 14 of the Companies Act, 1900.

**Decision of C. A., sub nom. Re Yorkshire Woolcombers’ Association, Houldsworth v.**

*Debentures—Continued.*

*The Association* ([1903] 2 Ch. 284, 72 L. J. Ch. 635, 88 L. T. 811; 10 *Manson*, 276) affirmed.

*ILLINGWORTH v. HOULDSWORTH AND OTHERS*, [1904] A. C. 335; 73 L. J. Ch. 739; 20 T. L. R. 633, 55 W. R. 113; 91 L. T. 602; 12 *Manson*, 141—H. L. (E.)

**74. Sale of Part of Assets to Another Company—Rights of Dissentient Debenture-holders—***Intra vires*—A floating security remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.

A company having power to amalgamate with or sell all or any part of its business or property to another company of a similar kind had issued debentures for a large amount, giving a floating charge on the assets. The company entered into an agreement to sell its assets, except some £24,000 of securities, to a new company. The old company would, notwithstanding the arrangement, still be carrying on some substantial part of the undertaking as contemplated by its memorandum of association, and could not be wound up. It had not acted *ultra vires* of the memorandum of association.

**HELD**—that there was nothing in the debentures to prevent the company from carrying out the operation; that the dissenting debenture-holders had no special right to have, as security for them, a sum of money brought into Court, and they ought to be treated as having the same rights as the debenture-holders who had assented to the sale.

*Decision of North, J.* ([1899] 2 Ch. 130; 68 L. J. Ch. 410; 80 L. T. 461; 6 *Manson*, 439), disapproved.

*IN RE BORAX CO; FOSTER v. BORAX CO.*, [1901] 1 Ch. 326; 70 L. J. Ch. 162; 49 W. R. 212; 83 L. T. 638; 17 T. L. R. 159—C. A.

**75. Sale of Part of Business—Injunction.**—The holders of debentures in a company working smelting works had a floating security over the property of the company, which consisted of a business carried on in three distinct branches. Power was reserved to the company in the trust deed to sell the business carried on at one of the three branches, and to take shares in other similar companies.

**HELD**—that the debenture-holders could not restrain the company from getting rid of one of the three businesses, as it was being done in good faith and for the benefit of the company, and was not contrary to anything in the debentures or in the trust deed.

*IN RE VIVIAN & CO., METROPOLITAN BANK OF [ENGLAND AND WALES, LTD., v. VIVIAN & CO.]*, [1900] 2 Ch. 654; 69 L. J. Ch. 659; 48 W. R. 636; 82 L. T. 674—*Cozens-Hardy, J.*

**76. Second Debentures held by Debtors of Company—Right of Debtors to Set-off—Right**

*of First Debenture-holders—Liberty of Company to carry on Business*—An ordinary debenture, creating a floating charge on a company's undertaking, does not cease to be a floating security and become an active security, until the company is wound up, or stops business, or until the holder appoints a receiver.

A company issued ordinary "floating charge" debentures payable on August 1st, 1900; but, though interest was in arrear, a receiver was not appointed till October 2nd, 1901. The defendants, who were debtors to the company for goods received before the latter date, held second debentures, which fell due before that date.

In an action by the company and the first debenture-holders for the price of the goods:

**HELD**—that, as there had been no intervention by the first debenture-holders before October 2nd, 1901, the company were up to that date at liberty to deal with the property included in the floating charge in the ordinary course of business; and that the defendants were entitled to set-off the value of their debentures as against the price of the goods.

And, further, that it was immaterial that their debentures were expressed to be subject to the first debentures.

*E. NELSON & CO., LD., AND OTHERS v. FABER & CO.*, [1903] 2 K. B. 367; 72 L. J. K. B. 771; 89 L. T. 21; 10 *Manson*, 427—*Joyce, J.*

**77. Security in Jeopardy—No Principal or Interest due on Debentures—Right of Debenture-holders to have Receiver Appointed**—Debenture-holders, who have a floating security upon the undertaking and all present and future property of a company are entitled to claim the appointment of a receiver of the property subject to their debentures, if their security is in jeopardy.

So held, where a creditor had obtained judgment and was in a position to issue execution against the company for £110, although no interest was due or in arrear in respect of the debentures, and the principal moneys were not yet payable. The appointment of a receiver is indeed discretionary, but in such circumstances as the above there is no reason why the Court should exercise its discretion against the debenture-holders.

*IN RE LONDON PRESSED HINGE CO., LD, CAMP-BELL v. THE COMPANY*, [1905] 1 Ch. 576; 74 L. J. Ch. 321; 53 W. R. 407; 92 L. T. 409; 21 T. L. R. 322; 12 *Manson*, 219—*Buckley, J.*

(d) **Priority.**

*See also under (c) Floating-Security.*

**78. Agreement to Issue Debentures—Execution Creditor taking Subject to Equities—Priority.**—An execution creditor takes subject to all the equities. The plaintiffs agreed to sell the goods in question to a company who were not to have possession of the goods

**Debentures—Continued.**

until they had issued to the plaintiffs in part payment of the purchase-money debentures charged upon all their property, including the goods. The company wrote a letter to the plaintiffs, informing them that a resolution had been passed to seal the debentures, and that the scrip would be issued in the course of the next few days, and thereupon the company were allowed to take possession of the goods. Before the debentures were in fact issued an execution was put in by the defendant.

**HELD**—that the effect of the letter was to put the plaintiffs in the position of debenture-holders, and to give them a charge equivalent to that of actual debentures, and that the defendant took the goods subject to such charge.

**SIMULTANEOUS COLOUR PRINTING SYNDICATE v. [FOWERAKER, [1901] 1 Q. B. 771; 70 L. J. K. B. 453; 17 T. L. R. 361, 8 Manson, 307—Wright, J.**

**79. Buying Back Debentures — Taking Blank Transfer from Debenture-holder—Subsequent Transfer of Debentures — Priority]**—A company had power to issue, and had issued first mortgage debentures up to a certain amount, which were to rank *pari passu* with each other, the company not being at liberty to create any charge ranking with or in priority thereto. From time to time the company paid off certain of those debentures, and took a blank transfer from the debenture-holders, the names of the transferees being left blank. The company subsequently received applications for debentures from other persons, and thereupon filled in the names of those persons as transferees in the blank transfers and handed the debentures and the transfers to them for value received.

**HELD**—that, upon the company paying off the debentures the debt and security were both gone, and that the subsequent transaction was a new issue of debentures which therefore did not rank *pari passu* with the old debentures.

*In re Routledge & Sons, Ltd.* ([1904] see No. 33, *supra*, 2 Ch. 474; 73 L. J. Ch. 843, 53 W. R. 41, 91 L. T. 288—Buckley, J., No. 33, *supra*) approved.

**Decision of Kekewich, J.** ([1905] 1 Ch. 283; 74 L. J. Ch. 141; 21 T. L. R. 158, 53 W. R. 247, 92 L. T. 17), affirmed.

**IN RE W. TASKER & SONS, LD; HOARE v THE [COMPANY, [1905] 2 Ch. 587; 74 L. J. Ch. 643; 54 W. R. 65; 93 L. T. 195, 21 T. L. R. 736; 12 Manson, 302—C. A.**

**80. Charge Created by—Meaning of “Undertaking”—Conflicting Claims of Debenture-holders and Judgment Creditor.]**—The stock-in-trade, plant, furniture, and machinery, or certain premiums had been seized by the sheriff under a judgment obtained by the defendants against Thomas &

Co., Ltd. A claim to the property seized was put in by the receiver appointed by a debenture-holder of the said company, and an interpleader issue was ordered. The charge contained in the debentures was as follows: “The company hereby charges all the said payments, its undertaking, and all its profits, whatsoever and wheresoever, both present and future, including its uncalled capital, if any, for the time being.” The receiver had been appointed on Oct. 25, 1897, and took possession on the morning of the 26th. At a later hour of the latter day the sheriff seized.

**HELD**—that the receiver had a good title to the goods as against the execution creditor.

**MARSHALL v. ROGERS & Co., (1898) 14 T. L. R. [217—Ridley, J.]**

**81. Equitable Incumbrancers—Possession of Title Deeds—Inquiry—Negligence—Conflicting Equities—Postponement of Prior Incumbrance—One Man Company—Debentures issued to Director to make good Private Breach of Trust by him—Investment of Trust Funds in Business—Notice to Director not Notice to Company.]**—The directors of a limited company had power under the articles of association to raise by mortgage or debenture such sums as they should think expedient, and to charge the property of the company therewith. The company was formed to take over the business of M. M. was managing director, and practically the owner of the company, the shares never having been offered to the public, and except for the limitation of liability, the concern went on as before the formation of the company.

On April 1st, 1897, the company being indebted to its bankers, and requiring further advances, issued debentures in favour of the bank, charging the same on all the property of the company. These documents showed that there was power to issue further debentures. There was a collateral agreement by the company authorising the bank to hold the debentures as a collateral security for advances and transactions.

On April 16th, 1897, two further debentures charged on the property of the company for the sum of £11,000 were issued to M. and T., who were the trustees of the estate of B., deceased. According to affidavits in the case £9,323, representing the B. trust estate, was (in breach of trust) invested by M. and T. in M.'s business prior to the incorporation of the company, and the company took over the liability for this debt. It was also stated in the affidavits that a further sum of £2,962, also portion of the B. trust estate, was advanced by the trustees to the company, and invested in the business, and that the company had undertaken to give security for all the moneys due by the company to the trust estate.

On May 28th, 1897, M. deposited certain title deeds of the company's property with the bank as a collateral security for all

**Debentures—Continued.**

moneys then due, or to become due by the company to the bank. When this charge was given, the amount due to the bank exceeded the nominal amount of the debentures issued to them on April 1st. The bank had no notice of the existence of the debentures of April 16th, and made no inquiries. The bank commenced an action to enforce its securities, and the company passed a resolution for voluntary winding-up. By the judgment of the Court the debentures issued to the bank were declared valid, and a sale was directed. An application was made on behalf of the *cestuis que* trust of the estate of B. for liberty to intervene in the action, and to have it declared that the debentures of April 16th, issued to M. and T., were charged on the property of the company in priority to the equitable charge in favour of the bank by deposit of title deeds on May 28th.

**HELD**—on the assumption that, at the date of the issue of the two debentures for £11,000 there was money due by the company to M. and T. as trustees of the B estate, that the bank, as having the stronger equity, were entitled to priority in respect of their equitable mortgage over these two debentures.

Subsequently it was established by oral evidence taken in Court that the trust funds had been mainly spent by M. in Stock Exchange transactions, and that so far as any had been invested by him in the business, they constituted a private debt of M., and that his liability was not taken over by the company, and that any trust moneys advanced to the company had been repaid.

**HELD**—that, neither in fact nor in law had the company any notice of the trust, and that the debentures were issued without authority and without consideration, and did not bind the assets of the company, as against creditors.

**BANK OF IRELAND v COGROY SPINNING CO., [1900]**  
[1 Ir. R. 219—M. R.]

**82 Floating Charge—Power of Company to Deal with Property—Pledge of Delivery Warrants—Priority.]**—A distillery company issued debentures, and executed a trust deed to further secure them. By the debentures, the undertaking and all the property, present and future, of the company (not comprised in the trust deed) were charged with the moneys borrowed as a first charge thereon. By the conditions indorsed, the company was to be permitted, until default in payment of interest, &c., in course of its business, and for the purpose of carrying on same, to deal with the property thereby charged in such manner as the company might think fit, and in particular might sell, lease, or exchange the same, pay and receive money, and might declare and pay dividends out of profits, and nothing therein should be taken to authorise the creation of any mortgage or charge on the property for the time being of the company in priority to the charge thereby created. By the trust

deed the company mortgaged the freehold and leasehold premises of the company to secure the repayment of the debentures covenanting that the moneys secured should be a first charge on the mortgaged premises, and should take precedence over all moneys which might thereafter be raised by the company by any means whatsoever. The company obtained advances from their bankers to enable them to purchase grain for the purpose of manufacturing whisky, and pledged to the bank certain whisky by handing over delivery warrants with invoices.

**HELD**—that the transaction came within the restriction against creating any mortgage or charge on the property in priority to the debentures, and the provision that the debentures should take precedence over all moneys which might be raised by the company by any means whatsoever, and that the bank were not entitled to the whisky as against the debenture-holders.

**HELD ALSO**, on the evidence—that the bank had notice of the debenture at the date of the pledge of the whisky to them, and were consequently not in the position of purchasers for value without notice.

**COX v. DUBLIN DISTILLERY CO., [1906] 1 Ir. R. [446—C. A.]**

**83. Liquidation—Hypothecation of Remittances—Receiver—Priorities.]**—A limited company owned a railway and also valuable coal mines in a foreign country. In 1888 it issued 5 per cent. debentures on the security of its railway, it being provided by the trust deed securing the same that the security should not, except in the case of suspension of payment by or liquidation of the company, affect its other property.

In 1892 it issued 6 per cent. debentures charged on all its property, and ranking as a first charge on its property other than its railway, in respect of which the 1892 debentures ranked as a second charge after the 1888 debentures, it being provided by the trust deed securing the 1892 debentures that the company, notwithstanding that issue, should be at liberty in the ordinary course of its business, and for the purpose of carrying on the same, to sell, lease, and deal with its property for the time being, but not to create any mortgage or charge on its railway or coal mines in priority to the debentures, and not to sell its undertaking or any substantial part thereof without the concurrence of the trustees for the debenture-holders.

The ordinary course of business was for its foreign agents when they had sufficient cash in hand on account of the company to remit it to the company by bills through its agents in England, who sent the bills to the company's bankers for discounting or for collection on account of the company, and the bankers placed the proceeds to the credit of their account with the company.

**Debentures—Continued.**

In August, 1896, the company being in need of money to pay interest on its 6 per cent. debentures, obtained an advance from its bankers on the security of a letter hypothecating all remittances to be received from its foreign agents; and in September the company, being in need of money to pay off certain debentures, obtained another advance from its bankers on a similar letter of hypothecation.

In March, 1897, the company made default in payment of interest on its debentures, and a debenture-holder's action was brought against it and a receiver appointed on the 27th March.

On the 18th March, and again on the 27th March, the foreign agents, having no notice of the appointment of the receiver, sent remittances to the company, which were handed to the receiver on the 23rd April and the 3rd of May respectively.

**HELD**—that the bankers, by virtue of the two letters of hypothecation, were entitled to these remittances in priority to the debenture-holders.

**RE ARAUCO Co., Ltd., (1895) 79 L. T. 336—**  
[North, J.]

**84. Receiver for Debenture-holders—Garnishee Order nisi obtained by Creditor—Priorities—R. S. C. Ord. 45, r. 2.**—A company had issued debentures creating a first charge by way of floating security over all its assets. On January 19th a receiver was appointed in a debenture-holder's action, and notice thereof was served on Y. on January 20th. On January 17th Y. had signed judgment against the company, and on the same day had obtained and served on T. a garnishee order nisi in respect of £434 owing from T. to the company.

**HELD**—that the receiver had priority over Y., since the service of the garnishee order nisi did not operate as an equitable assignment of transfer of the debt, and therefore Y.'s rights were subject to the existing charge of the debenture-holders.

**In re Combined Weighing and Advertising Co., Ltd. ([1889] 43 Ch. D. 99; 59 L. J. Ch. 26; 38 W. R. 67; 61 L. T. 582; 1 Meg. 398—C. A.)** followed.

**Ex parte Joselyne (1878) 8 Ch. D. 327; 47 L. J. Bkcy. 91; 26 W. R. 645; 38 L. T. 661—dictum of James, L.J.)** explained.

**Robson v. Smith ([1895] 2 Ch. 118; 64 L. J. Ch. 457; 43 W. R. 632; 72 L. T. 559; 2 Manson, 422—Romer, J.)** distinguished.

**NORTON v. YATES, [1906] 1 K. B. 112; 75 [L. J. K. B. 252; 54 W. R. 183**

—Warrington, J.

**85. Receiver for Debenture-holders—Garnishee Order Absolute.**—A company issued a debenture to the plaintiff creating a charge on the company's property by way of floating security. Subsequently the defendant recovered judgment against the company, and obtained a garnishee order absolute attaching

a sum of money due to the company from their bankers. Before the bankers paid the money a receiver was appointed on behalf of the plaintiff as a debenture-holder, and the money was claimed by both the plaintiff and the defendant.

**HELD**—that the plaintiff, as the debenture-holder, had priority over the defendant.

**Norton v. Yates (supra)** applied.

**CAIRNEY v. BACK, [1906] 2 K. B. 746, 75 L. J. [K. B. 1014; 22 T. L. R. 776; 96 L. T. 111; 141 Manson, 58—Walton, J.]**

**86. Restrictive Conditions—No Further Charge to be Imposed upon Premises—Floating Charge—Deposit of Shares with Bank by Directors—Priority of Bank over Debenture-holders—Notice—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.**—The C. company issued debentures secured by a trust deed, creating a floating charge on its property and undertaking. One of the indorsed conditions provided that no prior charge should be created, except that the company might mortgage the premises with its bankers up to £20,000. The debentures were duly registered. The four directors, having an overdraft with the M. Bank (not the company's ordinary bank) executed a memorandum of deposit, and transferred to the bank certain shares in the R. Company then standing in the name of the C. Company. At a later date a receiver was appointed on behalf of the debenture-holders of the C. company, and he objected to the said shares being registered in the name of the bank, the transferee.

**HELD**—that the transfer should be registered. The transaction with the bank was within the ordinary powers of the directors, who were by its articles empowered to borrow money for the company's purposes. It was no answer to say that some of the overdraft was perhaps applied to the directors' own purposes, for the bank was entitled to its security if anything was properly owing to it; and notice could not be imputed to the bank, for an inspection of the register of the debentures would not have disclosed the restrictive conditions.

**RE STANDARD ROTARY MACHINE Co., Ltd. (1907)**  
[95 L. T. 829—Kekewich, J.]

**(e) Registration.**

**87. Company Cancelling Unissued and Unregistered Debentures—Issuing and Registering New Debentures Instead—Validity—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14 (1), (6).**—By its memorandum of association a company had power to renew, vary, or exchange its debentures. On March 2nd the company agreed to issue debentures as security for a loan then made. On March 16th such debentures were sealed, but never issued or registered. On April 7th new debentures were sealed in accordance with a resolution that those previously sealed should be cancelled, and new ones substituted; they were registered and issued on April 11th.



**Debentures—Continued**

**HELD**—in the winding-up that the debentures were valid, and that the holder was entitled to the common order in a debenture-holder's action.

**IN RE DEFRIES & Co., LD., BOWEN v. THE Co.,**  
[1904] 1 Ch. 37; 73 L. J. Ch. 1; 52 W. R.  
253—Buckley, J.

**88. Conditions—“Compromise or Adjustment of Any Claim by the Holders”—Date of Repayment Postponed—Further Debenture Stock Issued to rank pari passu.**—A company was about to raise money by the issue of debentures in order to pay off the existing debentures, and to raise further capital, which was necessary for the purposes of the business of the company. But, unfortunately, owing to commercial depression in Germany, with which country this company was intimately connected, it was found impossible to float those debentures or to pay off the existing debentures, or to provide the further capital necessary for the business of the company. If the business was to be carried on, it was absolutely necessary that further capital should be furnished in order that a railway siding and further additional business premises should be erected. Clause 24 of the conditions endorsed on the debentures provided that “any meeting convened might by a resolution of three-fourths . . . agree to any compromise or adjustment of any claim by the holders of the stock against the company . . . or the giving of time to the company for the payment of any principal or interest or the release of the property or any portion thereof charged to secure the stock, and the resolution of any such meeting shall bind all the holders of the stock.” The debenture-holders passed a resolution that the date for the repayment of the existing issue of first debenture stock should be postponed for three years, and another resolution that the company should be at liberty to issue further first debenture stock to a large amount to rank *pari passu* with the existing issue of first debenture stock.

**HELD**—that the resolutions came within the powers of clause 24 of the conditions.

**Decision of Buckley, J., affirmed.**

**WALKER v. ELMORE'S GERMAN AND AUSTRO-HUNGARIAN METAL CO., LD.,** (1902) 85 L. T. 767  
—C. A.

**89. Debentures “Created” before but Issued after January 1st, 1901—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.**—In August, 1900, a company resolved to issue debentures redeemable at twelve months from date of issue. The form of the debentures was approved, and the seal of the company was affixed to each. The debentures created a charge on the assets and undertaking of the company by way of floating charge. Half of these debentures were issued in September, 1900, and the other half retained by the company. In January, 1901, after the

coming into operation of the Companies Act, 1900, the company issued the rest of the debentures. On April 18th, 1901, the company passed a special resolution for voluntary winding-up.

**HELD**—that no registration of the debentures issued after January 1st, 1901, was required under the Companies Act, 1900.

**IN RE SPIRAL GLOBE, LD. (No 2), WATSON v. [SPIRAL GLOBE, LD.,** [1902] 2 Ch. 209, 71 L. J. Ch. 538; 86 L. T. 499, 18 T. L. R. 532—  
Joyce, J.

**90. Joint Debentures Issued by Three Companies—Joint and Several Covenants—Charge on each Undertaking—Rights of Lenders.**—Three companies, each of which had power to issue debentures, issued joint debentures; they jointly and severally agreed to repay the whole loan, and each company charged its own undertaking.

**HELD**—(1) that it was *ultra vires* for a company to charge its assets with the repayment of money advanced to another company; but (2) that the debentures formed a valid charge upon each company's assets up to the amount which such company had received.

**IN RE JOHNSTON FOREIGN PATENTS CO., LD., AND [ALLIED COMPANIES,** [1904] 2 Ch. 234; 73 L. J. Ch. 617; 91 L. T. 124—C. A.

**91. “Mortgage or Charge Created by Company”—Sale of Part of Property—Purchase of other Property—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.**—A company before January 1, 1901, issued debenture stock, and conveyed to trustees under a trust deed for the debenture-holders certain property as security for the debentures. The trustees, in pursuance of a power contained in the deed, sold part of the property, and after January 1, 1901, they invested the proceeds of the sale in the purchase of other property, which the vendor conveyed to them (the company not being parties to the deed) upon the trusts contained in the trust deed as part of the mortgaged property.

**HELD**—that the conveyance did not require to be registered, as it did not create a mortgage or charge within the meaning of sect. 14 of the Companies Act, 1900.

**BRISTOL UNITED BREWERIES, LD. v. ABBOT AND [OTHERS,** (1907) 24 T. L. R. 91—Parker, J.

**92. Omission to Register—Inadvertence—Extension of “Time”**—Where a company issued debentures but owing to inadvertence neglected to register them within twenty-one days as required by sect. 14 ss. 1 of the Companies Act, 1900, the Court made an order extending the time for registering the debentures for one month from the date of the order.

**IN RE BEATTIE, E. & F., LD.,** (1901) W. N. [152; 36 L. J. N. C. 378—Cozens-Hardy J.

**93. Omission to Register—Extension of**

**Debentures—Continued.**

*Time—Grounds upon which Time will be Extended.*—In a case where there had been delay at the Stamp Office and also inadvertence in misunderstanding the provisions of sect. 1 ss. 4 of the Companies Act, 1900, the Court, acting under sect. 15 of that Act, extended the time for registering a series of mortgage debentures and a trust deed for securing them.

IN RE BOOTLE COLD STORAGE AND ICE COMPANY,  
[1901] W. N. 54; 110 L. T. Jo. 447—  
Farwell, J

94. *Omission to Register—Extension of Time—Form of Order—Saving of Prior Rights—Companies Act, 1900* (63 & 64 Vict. c. 48), ss. 14, 15.]—Direction given by the Judge for the insertion in orders for the extension of time for registration of debentures of a company of words saving the rights of parties acquired prior to registration.

IN RE JOPLIN'S BREWERY CO., LD., (1901) 50  
[W. R. 75; 85 L. T. 411; [1902] 1 Ch. 79;  
71 L. J. Ch. 21; 8 Manson, 426—Buckley, J.

95. *Omission to Register—Extension of Time — "Inadvertence" — Protection of Creditors—Saving of Prior Rights—Winding-up—Companies Act, 1900* (63 & 64 Vict. c. 48), ss. 14, 15.]—After the commencement of the winding-up of a company, a motion was made under sect. 15 of the Companies Act, 1900, for an order extending the time for registration of ten debentures on the ground that the omission to register them was due to inadvertence.

HELD—that the order might be made with the addition of the words. "This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

*In re Joplin Brewery Co., Ltd.* ([1902] 1 Ch. 79; 71 L. J. Ch. 21; 50 W. R. 75; 85 L. T. 411; 8 Manson, 426—Buckley, J., *supra*), followed.

The principle of the cases—*Crew v. Cummings* ((1888) 21 Q. B. D. 420; 57 L. J. Q. B. 641; 36 W. R. 908; 59 L. T. 886—C. A.) and *In re Parsons, Ex parte Furber* ([1893] 2 Q. B. 122; 4 R. 374; 62 L. J. Q. B. 365; 41 W. R. 468; 68 L. T. 777—C. A.)—is not limited in its application to those cases in which the ownership of or property in goods or chattels has actually changed; it extends to cases in which the rights of third persons have actually accrued, and which would be prejudicially affected if registration were allowed without saving and protecting those rights.

IN RE SPIRAL GLOBE, LD., [1902] 1 Ch. 396; 71  
[L. J. Ch. 128; 50 W. R. 187; 85 L. T.  
778; 18 T. L. R. 154; 9 Manson, 52—  
Eady, J.

96. *Omission to Register—Extension of Time—"Inadvertence"—Secretary's Ignorance—Companies Act, 1890* (63 & 64 Vict. c.

48), ss. 14, 15.]—A company applied by *ex parte* originating motion for an order under sect. 15 of the Companies Act, 1900, extending the time for registering under sect. 14 of the Act the debenture trust deed of the company, and if necessary eighty-three of the debentures, on the ground that the omission was due to "inadvertence," consisting of the fact that the secretary of the company was imperfectly acquainted with the provisions of the Act of 1900 with regard to the registration of debentures, and after eighty-three of the debentures had been issued had let the time go by for registering them.

HELD—that the time might be extended for registering the trust deed and such other documents as the applicants should be advised ought to be registered for fourteen days from the date of the order, the order to be without prejudice to the rights of persons accrued prior to the time at which the securities in question should be actually registered.

IN RE MENDIP PRESS, LD., (1902) 18 T. L. R.  
[38—Buckley, J

97. *Omission to Register—Extension of Time—"To some other Sufficient Cause"—Form of Order—Application after Winding-up—Companies Act, 1900* (63 & 64 Vict. c. 48), ss. 14, 15.]—The directors of a company resolved in 1898 that £5,500 should be raised by an issue of fifty-five debentures for £100 each. They issued fifty of the debentures before January 1st, 1901, and they issued in July, 1901, the remaining five debentures to D. His solicitor considered the question whether it was necessary to comply with the provisions of the Companies Act, 1900, with reference to registration, and he said that, perusing the Act, he came to the conclusion that in such a case, if anything required to be registered, it was only the company's resolution, and that as the resolution was passed in 1898, and therefore before the Act came into operation, nothing required registration. The debentures issued to D. were, therefore, not registered. In October, 1901, the company resolved to wind-up, and a liquidator was appointed. D. applied for an extension of time for registration of his debentures.

HELD—that the solicitor was wrong, as the resolution did not create any mortgage or charge, but merely put the company in a position to raise a sum of money secured by a mortgage or charge; that the omission to register was due "to some other sufficient cause," and the case was within sect. 15 of the Companies Act, 1900; that though the applicant had been badly advised, he ought not to be benefited at the expense of other wholly innocent persons, viz., the other creditors; and as the winding-up had commenced, an order containing the words inserted in the order made in the case of *In re Joplin Brewery Co.* ([1902] 1 Ch. 79, 71 L. J. Ch. 21; 50 W. R. 75; 85 L. T. 411; 8 Manson, 426—Buckley, J., No. 94, *supra*)

**Debentures—Continued.**

could do nobody any good, and that the application must be refused.

IN RE S ABRAHAMSON AND SONS, [1902] 1 Ch. 695; [71 L. J. Ch. 307; 50 W. R. 284; 86 L. T. 290, 13 T. L. R. 336; 9 Manson, 176—Buckley, J.

98 *Registration of Some and Failure to Register Others in Time—Extension of Time—Rights of Parties—Rights of Debenture-holders inter se—Form of Order—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15*—A company having power to do so resolved to issue debentures, ranking *pari passu*, to the extent of £85,000. They succeeded in actually issuing debentures for a considerable part of that sum before the Companies Act, 1900, came into operation, and, therefore, at a time when registration was not necessary. They afterwards issued others after the commencement of the Act which were not registered within the time prescribed by the Act, and, therefore, they were in a condition which obliged the company and the debenture-holders to have recourse to the 15th section of the Act. The holders of these debentures and the company obtained from the judge an extension of time for the registration, and the judge inserted in the order the following qualification, "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered," on appeal.

HELD—that the fact of registration and failure to register ought not to make any difference between the two sets of debenture-holders; that their rights *inter se* ought to rank *pari passu*; and that the order must be altered to that extent.

IN RE JOPPIN BREWERY CO. ([1902] 1 Ch. 79; 71 L. J. Ch. 21; 50 W. R. 75; 85 L. T. 411; 8 Manson, 426—Buckley, J., No. 94, *supra*) discussed.

IN RE J. C. JOHNSON & CO., LD., [1902] 2 Ch. [101, 71 L. J. Ch. 576; 50 W. R. 482; 86 L. T. 791; 9 Manson, 307—C. A. And see No. 104, *infra*.

99. *Extension of Time—Conditions as to Unsecured Creditors—"Just and Equitable"—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 15.*—The Court will not, as a general rule, in extending the time, under sect. 15 of the Companies Act, 1900, for registering debentures in a company, impose a condition protecting the rights of unsecured creditors of the company who have become such after the date when the debentures ought to have been registered and before the time when they are actually registered.

*Semble*, if a case of sufficient magnitude arises, it may be that the Court will direct the order to be advertised and its operation suspended for a time so as to enable unsecured creditors to come in and ask for terms to be imposed.

IN RE CARDIFF WORKMEN'S COTTAGES CO., LD., [1906] 2 Ch. 627; 75 L. J. Ch. 769, 22 T. L. R. 779, 95 L. T. 669, 13 Manson, 382—Buckley, J.

100. *Extension of Time—"Without prejudice to" Rights Acquired—Rights of Unsecured Creditors—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14 (1), 15*—A company in 1900 passed a resolution to raise a sum of money by the issue of debentures, and certain debentures were issued before January 1st, 1901. Subsequently to that date further debentures of the same series were issued, but were not registered as required by sect. 14 of the Companies Act, 1900. On July 24th, 1903, an order was made under sect. 15 of the Act, extending the time for registration of the debentures "without prejudice to the rights which may have been or may be acquired against the holders" thereof "prior to the time when the last-mentioned debentures shall be actually registered." The debentures were accordingly registered. The company having gone into voluntary liquidation after the registration,

HELD—that the proviso in the order extending the time for registration only protected creditors who had obtained some charge or security upon the property, and did not make the debentures which were registered under the order but before the liquidation of no validity as against the unsecured creditors of the company.

IN RE ANGLO-ORIENTAL CARPET MANUFACTURING CO. ([1903] 1 Ch. 914; 72 L. J. Ch. 458; 51 W. R. 634; 88 L. T. 391; 10 Manson, 207, No. 104, *infra*) distinguished.

Decision of Joyce, J. (75 L. J. Ch. 575; 54 W. R. 555; 22 T. L. R. 624) reversed.

IN RE EHRMANN BROS., LD., [1906] 2 Ch. 697; [75 L. J. Ch. 817; 22 T. L. R. 734, 13 Manson, 256, 95 L. T. 664; 13 Manson, 368—C. A.

101. *Power to Issue "not exceeding Amount of Preference Share Capital"—No Preference Shares Issued*—If articles of association authorise the borrowing upon debentures of a sum not exceeding the amount of the preference share capital of the company, the fact that no preference shares have been issued does not limit the borrowing power.

IN RE JOHNSTON FOREIGN PATENTS CO., LD., AND ALLIED COMPANIES, [1904] 2 Ch. 234; 73 L. J. Ch. 617; 91 L. T. 124; 53 W. R. 189; 11 Manson, 378—C. A.

102. *Registrar's Certificate—Conclusiveness—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.*—The certificate of the registrar of joint stock companies given under sect. 14 of the Companies Act, 1900, is conclusive evidence that all the requirements of the section as to the registration of debentures have been complied with. The Court will

**Debentures—Continued.**

not go behind such a certificate and inquire, e.g., whether debenture-holders do in fact rank *pari passu*.

IN RE YOLLAND, HUSSON & BIRKETT, LD.,  
[LEICESTER v. THE CO., [1907] 2 Ch. 471—  
Warrington, J.

103. *Trust Deed—Subsequent Issue—Construction of s. 14 of the Companies Act, 1900* (63 & 64 Vict. c. 48).—The following is the correct interpretation of sect. 14 of the Companies Act, 1900, with regard to the registration of debentures—(a) Where a company determines by resolution to issue one or more independent debentures (*i.e.*, not a series of debentures all secured *pari passu* by one charge); then sub-ss. 1, 2, and 3 apply. Each debenture issued at any time in pursuance of such resolution must be registered within 21 days, not of the date of the resolution authorising the charge, but of the date at which the charge was actually created in favour of the first holder;

(b) Where a company determines to issue a series of debentures within the meaning of sub-s. 4, then the particulars set out in that sub-section must be registered; and they may be so registered at any time, irrespective of the date of the resolution and covering deed (if any), such registration will protect all debentures of the series issued subsequently, and also all registered not more than 21 days previously; and there is no need to register the actual debentures (as in case (a)). Sub-s. 5 relates only to cases where there has been registration under sub-s. 4.

Sub-s. 6 applies to both cases; but the form of certificates will vary.

IN RE HARROGATE ESTATES, LD., [1903] 1 Ch. 498; 72 L. J. Ch. 313; 51 W. R. 334; 88 L. T. 82; 19 T. L. R. 246; 10 Manson, 136—  
Buckley, J.

104. *Trust Deed—Extension of Time—Not Registered till after Winding-up Order—Companies Act, 1900* (63 & 64 Vict. c. 48), ss. 14, 15].—A debentures trust deed was not registered within 21 days, as required by sect. 14 of the Companies Act, 1900, but the time for registering was extended "without prejudice to the rights of parties acquired prior to the time when such deed and debentures shall be actually registered." A winding-up order was made 14 days before such registration was effected.

HELD—that upon the making of the winding-up order the assets became impressed, in the hands of the liquidator, with a statutory trust in favour of the creditors; and that the general body of creditors took preference of the debenture-holders under the protective clause of the order, whether or no they had commenced proceedings against the company before the winding-up began.

IN RE I. C. JOHNSON & CO. ([1902] 2 Ch. 101; 71 L. J. Ch. 576; 50 W. R. 482; 86 L. T. 791; 9 Manson, 307—C. A., No. 98, *supra*) discussed.

IN RE ANGLO-ORIENTAL CARPET MANUFACTURING  
[Co., LD., [1903] 1 Ch. 914, 72 L. J. Ch. 458;  
51 W. R. 634; 88 L. T. 391; 10 Manson, 207—  
Buckley, J.

105. *Trust Deed prior to Act of 1900—Change of Securities subject thereto—Sub-demise of Newly-acquired Property to the Trustees in 1902—Need for Registration—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 14].—Before the passing of the Companies Act, 1900, a company had issued debenture stock secured by a covering deed. In accordance with the provisions of this deed the trustees, in 1902, at the request of the company, sold some of the specifically mortgaged property, and reinvested the proceeds in the purchase of a leasehold public-house. In order, however, that the trustees might incur no liability under the covenants in the lease, the company took an assignment of the lease to themselves, and then sub-demised the house to the trustees for the whole term, less one day.

HELD—that the company had by the deed of sub-demise "created a specific mortgage or charge" upon the property sub-demised, and that the deed must be registered under sect. 14 of the Act of 1900.

Per Stirling, L.J.—The trustees already had a "floating charge," for which the deed substituted a specific charge.

SEMBLE—if the trustees had purchased direct there would have been no need for registration.

Decision of Byrne, J. ([1903] 2 Ch. 527; 72 L. J. Ch. 496; 57 W. R. 508; 88 L. T. 722; 10 Manson, 321), affirmed.

CORNBRÖCK BREWERY CO., LD. v. LAW DEBENTURE CORPORATION, LD., [1904] 1 Ch. 103; 73 L. J. Ch. 121; 52 W. R. 242; 89 L. T. 680; 20 T. L. R. 140; 11 Manson, 60—C. A.

**(f) Validity.**

106. *Unauthorised Issue—Bonâ fide Holder for Value—Validity—Prevalence over Execution Creditor*].—The memorandum of association allowed the company to borrow money on debentures. A debenture-holder advanced money to the amount of £519, and he received in respect of such advance a debenture. The seal of the company was affixed, and the debenture purported to be signed by two directors, though none were appointed and no resolution passed to issue debenture. The debenture-holder acted in good faith, and without notice of the circumstances under which the debenture was issued. On an interpleader issue between the debenture-holder and an execution creditor.

HELD—that the debenture-holder was entitled to judgment, as it was not incumbent on him to inquire whether the persons pretending to sign as directors had been duly appointed.

DUCK v. TOWER GALVANIZING CO., [1901] 2 K. B. 314; 70 L. J. K. B. 625; 84 L. T. 847—  
Div. Ct.

## X. DEEDS OF ARRANGEMENT.

107. *Non-Registration — Construction — "Creditors Generally"*—*Deeds of Arrangement Act, 1887* (50 & 51 Vict. c. 57), s. 4 (2) (b).—The Deeds of Arrangement Act, 1887, does not apply to limited companies registered under the Companies Act—deeds of arrangement by such companies are dealt with by sect. 164 of the Companies Act, 1862.

A deed was executed by (1) a company, (2) a trustee, and (3) "the persons named in the schedule hereto (creditors)"; by the deed the company agreed to pay a weekly sum to the trustee in order to pay "the creditors the whole of their claims."

HELD—that the agreement was intended to be for the benefit of creditors generally, and that any creditor might come in and take advantage of it.

*General Furnishing Co. v. Venn* (1863) 32 L. J. Ex. 220; 2 H. & C. 153 applied.

IN RE RILEYS, LD.; *HARPER v. RILEYS, LD.*, [1903] 2 Ch. 590; 72 L. J. Ch. 678, 51 W. R. 681, 10 Manson, 315, 89 L. T. 529—Byrne, J.

## XI. DEFUNCT COMPANY.

108. *Neglect to Make Returns—Striking Name off Register—Application to Court to Restore Name—Companies Acts, 1862* (25 & 26 Vict. c. 89), ss. 26, 45, 1880 (43 Vict. c. 19), s. 7; and 1900 (63 & 64 Vict. c. 48), ss. 19, 26.—Where a company neglects to send to the Registrar of Joint Stock Companies the annual return required by sect. 26 of the Companies Act, 1862, as amended by sect. 19 of the Companies Act, 1900, and the Registrar strikes the name of the company off the register under sect. 7, sub-sect. 4, of the Companies Act, 1880, as a defunct company, the Court, upon an application under sect. 7, sub-sect. 5, of the Act of 1880 to restore the name to the register, has no power to impose a penalty as a condition of restoring the name.

By sect. 7, sub-sect. 4, of the Act of 1880, the effect of striking the name of a company off the register is to dissolve the company, but the personal liability of its officers for the engagements made as its agents is preserved, and the mere restoring of the name to the register does not relieve them from that liability. To relieve them from liability the Court must make an order under sect. 7, sub-sect. 5.

IN RE BROWN BAYLEY'S STEEL WORKS, LD., [1905] 21 T. L. R. 374—Buckley, J.

## XII. DIRECTORS.

### (a) General.

And see BANKERS AND BANKING, 80, 34; LIMITATION OF ACTIONS, 2.

109. *Agreement to Employ Managing Director—Commencement and Nature of Services—Regard to the Interests of the* B.D.—VOL. I.

*Company—Statute of Frauds* (29 Chas. 2, c. 3), s. 4].—An agreement on February 27th, 1899, was entered into for and on account of a company to be registered to employ A. W. J. as joint managing director of the company for a term of five years at a certain salary. On the same day the company was registered. A. W. J. was one of the signatories of the memorandum of association. On March 11th, 1899, A. W. J. and the only other director met and passed a resolution that the agreement of February 27th, 1899, should be approved, and it was signed and sealed.

HELD—that as the agreement did not show when the employment was to commence, it was not sufficient within the Statute of Frauds, that it was also insufficient on the ground that nothing definite was said in it as to the nature of the services to be performed, and as there was no reference to the articles of association, they could not be referred to to show what the services of a managing director were; that as there was no evidence that in making the agreement regard was had to the interests of the company, it did not bind the company.

IN RE ALEXANDER'S TIMBER CO., (1901) 70 L. J. [Ch. 767, 8 Manson, 392—Wright, J.

110. *"Being a Director"—Larceny Act, 1861* (24 & 25 Vict. c. 96), ss. 81, 83.—To convict a person of offences as a director of a public company within sects. 81 and 83 of the Larceny Act, 1861, it is not enough to prove that such person acted as a director of the company; it must be proved that he was properly appointed such director.

REG. v. ATKINS, (1900) 64 J. P. 361—The Recorder, C. C. Ct.

111. *Bonâ fide Acts of de facto Directors—One really Disqualified—Subsequent Discovery of Defect—Validity—Companies Act, 1862* (24 & 25 Vict. c. 89), s. 67].—B., a director of a company, was appointed secretary to it; and, by one of the articles of association, he thereby vacated his office of director, as the consent of a general meeting was not asked before his acceptance of the post of secretary.

He, nevertheless, continued in good faith to act as director, and, on one occasion, he and a co-director (two forming a quorum) elected an additional director; and the question now arose whether such election was valid.

The company's articles of association contained the usual "common-form" article, validating acts done at a meeting of directors, notwithstanding the subsequent discovery of any defect in the appointment or qualifications of all or any of them.

HELD—(1) that this article applied, although the facts giving rise to the defect were, in one sense, not "subsequently discovered," for they appeared in the minute-book at the time, and

**Directors—Continued.**

(2) that it rendered valid the election of the additional director.

*Dawson v. African Consolidated Land and Trading Co.*, ([1898] 1 Ch. 6; 67 L. J. Ch. 47; 46 W. R. 162; 77 L. T. 392; 4 Manson, 372—C. A., No. 116, *infra*) followed.

*BRITISH ASBESTOS CO., LD. AND OTHERS v. BOYD [AND OTHERS]*, (1903) 51 W. R. 667; 88 L. T. 763; 73 L. J. Ch. 31; 11 Manson, 88—Farwell, J.

112. *Contract—Directors agreeing to Purchase Shares from Another Company—All Directors Shareholders in and Directors of the other Company—Articles of Association—No Director to Vote in Respect of a Contract in which he is Interested—Agreement not Binding.*—By the articles of association of a company, no director was to vote "in respect of any contract or arrangement in which he is so interested as aforesaid"; but a director might have an interest in contracts made with the company, provided he disclosed his interest, it being sufficient for him to give a general notice "that he is interested, or that he, being a member of any specified firm or company, is to be regarded as being interested in any contract made with such firm or company."

**HELD**—that a director of B. company, being also a shareholder of G. company, was interested in, and could not validly vote for, a contract for the purchase of shares by B. company from G. company.

Therefore, a contract made on behalf of B. company at a board meeting by three of its directors for the purchase of shares from G. company was held invalid, because all three directors were also shareholders in, and directors of, G. company.

*IN RE BRITISH NORTH AMERICA CORPORATION, [LD.]*, [1903] 19 T. L. R. 662—Buckley, J.

113. *Duty of Directors—Preparation of Accounts by Cashier—Duty of Chairman to Detect Misstatements in Accounts.*—The defendant was the president of a banking company in Quebec which was constituted by a Canadian statute, and he was paid a salary as president. The cashier of the bank was the principal executive officer under the directors, and he improperly allowed overdrafts to certain customers, which caused losses. The cashier prepared the accounts, which were periodically submitted to the defendant and the other directors, and these accounts were duly audited. The accounts were so framed as not to disclose the fact that the totals included unauthorised overdrafts. There was nothing to show that the defendant or the other directors had any reason to suspect or distrust the cashier.

**HELD**—that the defendant was not liable on the ground of negligence for having, in the circumstances, trusted the regularly authorised officer of the company, and having failed to detect his concealment of the overdrafts.

*Dovey v. Cory* ([1901] A. C. 477; 70 L. J. Ch. 753; 85 L. T. 257; 50 W. R. 65; 8 Manson, 346—H. L., No. 124, *infra*) followed.

*PREFONTAINE v. GRENIER*, [1907] A. C. 101; 76 [L. J. P. C. 4; 95 L. T. 623; 23 T. L. R. 27; 13 Manson, 401—P. C.

114. *One Company Sole Director of Another Company—Ultra vires*—It is not *ultra vires* for a company to have no directors or to have another company as its sole directors or managers

*IN RE BULAWAYO MARKET AND OFFICES CO., LTD.*, [1907] 2 Ch. 458; 76 L. J. Ch. 673; 23 T. L. R. 714—Warrington, J.

115. *Person ceasing to be, but acting as Director—Statement of Affairs—Jurisdiction of County Court—Companies (Winding Up) Act, 1890 (53 & 54 Vict. c. 63), s. 7, ss. 1, 2, 5.*—A person is a director within the meaning of sect. 7 of the Companies (Winding Up) Act, 1890, notwithstanding that he has legally ceased to be a director, if he has in fact acted as such within one year before the order for the winding-up of the company; and, therefore, liable to furnish the statement of affairs required by that section. A County Court judge has jurisdiction to order a director to make out and furnish such a statement, for the special provision for a penalty contained in sub-sect. 5 of the above section is not inconsistent with the inherent power of the Courts to enforce compliance with the Act. The sub-section is not exclusive of the jurisdiction of the Court to make such an order.

*NEW PAR CONSOLS, IN RE* (No. 1), [1898] 1 Q. B. [573; 67 L. J. (Q. B.) 595; 5 Manson 273—Div. Ct.

**(b) Appointment.**

116. *Defect in appointment—Clause in Articles as to—Call made by Directors—Validity—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67.*—A clause in the articles of association of a company—that all acts done at any meeting of the directors, or by any person acting as a director, shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they, or any of them, were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director—applies to transactions between the company and the shareholders as well as to transactions between the company and strangers; and consequently a call made by directors whose appointment is defective will be validated by that clause.

*The Howbeach Coal Company v. Teague* (2 L. T. Rep. 187; 5 H. & N. 151) discussed.

Decision of Ridley, J., sitting as vacation judge, reversed.

*DAWSON v. AFRICAN CONSOLIDATED LAND AND [TRADING CO.]*, [1898] 1 Ch. 6; 67 L. J. Ch. 47; 77 L. T. 392; 4 Manson 372; 14 T. L. R. 30; 46 W. R. 132—C. A.

**Directors—Continued.**

**117. Defective Appointment—Validity of Acts done as Directors—Articles of Association.]**—A company's articles of association provided *inter alia* that all acts done at any meeting of directors, or by any person acting as a director, should be valid notwithstanding any appointment being defective, and that no person not being a retiring director should, unless recommended by the directors for election, be eligible for election as a director unless fourteen days' notice of his candidature should have been given.

On May 27th B. was elected by the board a director of the company: the appointment was in fact defective, but B. was not aware of this fact. On September 23rd two other directors, D. and H., requested B. in writing to accept their resignation, this being done in pursuance of an agreement between them and B. and the fourth director S. On September 26th B. caused notices to be sent out calling a general meeting for October 5th in order to fill up the vacancies.

At the meeting B. was formally elected a director and W. and M. were elected to fill the vacancies in accordance with the arrangement between B., S., D. and H. Subsequently D. and H. purported to withdraw their resignations, claimed that B., W. and M. were not directors, and that they were entitled to act as such with S.

**HELD**—(1) that the resignations were effective without any acceptance, or alternatively that they were accepted at once by arrangement with the other directors;

(2) that B. honestly believed himself to be a director when he sent out the notice of September 26th, that S. subsequently adopted and concurred in it, and that therefore it was validly issued by two directors; and

(3) that on October 5th B., W. and M. had all such a recommendation from directors as entitled them to be elected; B. having already been appointed by the Board, and W. and M. being proposed in accordance with the arrangement between the original directors.

*British Asbestos Co. Ltd. v. Boyd*, [1903] 2 Ch. 439; 73 L. J. Ch. 31; 51 W. R. 667; 88 L. T. 763—Farwell, J., No. 111, *supra*), and

*In re Haycraft Gold Mining and Reduction Co.* ([1900] 2 Ch. 230; 69 L. J. Ch. 497; 83 L. T. 166; 7 Manson, 243—Cozens-Hardy, J., No. 486, *infra*), discussed.

*TRANSPORT, LD., v. SCHONBURG*, (1905) 21 [T. L. R. 305—Warrington, J.

**118. Validity of Appointment.]**—A company's articles of association provided that the number of directors should be not less than three or more than seven; that casual vacancies on the board might be filled up by the other directors; and that if at any general meeting, at which directors ought to be elected, the places of retiring directors were not filled up, the retiring directors should continue in office, "unless it shall be

determined at such meeting to reduce the number of directors."

At the date of the annual meeting in June, 1903, one of the five directors was dead, and a resolution was moved without previous notice, and carried, to the effect that A. and B. be not re-elected and that the two vacancies be not filled up, and that the number of directors be reduced accordingly.

**HELD**—that, as the two directors remaining had power to fill up the vacancy due to death, the constitution of the company had not been altered by reduction of the number to less than three directors, and that the resolution was valid; and that, therefore, two new directors elected at a subsequent meeting after due notice were validly appointed, the seats of A. and B. being vacant.

*Munster v. Cammell Co.* ((1882) 21 Ch. D. 183; 51 L. J. Ch. 731; 30 W. R. 812, 47 L. T. 44—Fry, J.) followed.

*BENNETT BROS., LTD. v. LEWIS AND OTHERS*, [1904] 20 T. L. R. 1—C. A.

**119. Notice of Meeting—Companies Act]**—A company was registered on February 17th, 1897, under the Companies Acts, and on February 18th a meeting of the subscribers to the memorandum of association was held, at which one of the subscribers was appointed a director, and he afterwards acted as such. By the articles of association of the company, Table A. of Schedule I. to the Companies Act, 1862, so far as it dealt with the appointment of the first directors, was expressly excluded, but the articles contained no provisions in substitution therefor. By the articles seven days' notice of any meeting was necessary. The person so appointed as a director assigned to the plaintiff the fees alleged to be due to him as such.

**HELD**—that as seven days' notice of the meeting was not and could not have been given, the appointment of the director was invalid, and neither he nor his assignees could sue the company for his fees, or upon a *quantum meruit* for services rendered.

*WOOLF v. EAST NIGEL GOLD MINING CO., LTD.*, [1905] 21 T. L. R. 660—Kennedy, J.

**120. Informal—Validity.]**—So long as the articles of association are complied with, a director may be appointed in an informal manner, *e.g.*, elsewhere than at the offices of the company.

*SMITH v. PARINGA MINES, LTD ; PARINGA MINES [LTD. v. BLAIR*, [1906] 1 Ch. 193; 75 L. J. Ch. 702, 94 L. T. 571; 13 Manson, 316—Kekewich, J.

**(c) Fiduciary Relation.**

**121. Purchasing Shares from Shareholder—Negotiations for Sale of Company's Under taking on Foot—Obligation to Disclose.]**—Where shareholders approach the directors of a company with the view of selling their shares to the directors, the purchasing

**Directors—Continued.**

directors are under no fiduciary obligation to disclose to their vendor shareholders that negotiations for the sale of the company's undertaking are on foot.

PERCIVAL v WRIGHT, [1902] 2 Ch. 421; 71 L. J. [Ch. 846, 51 W. R. 31, 18 T. L. R. 697; 9 Manson 443—Eady, J.

122. *Secret Profits—Contracts with Company—Director's Interest in Contracts—Disclosure—Voting.*—A man in a fiduciary relation who makes "secret profits" is bound to give them up to the principal for whom he is acting. The articles of association of a railway company provided for the vacation of his office by a director concerned or participating in the profits of any contract with the company unless he declared in writing the nature of his interest, but that "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with, or done any work for, the company, or by reason of his being interested either in his individual capacity or as a member of any company, corporation or partnership, in any adventure or undertaking in which the company may also have an interest," and that "no director shall vote on any question in which he has a personal interest apart from the members at large."

HELD—that having regard to the above articles, a director who had not voted or joined in any vote about such contracts, was not liable to account for profits received by him as shareholder and partner arising out of contracts with another company or partnership in which he was a shareholder or partner, as the company had had every disclosure that was material to them to know with reference to the interest of the director and to any conflict of duty that might arise from that interest.

*Imperial Mercantile Credit Association v Coleman* ((1871) L. R. 6 Ch. 558; 40 L. J. Ch. 262; 18 W. R. 570, 24 L. T. N. S. 290—Lord Hatherley, L.C.) followed.

Decision of Byrne, J. ([1900] 1 Ch. 756; 69 L. J. Ch. 408; 48 W. R. 553; 83 L. T. 19), affirmed.

COSTA RICA Ry. Co., Ltd v. FORWOOD, [1901] 1 [Ch. 746, 70 L. J. Ch. 385; 49 W. R. 337; 84 L. T. 279; 17 T. L. R. 297; 8 Manson, 374—C. A.

**(d) Misfeasance.**

See also Sect. XIII. DIVIDENDS (b) Payment out of Capital.

123. *Breach of Duty—Unauthorised Payment of Capital to Shareholders—Liability of Shareholders to Refund the Directors after a Winding-up Order.*—The directors of a company owning ships having received a sum of money under a policy of insurance of one of the ships which had become a total loss, distributed the money among the share-

holders in the company, with their knowledge and consent. An order was made in the winding-up, under sect. 10 of the Companies Act, 1890, declaring that the payments to the shareholders were payments in reduction of the capital of the company and were unlawful, and the directors were ordered to repay the amount to the liquidator. This order was made without prejudice to the right of the directors to be recouped by the shareholders.

HELD—that the directors were entitled to recover from the shareholders the money paid to them.

Judgment of Divisional Court ([1899] 1 Q. B. 480; 68 L. J. Q. B. 283; 47 W. R. 282; 80 L. T. 356, 15 T. L. R. 180; 6 Manson, 120) affirmed.

MOXHAM v. GRANT, [1900] 1 Q. B. 88; 69 [L. J. Q. B. 97; 48 W. R. 130, 81 L. T. 431; 16 T. L. R. 34—C. A.

124. *Improper Advances — Payment of Dividends out of Capital — Reliance of Director on Officers of Company—Duty of Director—Reasonable Care—Examination of Entries in Company's Books—Negligence—Treatment of Abstract Propositions by the Court*—Directors who are proved to have, in fact, paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account, such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements submitted to them.

The appellant sought to make the respondent liable (1) in respect of losses incurred by advances of money which he alleged that the respondent and the other directors of the bank negligently made to irresponsible persons, and without sufficient security, (2) in respect of advances to the directors themselves, which he alleged were made contrary to the express provisions of the articles of association; (3) in respect of sums paid to the shareholders (including the respondent himself) by way of dividend on their shares, which he alleged were paid out of the capital of the bank and not out of profits.

No imputation of dishonesty was made on the respondent, nor any imputation of moral obliquity imputed to him.

HELD—that the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it was not proved that he did not do so; that he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion; that he was not bound to examine entries in the company's books; that the



**Directors—Continued.**

appellant had not made out that the respondent wilfully misappropriated the company's funds in payment of dividends or was guilty of any breach of duty whatever.

Except as to some of the abstract propositions treated of by the Court of Appeal, their decision *sub nom In re National Bank of Wales, Ltd., Cory's Case* [1899] 2 Ch. 629, 68 L. J. Ch. 634; 48 W. R. 99; 81 L. T. 363, 15 T. L. R. 517) affirmed.

DOVEY v. CORY, [1901] A. C. 477, 70 L. J. Ch [753; 50 W. R. 65; 85 L. T. 257; 17 T. L. R. 732, 8 Manson, 346—H. L. (E.)

**125. Improper Allotment of Shares—Measure of Damages—Stay of Proceedings under Judgment]**—Shares were improperly allotted to directors or their nominees.

HELD—that the directors were jointly and severally liable to make good to the company all moneys received by them, or either of them, or by any other person or persons by the order, or for the use of them or either of them in respect of all the shares improperly allotted, which had been disposed of by them respectively, or their respective nominees, in excess of the moneys received by the company in respect of the shares so disposed of, and that they were jointly and severally liable to pay to the company the excess (if any) of the market value on the dates of the respective allotments of the shares.

Proceedings under a judgment should not be stayed, pending an appeal, unless on special grounds.

SHAW v. HOLLAND, [1900] 2 Ch. 305; 69 [L. J. Ch. 621; 48 W. R. 681, 82 L. T. 782—C. A.

**126. Improper Payment to Director for Services—Payment in Excess of Director's Expenditure—Ultra vires—Liability of Co-directors.]**—A director claimed for alleged services rendered by him to the company in excess of his expenditure. He did not render any services beyond those rendered by him in his capacity of director, or any for which he was entitled to be paid by the company any sum outside his ordinary remuneration as director.

HELD—that in paying the director the moneys in excess of his expenditure his co-directors had not acted as men with any ordinary degree of prudence would have acted on their own behalf, and had been guilty of such negligence and misconduct as to make them liable to the company.

MERCHANTS' FIRE OFFICE, LD. v. ARMSTRONG, [1901] 17 T. L. R. 709—C. A.

**127 Injunction to Restrain Director from carrying out an unfair Transaction.]**—The plaintiffs appealed from an order of Mr. Justice North refusing a motion by the plaintiffs who were holders of vendors' shares, and who were suing both on their

own behalf and on behalf of the fully paid-up shareholders, to restrain the defendant company and its directors till the trial of the action from completing a purchase of shares in another company which had been authorised by resolution. On it appearing that the terms of the proposed purchase would give an advantage to one set of shareholders against another, the Appeal Court granted an injunction to restrain the defendants till the trial from carrying out the resolution to buy the shares

KERRY v. MAORI DREAMGOLD Co., (1898) 14 [T. L. R. 402—C. A.

**128 Misfeasance Summons—Directors found Guilty of Breach of Duty—No Resulting Loss to Company—Directors Ordered to Pay Costs of Summons—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 165]**—The liquidator of a company took out a misfeasance summons asking that it might be determined whether sums drawn out on cheques signed by two directors in favour of a third had been expended *ultra vires*, and if so that the three directors should repay the same.

It was found that the directors had been guilty of gross neglect and breach of duty, but that no loss had resulted to the company as the amounts had been refunded.

HELD—that though the liquidator had established no money claim, there was jurisdiction to order the directors to pay the costs of the summons.

IN RE DAVID IRELAND & Co., [1905] 1 Ir. R. [133—C. A.

**(e) Prospectus.**

See also Sect. XX. PROSPECTUS (b).

**129. Fraud—Rescission of Contract to take Shares—Joinder of Bankrupt Director—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38—Directors Liability Act, 1890 (53 & 54 Vict. c. 64)]**—An action was brought by a shareholder of a company claiming as against the company rescission of his contract to take shares, and claiming as against a promoter and director of the company a declaration that the prospectus was fraudulent, and damages under sect 38 of the Companies Act, 1867, and also compensation under the Directors Liability Act, 1890.

HELD—that the action against the company was distinct from the action against the director, and that the former could very well go on by itself.

GREENWOOD v. HUMBER & Co. (PORTUGAL), LD., [1899] 6 Manson, 42—Romer, J.

**130. Liability—Repudiation—Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3.]**—The expression "prospectus" in the Directors Liability Act, 1890, means the prospectus on the faith of which shares or debentures are taken. A person who assumes the

**Directors—Continued.**

post of director of a company and is aware of the issue of a prospectus, does not escape from his liabilities under the Directors Liability Act, 1890, by abstaining from making an inquiry as to its contents; he must give public notice of his repudiation of such prospectus, and it will not be sufficient for him to repudiate it after action brought.

DRINCQUIER v. WOOD, [1899] 1 Ch. 393; 68 [L. J. Ch. 181; 47 W. R. 252; 79 L. T. 548; 15 T. L. R. 18; 6 Manson, 76—Byrne, J.

131. *Statement in Prospectus that Directors would take Shares—Indefinite Agreement.*—A prospectus of a company, approved by the directors at their first meeting and issued, stated that the whole of the ordinary shares not taken by the vendors to the company would be taken by the directors. The register of shareholders did not contain the names of any of the directors, nor were any shares allotted to them. In the winding up of the company the liquidator applied for a balance order against B, one of the directors, in respect of 367 unallotted ordinary shares.

HELD, by the Court of Appeal (reversing Wright, J.)—that there was no evidence of an agreement by B. to take any definite number of shares, and that therefore he was not liable to be put on the list of contributors either on the ground of agreement or on the ground of estoppel.

IN RE MOORE BROTHERS & CO., LD., [1899] 1 Ch. [627; 68 L. J. Ch. 302; 47 W. R. 401; 80 L. T. 104; 15 T. L. R. 192; 6 Manson, 290—C. A.

132. *Untrue Statements—Directors Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3—*Civil Procedure Act, 1833* (3 & 4 Will. 4, c. 42), s. 3.—An action for compensation for loss or damage sustained by a shareholder in a company by reason of untrue statements in a prospectus under sect. 3 of the Directors Liability Act, 1890, is not an action "for penalties, damages, or sums of money given to the party grieved" within the meaning of sect. 3 of the Civil Procedure Act, 1833, and consequently need not be brought within two years after the cause of action accrued.

THOMSON v. LORD CLANMORRIS, [1899] 2 Ch. [528; 68 L. J. Ch. 727; 48 W. R. 39; 81 L. T. 286; 15 T. L. R. 502—Kekewich, J.

133. *"Untrue Statements"—Misleading Statements—Notice of Contract—"Fraudulent" Prospectus—Tricky Waiver Clause—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38—*Directors Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3, sub-s. 1.—The object of the Directors Liability Act, 1890, was to remove the defect in the law brought to light by the decision of the House of Lords in *Derry v. Peek* ((1889) 14 App. Cas. 337; 58 L. J. Ch. 864; 38 W. R. 33; 61 L. T. 265; 1 Meg. 292—H. L. (E.)), and to impose upon those who

issue prospectuses the duty to take reasonable care not to make untrue statements.

A statement in a prospectus is untrue if it is distinctly misleading.

A prospectus which does not comply with the first half of sect. 38 of the Companies Act, 1867, is to be deemed fraudulent, as between the persons issuing it, on the one hand, and all persons taking shares on the faith of it, on the other, except only in one case, namely, if they have notice of the contract, of which some particulars have to be given in compliance with the first part of the section. Notice in the section means, not what is called "constructive notice," but actual notice, that is, notice which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly, and in a business sense, amounts to notice of a contract.

The introduction into the prospectus of a tricky waiver clause, instead of preventing the prospectus from being deemed fraudulent, affords an additional reason for holding it to be so in fact.

Judgment of Kekewich (80 L. T. 462) affirmed.

GREENWOOD v. LEATHER SHOD WHEEL CO., [1900] [1 Ch. 421; 69 L. J. Ch. 131; 81 L. T. 595; 16 T. L. R. 117—C. A.

**(f) Powers.**

134. *Postponing Ordinary General Meeting—Extraordinary Meeting—Business of Ordinary Meeting at.*—Directors of a company have (apart from special provision in the articles) no power to postpone an ordinary general meeting of shareholders: the chairman, with the consent of the meeting, can adjourn it.

Where the articles provide that ordinary general meetings are to be held in specified months, the directors may nevertheless call extraordinary meetings at other times, at which meetings the business of ordinary meetings may be transacted.

SMITH v. PARINGA MINES, LD.; PARINGA MINES [LD. v. BLAIR, [1906] 2 Ch. 193, 75 L. J. Ch. 702; 94 L. T. 571; 13 Manson, 316—Kekewich, J.

135. *Refusing to Carry out Shareholders' Order—Sale of Company's Assets—Ordinary Resolution of Company—Refusal of Directors to Comply with Resolution.*—A limited company had, by its memorandum of association, power to sell its undertaking or any part thereof. By one of the articles of association the company might by special resolution remove any director and appoint another person in his place. By another article the management of the business of the company was vested in the directors, who might exercise all such powers and do all such acts as might be exercised or done by the company, and were not thereby or by statute expressly directed or required to be exercised or done by the company in general meeting,

**Directors—Continued.**

subject, nevertheless, to such regulations, not being inconsistent therewith, as might be made by extraordinary resolution. By another article, without prejudice to the general powers conferred by the last-mentioned article and to the other powers and authorities conferred as aforesaid, the directors were entrusted with the power to sell any property, rights, or privileges to which the company might be entitled on such terms and conditions as they might think fit. At a meeting of the shareholders of the company a resolution was carried by a simple majority for the sale of the company's assets to a new company. The directors, being of opinion that the sale would not be in the interests of the company, refused to comply with the resolution.

**HELD**—that it was not competent for the company by a simple majority at an ordinary meeting to compel the directors to carry out the sale. If the mandate to the directors, which was that of all the shareholders, was to be altered, it could only be altered in the manner provided by the articles.

**AUTOMATIC SELF-CLEANSING FILTER SYNDICATE**  
[Co., *LD. v. CUNINGHAME*, [1906] 2 Ch. 34;  
75 L. J. Ch. 437; 94 L. T. 651; 22 T. L. R.  
378, 13 Manson, 156—C. A.]

**136 Sending Out Stamped Proxies to Shareholders—Payment out of Funds of Company—Ultra vires.**—The directors of a railway company, whose policy is attacked, are entitled to send out circulars, stamped proxy forms with the names of certain persons inserted therein as proxies, and stamped envelopes for return postage to shareholders, explaining their policy and asking for the shareholders' support at the ensuing meeting of the company, and to pay the costs thereof out of the funds of the company, if they honestly believe that their policy is for the benefit of the company. Such an expense is fairly and reasonably incidental to or consequential on the business expressly authorised by the Acts under which the company was incorporated.

*Studdart v. Grosvenor* ((1886) 33 Ch. D. 528; 55 L. J. Ch. 689; 50 J. P. 710, 34 W. R. 754; 55 L. T. 171, 2 T. L. R. 811—Kay, J.) not followed.

*Pickering v. Stephenson* ((1872) L. R. 14 Eq. 822; 41 L. J. Ch. 493; 26 L. T. 603; 20 W. R. 654) explained.

**PEEL V. LONDON & NORTH-WESTERN RAILWAY**  
[COMPANY, [1907] 1 Ch. 5; 76 L. J. Ch. 152;  
95 L. T. 897, 23 T. L. R. 85; 14 Manson, 30—  
C. A.]

**(g) Qualification.**

**137 Director's Qualification Increased—Director "Ceasing to Hold Necessary Qualification"—Signing Share Prospectus—Binding Contract to Acquire Qualification—Resignation of Office—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 3, sub-s. 2.]**—The

plaintiff was appointed a director of the defendant company in May, 1889, and held throughout 50 £1 shares in his own right, the qualification of a director. He at one time held 200 shares, but he sold 50 to a third person and transferred 100 to his brother, apparently as trustee for himself. The capital of the company was duly increased from £10,000 to £100,000, and the directors' qualification increased to 250 shares, and the articles altered so as to make the plaintiff a life director. The plaintiff was present at all the meetings held for these purposes. On April 22nd, 1901, the plaintiff signed the share prospectus, in which his name appeared as one of the directors. On April 20th the secretary and manager had entered the plaintiff's name on the register in respect of 200 shares, making with his original 50 his qualification. On April 26th the plaintiff wrote to the secretary saying that if the secretary could obtain a purchaser of the plaintiff's 200 shares at 10s. he should be pleased to hand the secretary £5 and resign his seat. On May 16th the plaintiff sent in his resignation of the office of director.

**HELD**—that the plaintiff did not "cease" to hold 250 shares on April 19th, 1901, the date at which a general meeting was held at which the resolutions were passed for increasing the capital within the meaning of sect. 3, sub-sect. 2, of the Companies Act, 1900; and that a person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, and acts as director, must be held to have contracted with the company that he will, within a reasonable time, obtain the requisite shares, either by transfer from existing shareholders or directly from the company, and if he has not obtained the shares within a reasonable time from the public, the company are authorised to put him on the register in respect of the shares; that where a director takes an active part in the scheme for increasing the qualification, the time runs before the date of the second or confirmatory resolution or at the latest on the first occasion when he does an important act as director after that date; that, therefore, the plaintiff was bound to have acquired his qualification before signing the prospectus on April 22nd, 1901, as this was a statutory duty imposed upon him as director by sect. 9, sub-sect. 2, of the Act of 1900, and was a solemn assertion that he was a duly qualified director; that the insertion of his name on the register on April 20th must be deemed to have been authorised; and that there was a binding contract prior to May 16th, the date of the plaintiff's resignation, and he could not, by his own sole act, release himself from its obligation.

**MOLINEUX V. LONDON, BIRMINGHAM AND MAN-**  
[CHESTER INSURANCE CO., [1902] 2 K. B. 589;  
71 L. J. K. B. 848; 51 W. R. 36; 87 L. T.  
324; 18 T. L. R. 783—C. A.]

**Directors—Continued.**

**138. Holding Shares "in his own Right"—Director an Undischarged Bankrupt—Shares claimed by Trustee in Bankruptcy—Charging Order—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14.]**—Where the articles of association provide that the qualification of a director shall be the holding "in his own right" a certain number of shares, he need not be the beneficial owner of them, but he must be a person who holds the shares in such a way that the company can safely deal with him in respect of the shares, whatever his interest may be in the shares. Holding in a representative character will not do. Holding as trustee without beneficial ownership will do.

In 1888 the plaintiff was adjudicated a bankrupt, and he was never discharged. In 1901 the defendant company was incorporated and by its articles of association the plaintiff was appointed a first director, whose qualification was the holding "in his own right" 100 shares. The plaintiff was and on April 25th, 1902, continued to be, the holder of 1,000 shares, and on that day he was excluded from the board upon the ground that he had become disqualified. The trustee on April 14th, 1902, had claimed the shares as his, but had postponed for a few days his decision as to whether he would require to be registered himself or elect to have some person nominated by him registered as transferee. On April 28th, 1902, a transfer in the plaintiff's favour of 100 shares was executed and lodged for registration.

**HELD**—that the company could not have safely dealt with the plaintiff in disregard of the claims of the trustee; that the plaintiff (although he had a beneficial interest in case his estate proved to be solvent) was not on April 25th the holder "in his own right" of the 1,000 shares; that he had thereby become disqualified and his office of director was vacated; and that as the trustee had not raised any objection to the registration of the transfer of the 100 shares, an order for rectification of the register must be made.

**HELD ALSO**—that the words "in his own right" for the purpose of qualification, and the same words for the purpose of a charging order under sect. 14 of the Judgments Act, 1838, have not the same meaning, as under sect. 14 the shares to be charged are to be shares in which the judgment debtor has a beneficial interest.

**SUTTON v. ENGLISH AND COLONIAL PRODUCE CO.**, [1902] 2 Ch. 502; 71 L. J. Ch. 685; 50 W. R. 571; 87 L. T. 438; 18 T. L. R. 647; 10 Manson, 101—Buckley, J.

**139. "In his own Right"—Income Tax on Directors' Fees—Meeting Convened by de facto Directors—Ratification of Acts Contrary to Articles—Notice Convening Meeting—Special Business.]**—By the articles of association of a company the qualification of a director was the holding "in his own right"

of at least 250 shares of the company. The defendant was registered as the holder of 250 shares as "liquidator of" another company.

**HELD**—that the defendant did not hold the shares "in his own right," and was therefore not qualified to be appointed a director.

Payment by the directors out of the company's funds of the income tax on the directors' fees is inadmissible unless expressly authorised by the articles of association.

Resolutions passed by a general meeting are not invalidated by any irregularity in the constitution of the board.

Articles fixing directors' fees and qualification are binding on the company, and, without first altering them by special resolution, the company cannot ratify an act of the directors which contravenes them.

A notice convening a general meeting of the company was sent out with the report of the directors; the report stated (but the notice did not state) that "you will be asked to ratify the election of R. as a director."

**HELD**—that this was sufficient notice to the shareholders of the intention to bring before the meeting the ratification of the previous election of R. by the other directors.

**BOSCHOEK PROPRIETARY CO., LD. v. FUKU**, [1906] 1 Ch. 148; 75 L. J. Ch. 261; 54 W. R. 359; 94 L. T. 398; 22 T. L. R. 196; 13 Manson, 100—Eady, J.

**140. Vacation of Office—Remuneration—Apportionment.]**—The terms of the implied agreement between a director who has accepted office and acted, and the company—viz., on his part to serve the company on the terms of the articles, and on the company's part that he shall receive the remuneration provided by the articles—are cross-contracts, and are not interdependent. An article providing that the office of a director shall be vacated if he cease to hold the due qualification, does not apply to the case of a qualification never possessed. An article providing a sum for the remuneration of the board in each year applies to every member of the board, including a *de jure* director who has not acquired his qualification shares under the articles. The omission to apply for and obtain such shares from the company is not such a breach of duty as to constitute a defence to any claim for remuneration. Where the articles provide a sum for the remuneration of the board "in each year," no remuneration can be claimed except for a complete year, and there is no apportionment in respect of an incomplete year.

**SALTON v. NEW BREESTON CYCLE CO.**, [1899] 1 Ch. 775; 68 L. J. Ch. 370; 47 W. R. 462; 80 L. T. 521—Cozens-Hardy, J.

**(h) Quorum.**

**141. Council of Administration—Loan from Bank—Payment by Member of Council—Proof in Winding-up.]**—By one of the articles of association of a company limited

*Directors—Continued.*

by shares, which was managed by a council of administration, the number of members of the council was not to be less than three, and, by another article, the continuing council might act notwithstanding any vacancy; and by another article the council might determine the quorum necessary for the transaction of business. At a time when the members of the council were reduced to two, the company overdrew its account at its bankers, who held securities given in the name of the company by the two members of the council. The bankers, who had no notice of the defect, demanded payment of the overdraft, and one of the members of the council paid off the amount and took a transfer of the securities. The company having gone into liquidation, the member of the council claimed to prove for the sum which he had paid the bankers. For several years the business of the company was conducted by two members of the council without regard to any resolution as to a quorum.

HELD—that the irregularity of the proceedings did not affect third parties, and that the bank's claim for payment of the overdraft was valid.

*In re Scottish Petroleum Co.* ((1883) 23 Ch. D. 413, 31 W. R. 846; 49 L. T. 318—C. A.) followed.

HELD ALSO—that the member of the council who paid off the amount was entitled to stand in the shoes of the bank.

Decision of Wright, J. ([1900] 2 Ch. 272; 69 L. J. Ch. 412; 83 L. T. 165), affirmed.

*IN RE BANK OF SYRIA, OWEN AND ASHWORTH'S CLAIM, WHITWORTH'S CLAIM*, [1901] 1 Ch. 115; 70 L. J. Ch. 82, 49 W. R. 100; 83 L. T. 547; 17 T. L. R. 84; 8 Manson, 105—C. A.

**142 Interested Directors—Validity of Resolution**—An article providing that "two directors shall be a quorum" means two directors competent to transact the particular business before the Board.

Therefore, where two out of three directors present when a certain resolution was passed, were on account of interest disqualified from voting upon it,

HELD—that the resolution was invalid.

*IN RE GREYMOUTH POINT ELIZABETH RY. AND [COAL CO., LD., YUILL v. THE CO.]*, [1904] 1 Ch. 32, 73 L. J. Ch. 92, 11 Manson, 85—Farwell, J.

(i) *Remuneration.*

**143. Fees—Annual Sum for Services—Apportionment—Contributory claiming as Creditor—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138.**—The articles of association of a company incorporated under the Companies Acts, 1862 to 1890, provided that "the directors shall be paid out of the funds of the company as follows, namely, a sum of £150 per annum to the chairman, and a sum of £100 per annum to each ordinary director, by way of remuneration for their ordinary services."

HELD—that the language of the articles did not allow apportionment, but really meant a sum for the entire year.

HELD ALSO—that a contributory has an interest which entitles him to be heard, notwithstanding he really claims as a creditor.

*IN RE CENTRAL DE KAAP GOLD MINES*, (1900) 69 [L. J. Ch. 18; 7 Manson, 82—Wright, J.

**144. "For each Year."**—A limited company was registered on the 25th March, 1896, with articles of association, one of which provided as follows "Each of the directors shall be paid out of the funds of the company by way of remuneration for their services £150 for each year." By another article S. B. was appointed one of the first directors, and he continued a director until the 28th May, 1897, when he was re-elected. From that time he continued to be a director until the 22nd March, 1900, when the company passed an extraordinary resolution for voluntary winding-up.

HELD—that S. B. was entitled to remuneration for the year ending 25th March, 1900, under the article which said he was entitled "for each year"

*IN RE SHAWES, BRYANT & Co.*, [1901] W. N. 124, [36 L. J. N. C. 308, 111 L. T. Jour. 157—Wright, J.

**145. Yearly Sum—Apportionment—Service for Period less than One Year.**—By one of the articles of association of a company the directors were to be paid, by way of remuneration for their services, the sum of £125 per annum, per director, and such further sums as should from time to time be determined by the company in general meeting, and the same was to be divided among them in such proportions and manner as the directors by agreement might determine, and in default of such determination equally. A director ceased to be a director before his fee for the year became payable, and sought to recover a proportionate part of such fee.

HELD—that the article referred to an annual distribution of the annual amount payable under the articles; that any director who went out of office before the end of the year had no claim to any part of the sum to be divided, and that the director was not entitled to recover a proportionate part for any less period than a year.

*Salton v. New Beeston Cycle Co.* ([1899] 1 Ch. 775; 68 L. J. Ch. 370; 47 W. R. 462; 80 L. T. 521; 6 Manson, 238—Cozens-Hardy, J., No. 140, *supra*), approved.

*Swabey v. Port Darwin Gold Mining Co.* ((1889) 1 Megone, 385—C. A.) distinguished.

Decision of Bruce, J. ((1900) 82 L. T. 621; 16 T. L. R. 379), affirmed.

*INMAN v. ACKROYD & BEST, LD.*, [1901] 1 Q. B. [613, 70 L. J. K. B. 450, 49 W. R. 369; 84 L. T. 344; 17 T. L. R. 293; 8 Manson, 291—C. A.

**146. Two Directors Appointed Receivers**

**Directors—Continued.**

*and Managers in a Debenture-holders' Action—Right of Two Directors to Remuneration, both as Directors and as Receivers and Managers.]*—Under the articles of association the directors had a right to be paid at the rate of £1,000 a year, which sum was always divided in such a way as to give the chairman £300 and each of the other directors £175. That was a subsisting contractual obligation down to the time when the company went into liquidation. Two of the directors were appointed by the Court in a debenture-holders' action to be receivers and managers of the company's assets and business, and the Court allowed them a remuneration for so acting. The company went into voluntary liquidation with a view to reconstruction of the company.

**HELD**—that the directors were entitled to remuneration under the articles of association from the time when two of their number were appointed receivers and managers until the company went into liquidation; and that the two who were appointed receivers and managers were entitled to their remuneration as such, and also to their shares in the remuneration given to the directors by the articles of association

**IN RE SOUTH WESTERN OF VENEZUELA (BARQUISIMETO RY. CO., [1902] 1 Ch. 701; 71 L. J. Ch. 407; 50 W. R. 300, 86 L. T. 321; 9 Manson, 193—Buckley, J.**

**147. Time for Payment—Condition Precedent—Power to Postpone or Anticipate Payment—Articles of Association—Interpretation.]**—By the articles of association of a company it was provided that "the directors shall be allowed to receive as a remuneration for their services, and there shall be allowed to them out of the funds of the company from the date of the incorporation of the company, the sum of £200 per annum each . . . and to be paid at such times as they may determine." At a meeting of the board a resolution was passed of which the minute was to the following effect: "With reference to the question of unpaid directors' fees, it was agreed, in view of the fact of the company being without funds, that the payment of the same should remain in abeyance for the time being."

**HELD**—that the words "and to be paid at such times as they may determine" imported a condition precedent to the right of the directors to be paid the remuneration mentioned in the articles of association; and that the directors had power to postpone or anticipate the period for payment, and most properly exercised that power.

**CARIDAD COPPER MINING CO. v. SWALLOW, [1902] 2 K. B. 44; 71 L. J. K. B. 601; 50 W. R. 565; 86 L. T. 699; 18 T. L. R. 601; 9 Manson, 336—C. A.**

**148. Travelling Expenses—Hotel Expenses—Articles of Association.]**—Unless its arti-

cles so provide, or the shareholders so resolve, directors of a company, who receive a salary, are not entitled to be reimbursed by the company for their travelling and hotel expenses incurred in attending board meetings.

By one of the articles of association of a company each director was to be paid £200 a year "by way of remuneration of his services." Another article provided for special remuneration to directors rendering special services or making special exertions in going abroad or otherwise for the purposes of the company. A third was an ordinary "indemnity" clause.

**HELD**—that a director was not entitled to be paid his travelling or hotel expenses incurred for the purpose of attending the board meetings, and must refund moneys received by him for such expenses; and further that he was liable to the company in respect of cheques signed by him for similar payments to other directors.

**YOUNG v. NAVAL AND MILITARY CIVIL SERVICE [CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LD., [1905] 1 K. B. 687; 74 L. J. K. B. 302; 53 W. R. 447; 92 L. T. 458; 21 T. L. R. 293; 12 Manson, 212—Farwell, J.**

**149. Special Remuneration for Extra Services—Capital Outlay—Articles of Association.]**—One of the articles of association of a company provided that, if any of the directors should be called upon to perform extra services on behalf of the company, the directors or the company might remunerate him or them by a fixed sum or by a percentage of profits or otherwise as might be determined. By another article the directors were empowered to give to any director a commission or a fixed sum on any particular business or transaction, or a share in the general profits of the company, which should be treated as working expenses or capital outlay of the company. The company in general meeting passed a resolution to pay to each of the directors for their services in effecting the sale of the company's business to another company the sum of £250 as a commission or fixed sum to be treated as capital outlay.

**HELD**—that the sums ought to be debited to profit and loss account, and not treated as a capital outlay.

**ASHTON & CO., LD. AND OTHERS v. HONEY AND [OTHERS, (1907) 23 T. L. R. 253—Parker, J.**

**150. Power of Directors to Grant—Action by Shareholder to Restrain.]**—Apart from any prohibition in the memorandum of association, a company may make a bargain with one of its directors to remunerate him for services rendered in the past, or to be rendered in the future, either by way of annuity or otherwise.

The memorandum of association of a company declared one of its objects to be to provide for the welfare of "persons in the employment of the company or formerly in

**Directors—Continued.**

their employment, and the widows and children of such persons and others dependent on them, by granting money or pensions"; and by the articles of association the business of the company was to be managed by the directors, who might exercise all such powers of the company as were not by the statutes or by the articles required to be exercised by the company in general meeting; and the directors' remuneration was to be £3,000, but the company might by resolution in general meeting grant to the directors additional remuneration.

**HELD**—that a director was not a "person in the employment of the company" within the meaning of the clause in the memorandum of association, and that the directors had no power to grant a director additional remuneration, either in the form of an annuity or otherwise.

**HELD FURTHER**—that, as it was within the powers of the company to do so, an action would not lie by a shareholder on behalf of himself and all other shareholders in respect of an act of the directors which, though without authority, could be adopted or confirmed by the company.

**NORMANDY v. IND, COOPE & Co, Ltd.,** (1907) 24 [T. L. R. 57—Kekewich, J.]

**151. Director Holding Qualifying Shares as Trustee—Claim by cestui que trust for the Remuneration.**—A director of a company receiving the remuneration authorised by its articles, receives it as payment for work done and not as profit derived from his qualifying shares, and he is not liable to account for it to the beneficial owner of his qualifying shares.

C., a director of the D. company, was put upon the board of the K. corporation to protect the interests of the D. company. His qualifying shares were provided out of a block already held by the D. company's chairman in trust for the company, and C. executed a declaration of trust in favour of the company. C., on ceasing to be a director of the K. corporation, retransferred the shares to the D. company; and subsequently that company was ordered to be wound up.

**HELD**—that its liquidator had no claim against C. in respect of the remuneration received by him for acting as a director of the K. corporation.

*Ex parte Beckwith* ([1898] 1 Ch. 324; 67 L. J. Ch. 164; 78 L. T. 155; 46 W. R. 376; 5 Manson, 168—Wright, J.) followed.

**Decision of Warrington, J.,** [1907] 2 Ch. 76; 76 L. J. Ch. 434; 96 L. T. 887; 14 Manson, 156—affirmed.

**IN RE DOVER COALFIELD EXTENSION, LD.,** [1908] 1 Ch. 65; 98 L. T. 31; 77 L. J. Ch. 94; 24 T. L. R. 52—C. A.

**(k) Vacation of Office.**

**152. Absence from Directors' Meetings—Remuneration—Resolution to Forego Fees—**

**Apportionment of Remuneration.**—By one of the articles of association of a company each of the directors was to be paid out of the funds of the company by way of remuneration for his services the sum of £300 per annum, and by another article the office of a director was to be *ipso facto* vacated "if he absents himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors," and "if he is requested by all his co-directors to resign."

McC. was appointed a director on 3rd August, 1898. He attended board meetings down to and including a meeting held on 3rd February, 1899, at which the directors, including himself, passed the following resolution: "That no remuneration be received by the directors for their services until a dividend is declared on the ordinary shares of the bank." The next meeting of directors was on 3rd March, 1899. McC. did not attend that meeting, and was absent without special leave till 7th May, 1899, having gone to the South of France, according to his custom, to benefit a weak chest. On 8th May, 1899, McC. received a letter from the directors informing him he had ceased to be a director by reason of his non-attendance at any of the directors' meetings during the last three months. He did not insist on his right to act as a director. No dividend was declared on the ordinary shares before 29th December, 1899, when the winding-up of the bank commenced. In the winding-up McC. claimed to prove for £45 for travelling expenses and £400 for remuneration as director from 3rd August, 1898, to 29th December, 1899, at £300 a year.

**HELD**—(1) that there was nothing which in point of law could be considered as an "involuntary absence" on the part of McC. and that under the circumstances he "absented" himself (2) That the directors were wrong in acting upon that absence as having vacated his office so soon as 7th May, that he could not be taken to have absented himself within the meaning of the article of association until 3rd March, when there was a meeting which he ought to have attended, and that the period of absence began then. (3) That McC. had on 3rd June absented himself from the meetings of the directors during a period of three months without special leave of absence from the directors, and had *ipso facto* vacated his office. (4) That the resolution as to foregoing remuneration was valid. (5) That McC. could not maintain his claim for remuneration, except the undisputed amount of £45, as the remuneration was not apportionable, not being due until the end of the year.

**Lambert v. Northern Railway of Buenos Ayres Co.** (1869) 18 W. R. 180 distinguished.

**IN RE LONDON AND NORTHERN BANK; McCON-**  
[NELL'S CLAIM, [1901] 1 Ch. 728; 70 L. J. Ch. 251; 84 L. T. 557; 17 T. L. R. 188; 8 Manson 91—Wright, J.]

*Directors—Continued.*

153. *Contract with Company—Office Vacated—Refunding Director's Fees—Company's Lien on Shares for Such Fees—Money Paid Under a Mistake of Fact*—Where the articles of a company provide that in certain events a director's office shall be vacated, the office is automatically vacated upon the happening of the event, and the board have no power to waive the vacation.

W., elected director of a company in July, 1900, became secretly interested in a contract with the company in December, 1900, by the articles this rendered his office vacant, but he did not disclose the contract, and continued to act as director. In June, 1901, the contract came to an end, and in July, 1901, W. was re-elected director.

HELD—that W.'s seat became vacant in December, 1900, but that his disqualification came to an end in June, and that, therefore, he was validly re-elected in July, 1901. *Turnbull v. West Riding Athletic Club* ((1894) 70 L. T. 92—Kekewich, J) distinguished. That he must repay to the company the fees received by him for attending meetings between December and June, such fees having been paid under a mistake of fact, or for a consideration which had failed, and That, under the articles the company had a lien on his shares for such fees.

IN RE THE BODEGA CO., LTD., [1904] 1 Ch. 276; [73 L. J. Ch. 198; 52 W. R. 249, 89 L. T. 694; 11 Manson, 95—Farwell, J.

154. *Place of Profit under the Company.*—Articles of association provided that the office of director should be vacated by a director "if he accepts or holds any other office or place of profit under the company (except that of managing director)."

HELD—that a director who accepted the trusteeship of a deed, covering or securing debentures, given by the company at a salary paid by the company, ceased to be a director.

ASTLEY v. NEW TIVOLI, LIMITED, [1899] 1 Ch. [151, 68 L. J. Ch. 90, 47 W. R. 326; 79 L. T. 541; 6 Manson, 64—North, J.

155. *Resignation—Managing Director—Power to Withdraw Resignation before Acceptance—Construction of Articles.*—Subject to any special provision in a company's articles, a director is entitled to resign his office; and, if due notice of resignation is given, he cannot withdraw it without the consent of the company.

A provision in the articles that a "vacation of office shall not take effect until the directors shall pass a resolution to that effect" does not prevent his notice of resignation being binding on him as soon as given.

GLOSSOP v. GLOSSOP, [1906] 2 Ch. 370; 76 [L. J. Ch. 610; 97 L. T. 372; 14 Manson, 246—Neville, J.

## XIII. DIVIDEND.

## (a) General.

And see LIMITATION OF ACTIONS, 3, 4.

156. *Apportionment—Company's Articles of Association—Stipulation against Apportionment—Apportionment Act, 1870* (33 & 34 Vict. c. 35), s. 7.]—*Quere*, whether an express stipulation against apportionment, such as is contemplated by sect. 7 of the Apportionment Act, 1870, can be looked for outside the will or instrument of gift in question.

O., who died on January 4th, 1906, gave certain shares to trustees upon trust to pay "the income arising therefrom" to his wife for life. After his death a dividend was declared for the year ending October 31st, 1905, and also an interim dividend on account of the year ending October 31st, 1906.

Two of the Company's Articles provided that "Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue and fall due upon the day on which it is declared, and not before", and "every dividend shall belong and be paid (subject to the Company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares."

HELD—that the dividends referred to were apportionable between O's estate and his widow, the articles not amounting to an express stipulation to the contrary.

IN RE OPPENHEIMER; OPPENHEIMER v. BOATMAN, [1907] 1 Ch. 399; 76 L. J. Ch. 287; 96 L. T. 631; 14 Manson, 139—Eady, J.

157. *Capital—Appreciation of Assets—Earned Profits—Realized Accretion to estimated Value of a Debt—Unexpected Profit.*—The question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital as well as profit and loss; and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, yet a realised accretion to the estimated value of one item of the capital assets cannot be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.

A debt formed part of the assets originally purchased by the defendant company, and as such part of its original capital assets. The debt was not regarded or treated as an asset of any value upon the purchase. It did not appear in any balance sheet as part of the assets of the company. The debt was paid off in full with arrears of interest.

HELD—that such payment off of the debt could not be regarded as a windfall in the nature of an unexpected profit, and as divisible accordingly amongst the shareholders without reference to the result of the whole accounts fairly taken.



**Dividend—Continued.**

**FOSTER v. NEW TRINIDAD LAKE ASPHALT CO.,**  
[Ld., [1901] 1 Ch. 208; 70 L. J. Ch. 123; 49  
W. R. 119; 17 T. L. R. 89; 8 Manson, 47  
—Byrne, J.]

158. *Interim Dividend—Postponement of Payment pending Litigation—Moneys at Bank set aside in "Interim Dividend Account" to Cover Interim Dividend—Right of Shareholders to Fund.*—The directors of a company passed a resolution declaring an interim dividend payable on a future date. Before that date arrived the directors resolved that, having regard to certain litigation then pending, the payment of the dividend should be postponed. The directors requested the company's bankers to set aside out of moneys in their hands, under a special account entitled "Interim Dividend Account," a sum sufficient to cover the dividend, pending the company's instructions. On the termination of the litigation the company claimed a declaration that neither they nor their bankers were bound to apply the sum in payment of the dividend.

**HELD**—that the money need not be applied in payment of the dividend, and that the declaration ought to be made.

**LAGUNAS NITRATE CO., LD. v. SCHROEDER & CO.,**  
[(1901) 85 L. T. 22; 17 T. L. R. 625—  
Joyce, J.]

159. *"Profits from Time to Time available for Dividend"—Reserve Fund—Table A in Part excluded by Articles of Association—Companies Act, 1862 (25 & 26 Vict. c. 89), Sched. I., Table A., cl. 74.*—By the memorandum of association of a company, whose shares were divided into ordinary shares and founders' shares, "the profits from time to time available for dividend" were to be applied in payment of a dividend of 15 per cent. per annum on the ordinary shares, and the surplus was to be divided between the ordinary and the founders' shares in certain proportions. By the articles of association, Table A. in Schedule I. to the Companies Act, 1862, was adopted except so far as thereby excluded or modified, and the articles provided that the "profits" in each year should be applied in payment of dividends as above set out. Some of the clauses in Table A. were expressly excluded, but clause 74 was not. The directors, after declaring a dividend on the ordinary shares, proposed to carry the balance to a reserve fund.

**HELD**—that "profits from time to time available for dividend" meant the net profits after deducting all proper appropriations made by the directors, and that clause 74 was not excluded from the articles of association, and that the directors had a modified power to set aside out of the profits a reserve fund under that clause.

**Decision of Kekewich, J. (17 T. L. R. 103), reversed.**

**FISHER v. BLACK AND WHITE PUBLISHING CO.,**  
[1901] 1 Ch. 174; 70 L. J. Ch. 175, 49 W. R. 310; 84 L. T. 305; 17 T. L. R. 146; 8  
Manson, 184—C. A.]

**(b) Payment out of Capital.**

*See also Sect. XII. DIRECTORS (d) Misfeasance.*

160. *Liability of Directors—Resolution of Board to Pay such Dividend—Directors not Present, but Present when Minutes Approved—Advice of Managing Director—Liability for Acts of Co-directors.*—Upon the advice of their managing director a board resolved to pay, and did pay, an interim dividend, when in fact no profits had been earned. At the next meeting, when the minutes came up for confirmation, A., who had not been present at the previous meeting, asked for information, and was told that the advice of the managing director had been followed in the matter, and he thereupon assented to the confirmation of the minutes.

**HELD**—that A. was not liable to refund to the company the money paid out in dividends, for his co-directors were not his agents (*Cullerne v. London and Suburban Building Society*, (1890) 25 Q. B. D. 485; 59 L. J. Q. B. 525; 39 W. R. 88; 63 L. T. 511), nor is a director rendered liable merely by taking part in a confirming resolution (*In re Lands Allotments Co.*, [1894] 1 Ch. 616; 63 L. J. Ch. 291; 42 W. R. 404; 70 L. T. 286; 1 Manson, 107—C. A.); and, further, that having received his own dividend innocently, he was not even liable to refund this.

*In re Denham & Co.* ((1883) 25 Ch. D 752; 32 W. R. 487; 50 L. T. 523—Chitty, J.) followed.

**LUCAS AND OTHERS v. FITZGERALD AND OTHERS,**  
[(1904) 20 T. L. R. 17—

Lord Alverstone, C. J.]

161. *Liability of Directors and Shareholders—Approval of Shareholders—Some Shareholders Suing Directors in Respect of Dividend so Paid—Right to Maintain Action—Liability of Shareholders to Refund Dividend.*—The directors of a company paid an interim dividend out of profits made in the first half of the year 1900. At the close of that year the accounts showed a debit balance, so that in effect the dividend had been paid out of capital; but the directors had acted honestly and *bonâ fide*. Having recognised the situation, the directors applied the profits of 1901 and 1902 to wiping off the debit balance, and it was probable that by the end of 1903 it would be extinguished.

In 1903 two of the shareholders who had concurred in passing the balance sheets commenced a shareholders' action against the directors to compel them to repay the amount expended in paying the dividend. The directors counter-claimed for the amount of the dividends received by the plaintiffs.

**Dividend—Continued.**

**HELD** (varying the decision of *Byrne, J.*, 20 T. L. R. 28.)—(1) that the plaintiffs must refund their dividends; and (2) that, as they had full knowledge of the facts and nevertheless retained such dividends, they could not succeed in their action against the directors: *quære*, whether they could have done so, if before action they had repaid the money received by them.

**TOWERS v. AFRICAN TUG CO.**, [1904] 1 Ch. 558, [73 L. J. Ch. 395; 52 W. R. 530, 90 L. T. 298, 20 T. L. R. 292; 11 *Manson*, 198—C. A.

**(c) Preference Shares.**

**162. Cumulative Dividend—Memorandum and Articles.**—A company, whose memorandum and articles provided for preference shares carrying a "cumulative preferential dividend," was reconstructed, and the memorandum of association of the new company provided for preference shares carrying a "preferential dividend," and article 95 of the articles of association of the old company was altered by striking out the word "cumulative" before "preference," so as to read thus: "The net profit from time to time available for distribution as dividend shall be applied first in payment to the holders of the preference shares in the company of a preference dividend. . . ."

**HELD**—that the holders of the preference shares in the new company were entitled to a cumulative preferential dividend.

*Staples v. Eastman Photographic Materials Co.* ([1896] 2 Ch. 303, 65 L. J. Ch. 682, 74 L. T. 479—C. A.) distinguished.

**FOSTER v. COLES AND M. B. FOSTER & SONS**, [Ld., (1906) 22 T. L. R. 555—*Joyce, J.*

**163. Fixed Cumulative Dividend—Reserve Fund—Declaration—Condition Precedent—Actual and Estimated Loss—Discretion of Directors—"Interest"—Circulating Capital—Court Overriding Directors' Opinion.**—The plaintiffs, who were preference shareholders, brought an action to obtain payment of their fixed cumulative preference dividends. They contended that they were entitled by contract to be paid the preferential dividends out of the balance to the credit of the profit and loss account in each year, and that the company could not appropriate any part of the balance to reserve or carry over one shilling until they had been paid in full. There was no suggestion of want of *bona fides* on the part of the directors or of the company.

**HELD**—that the provisions as to the declaration of a dividend applied to shares on which a fixed preferential dividend was payable, and was a condition precedent to bringing the action to recover dividend, and that the action failed. "Interest" is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance. "Interest" is compensation for

delay in payment, and is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of those profits.

There is no hard-and-fast rule by which the Court can determine what is capital and what is profit; it is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ.

*In re National Bank of Wales* ([1899] 2 Ch. 629, 670; 68 L. J. Ch. 634; 48 W. R. 99; 81 L. T. 363; 15 T. L. R. 517—C. A. see No. 124 *supra*) applied.

Whether there are profits available for distribution depends upon the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses.

There are some companies in which fixed capital may be sunk or lost. All the authorities, however, agree that circulating capital must be kept up.

*Lee v. Neuchatel Asphalte Co.*, (1889) 41 Ch. D. 1; 58 L. J. Ch. 1; 37 W. R. 321, 61 L. T. 11; 1 Meg. 140—C. A.

In a matter depending on evidence and expert opinion, it would be a very strong measure for the Court to override the directors' opinion that the state of the accounts did not admit of the payment of dividends.

**BOND v. BARROW HÆMATITE STEEL CO.**, [1902] 1 Ch. 353; 71 L. J. Ch. 246; 50 W. R. 295; 86 L. T. 10, 18 T. L. R. 249; 9 *Manson*, 69—*Farwell, J.*

**164. Rights of Preference Shareholders—Carrying Large Sum to Reserve—Discretion of Directors.**—A company's capital consisted originally of ordinary and cumulative preference shares; and the articles empowered the directors, before recommending any dividend, to set aside out of profits such sum as they might think fit as a reserve.

Subsequently the holders of preference and ordinary shares agreed that the latter should be split into preferred and deferred ordinary, and a new article was passed providing that should the profits be sufficient to enable the payment of a dividend of 7 per cent. on the deferred ordinary shares, after paying 5 per cent. on the preference and preferred ordinary shares, the preference shares should be entitled to such additional dividend not exceeding 1 per cent. as the balance of profits would permit—such dividend not to be cumulative.

**HELD**—that the directors were entitled to place to reserve a sum which would preclude the payment of such additional dividend.

**WEMYSS COLLIERIES TRUST, LD. v. MELVILLE** [(1906) 8 F. 143—*Ct. of Sess.*

**XIV. FLOTATION.**

**165. Agreement to Pay Money on Flotation—Action against Wrong Parties.**—*Agree-*

**Flotation—Continued.**

ments were made between prospectors and syndicates on the basis of the existing Mashonaland mining regulations, according to which certain conditions precedent had to be performed by persons who desired to be holders of claims, and those regulations provided that a prospector who obtained a licence was entitled to peg out a block of ten claims. Provision was also made for the transfer of the blocks to the syndicates, and then came a further step, viz., of "flotation." The syndicates agreed to pay £250 to the prospectors on the flotation by the syndicates of every block. The benefit of the agreement was assigned by the prospectors to the plaintiffs, and due notice was given to the defendants. The defendants against whom judgment might have been obtained—the original company—were, before the commencement of this action, wound up and dissolved, and a third company, who had purchased the undertakings, were joined as defendants.

**HELD**—that the action was brought against the wrong parties, as the persons against whom judgment might have been obtained had ceased to exist, and that there was no room for any vendor's lien, any trust, or any charge upon the property, so as to make the employers of the prospectors trustees for the prospectors on the sale of the property.

Decision of the Court of Appeal ([1899] 16 T. L. R. 24) affirmed.

**GIFFORD AND ANOTHER v. MASHONALAND DEVELOPMENT Co. (WILLOUGHBY'S), LD., AND WILLOUGHBY'S CONSOLIDATED Co., LD., (1902)**  
18 T. L. R. 274—H. L. (E.).

**XV. MANAGEMENT.**

**166. List of Members—Default in Filing—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 26, 27.]**—The respondent company was on July 16th, 1903, fined a nominal sum of 1d. per day for 143 days for not having forwarded to the Registrar a return of members for 1902, as required by sect. 26 of the Companies Act, 1862. The company was registered in 1901; in 1902 no general meeting of shareholders was held, and it was therefore not possible to make the return of all persons who were members "on the 14th day succeeding the ordinary general meeting."

A general meeting was held on November 19th, 1903. On the next day a summons was heard against the company claiming further penalties in respect of the eighty-three days from July 15th to October 20th (the date of the summons).

**HELD**—that this second summons was rightly dismissed, the word "default" in sect. 27 implying wilful neglect, and not including an omission which it was not possible to rectify.

**DORTÉ v. SOUTH AFRICAN SUPER-AERATION, LD.,**  
[1904] 20 T. L. R. 425—Div. Ct

**167. Internal Management—Action by Company—Action by Minority of Shareholders—Interested Shareholder Voting—Dividing or Retaining Profits—Investing Reserve Fund—Sole Trustee—Purchase by Director and Sale to Company at a Profit—Rescission or Accounting for Profits—Canadian Act (27 & 28 Vict. c. 23).]**—The Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

In order to redress a wrong done to a company or to recover moneys or damages alleged to be due to the company, the action should *primâ facie* be brought by the company itself. Where, however, the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company, the Courts allow the shareholders complaining to bring an action in their own names; and in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. No mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear.

Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote.

Whether the whole or any part of the profits of a joint stock company while a going concern should be divided, or what portion should be divided and what portion should be retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a "fair" or "reasonable" sum to retain undivided, or what reserve fund may be "properly" required, and it makes no difference whether the undivided balance is retained to the credit of profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company. These are questions for the shareholders to decide, subject to any restrictions or directions contained in the articles of association or bye-laws of the company.

If a company may form a reserve fund or retain a balance of undivided profits, it follows that it must have power to invest the

**Management—Continued.**

moneys so retained on such securities as the directors may select subject to the control of a general meeting.

It is not *ultra vires* for a company, if it thinks fit to do so, to invest its reserve fund or balance of undivided profits in the name of a sole trustee, however imprudent and undesirable such a course may be.

A director of a company, who was interested in another company being wound up, bid for and purchased at the public sale by the liquidator all the assets of the company in liquidation in four lots, and he shortly afterwards sold at a profit one of the lots to the company of which he was a director. The property was subsequently sold to a company formed for the purpose at an enhanced price payable in shares, which were distributed as a bonus amongst the shareholders of the company. The company claimed a declaration that the director purchased the property as a trustee for them and an order directing him to account for the profit made by him out of its re-sale to the company.

**HELD**—that the director was not under any legal obligation to give the company the benefit of his purchase; that assuming that the company, or the dissentient shareholders, might by appropriate proceedings have at one time obtained a decree for rescission of the contract, yet that was not the relief which they asked or could in the circumstances obtain in the present suit; and that to rescind the sale was one thing, but to force on the director a contract to sell at another price was a totally different thing.

*Erlanger v. New Sombbrero Phosphate Co.* ((1878) 3 App. Cas. 1218 at pp. 1234-5; 48 L. J. Ch. 73, 27 W. R. 65, 39 L. T. 269—H. L. (E.)), and *In re Cape Breton Co.* ((1885) 29 Ch. D. 795; 54 L. J. Ch. 822; 33 W. R. 788; 53 L. T. 181—C. A.) approved.

*BURLAND v. EARLE*, [1902] A. C. 83; 71 L. J. P. C. 1; 50 W. R. 241; 85 L. T. 553; 18 T. L. R. 41; 9 Manson, 17—P. C.

**XVI. MEETINGS.****(a) General.**

**168. General Meetings of Company—General Meetings of Classes of Shareholders—Quorum.**—The articles of association of a limited company provided that whenever the capital was divided into different classes of shares, the rights and privileges of each class might be modified by agreement duly confirmed by an extraordinary resolution passed at a special general meeting at that class, the quorum at the class meeting being members holding or representing by proxy three-fourths of the nominal amount of issued shares of that class. Another article provided that the quorum at general meetings of the company should be at least three members present, and holding or representing not less than one-tenth of the issued capital of the company. If the meet-

ing was adjourned, a quorum not being present, the members present at the adjourned meeting should form a quorum for the transaction of the business of such meeting.

**HELD**—that the provisions with regard to the general meetings of the company did not regulate the quorum of general meetings of classes of shareholders; and, therefore, at a meeting of a particular class of shareholders summoned to deal with the rights and privileges of that class, the necessary quorum was members of that class holding or representing three-quarters of the nominal amount of such issue, and not members holding or representing one-tenth of the issue of the company.

*HEMANS v. HOTCHKISS ORDNANCE COMPANY*, [1899] 1 Ch. 115; 68 L. J. Ch. 99; 47 W. R. 276; 79 L. T. 681; 6 Manson, 52—C. A.

**169. General Meeting—Conditional Notice—Validity.**—The articles of association of a company required thirty days' notice of every general meeting. On the 19th of February the company issued a notice of an extraordinary general meeting for the 23rd of March following, at which a resolution for reduction of capital was to be proposed. In the same document the company also gave notice of an extraordinary general meeting for the 7th of April, at which the said resolution, if passed at the first meeting, should be confirmed. The notice then continued "Should the said resolution not be passed by the requisite majority at the meeting to be held on the 23rd of March, due notice will be given to the shareholders that the meeting on the 7th of April, of which notice is now given, will not be held."

**HELD**—that the notice convening the second meeting was valid.

*IN RE ESPUELA LAND AND CATTLE CO.*, (1900) 48 [W. R. 684—Byrne, J.

**170. Requisition to Hold Meeting—Signed by Shareholders—One of Two Joint Holders—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 13.**—A requisition was signed by shareholders to directors to convene a meeting of the shareholders. By sect. 13 of the Companies Act, 1900, the requisition had to be signed by "holders" of one-tenth of the issued capital. The requisitionists held 3,106 shares, but 1,000 of them stood in the joint names of M. and G. G. was abroad and did not sign.

**HELD**—that the requisition was not properly signed; and *per. cur.* that "if shares are held by A., B. and C., and by D. and E. jointly, a requisition was not signed by all of them unless it was signed by A., B., C., D. and E."

*PATENT WOOD KEG SYNDICATE v. PEARSE*, [1906] [W. N. 164—Buckley, J.

**(b) Extraordinary.**

**171. Notice of Extraordinary Meetings—Disclosure of Interest of Directors in Notice**

*Meetings—Continued*

—*Conditional Notice.*—In a notice convening an extraordinary general meeting for the discussion of the reconstruction of a company by the sale of the undertaking to another company, it was stated, *inter alia*, that the full issue of debentures had been guaranteed by a third company. By another notice, convening a second extraordinary general meeting, the proposal to adopt the said reconstruction scheme was made conditional upon the non-acceptance of an alternative scheme. Neither notice disclosed the fact that the directors of the selling company were directors of or largely interested in the guaranteeing company. The resolutions as to the said reconstruction scheme were passed and confirmed.

HELD—that the notice did not sufficiently disclose the interests of the defendant directors, and that therefore the resolutions were not binding upon shareholders absent from the meeting; but that all the shareholders had been sufficiently informed of the conditional proposal announced in the second notice.

*Kaye v Croydon Tramways Co* ([1898] 1 Ch. 358; 67 L. J. Ch. 222; 46 W. R. 405; 78 L. T. 237, No 266, *infra*) followed.

*Alexander v Simpson* ((1889) 43 Ch. D. 139; 59 L. J. Ch. 137; 38 W. R. 161; 61 L. T. 708; 1 Meg. 457) distinguished.

*TIESSEN v. HENDERSON*, [1899] 1 Ch. 861; 68 [L. J. Ch. 353; 47 W. R. 458; 80 L. T. 483; 6 Manson, 340—Kekewich, J.

172. *Notice of Meeting—One Notice for Two Meetings—Articles of Association—Companies Act, 1862* (25 & 26 Vict. c. 89). s. 51 ]—The articles of association of a company provided that "Whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting."

HELD—that such a provision was not *ultra vires* as being inconsistent with sect. 51 of the Companies Act, 1867.

A notice stated that an extraordinary general meeting of the company would be held on a certain date for the purpose of considering and, if deemed advisable, passing a certain resolution; and further that, if such resolution was duly passed, it would be submitted for confirmation at a subsequent extraordinary general meeting to be held on a later specified day.

HELD—that the notice of the second meeting was valid.

*Alexander v. Simpson* ((1889) 43 Ch. D. 139; 59 L. J. Ch. 137; 38 W. R. 161; 61 L. T. 708; 1 Meg. 457—C. A.) distinguished and explained.

Decision of Buckley, J. ([1905] 1 Ch. 609; 53 W. R. 438; 92 L. T. 595; 21 T. L. R. 385) reversed.

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IN RE NORTH OF ENGLAND STEAMSHIP CO., [1905]  
[2 Ch. 15; 74 L. J. Ch. 404; 53 W. R. 499;  
93 L. T. 1; 21 T. L. R. 481; 12 Manson,  
174—C. A.

173. *Notice—Ratification by Directors of Secretary's unauthorized Notice—Validity* ]—Upon a requisition to the directors of a company to summon an extraordinary meeting of the shareholders to consider certain resolutions, the secretary of the company without consulting the directors sent out notices summoning a meeting. The directors subsequently ratified his action.

HELD—that the notices, as approved, were good.

*HOOPER v. KERR, STUART & CO, LD.*, (1901) 83 [L. T. 729, 17 T. L. R. 162—Cozens-Hardy, J.

174. *Notice—Sufficiency of—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 51.]—A notice of an extraordinary general meeting of a company stated that the meeting would be held for the purpose of considering and approving new regulations which would be submitted to the meeting and of passing a resolution approving and adopting the new regulations; and that copies of the regulations would be forwarded to any shareholder applying for them. The new regulations contained articles increasing the remuneration of the directors, confirming an agreement by the directors to pay the managing director a pension of £1,000 a year, giving each director an indemnity for loss happening in the execution of his office, and giving the directors power to borrow £150,000.

HELD—that the notice was not sufficient, and that therefore the meetings were not duly convened, and the resolutions passed thereat were not valid.

*NORMANDY v. IND, COPE & CO, LD.*, (1907) 24 [T. L. R. 57—Kekewich, J.

175. *Resolution Declared Passed—Subsequent Objection Taken—Injunction.* ]—When at an extraordinary meeting of a company, held on a proper notice, a resolution is declared to be passed, nobody challenging the ruling at the time, nor suggesting there had been any mistake, the Court will refuse to grant an injunction to restrain its being subsequently acted on.

Decision of North, J., affirmed.

*OPPERT v. BROWNELL GREAT SOUTHERN* (1898); [SAME v. COPELAND, 14 T. L. R. 249—C. A.

(c) *Special Resolution.*

176. *Declaration of Chairman—No Poll—“Conclusive Evidence”—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 51.]—The legislature intended, in the case of a special or extraordinary resolution, that the chairman's declaration should be conclusive unless challenged by means of a poll demanded by five members.

**Meetings—Continued.**

An extraordinary resolution to wind up voluntarily was proposed at a general meeting of a company duly convened. At this meeting the chairman declared the resolution to be carried on a show of hands. No poll was demanded.

**HELD**—that under sect. 51 of the Companies Act, 1862, after the declaration of the chairman, it is not competent for the Court to receive evidence to impeach that declaration.

*Young v. South African and Australian Exploration and Development Syndicate* ([1896] 2 Ch 268, 65 L. J. Ch. 638, 44 W. R. 509; 74 L. T. 527—Kekewich, J.) not followed.

*IN RE HADLEIGH CASTLE GOLD MINES, LD.*, [1900] 2 Ch 419, 69 L. J. Ch. 631; 83 L. T. 400; 16 T. L. R. 468—Cozens-Hardy, J.

**177 Declaration of Chairman that a Special Resolution is carried—“Conclusive Evidence”**—*Companies Act, 1862* (25 & 26 Vict. c. 89), s. 51.]—The declaration of the chairman of a company meeting that a special resolution has been duly carried is conclusive, unless challenged by means of a poll demanded by five members, and, in the absence of any evidence of *mala fides* on the part of the chairman, the Court will not receive evidence impeaching the declaration.

*In re Hadleigh Castle Gold Mines* ([1900] 2 Ch. 419; 69 L. J. Ch. 631, 83 L. T. 400, 16 T. L. R. 461—Cozens-Hardy, J., *supra*) approved.

*In re Horbury Bridge Coal, Iron and Waggon Co.* ((1879) 11 Ch. D. 109; 48 L. J. Ch. 341, 27 W. R. 433, 40 L. T. 353—C. A.) explained.

*ARNOT v. UNITED AFRICAN LANDS, LD.*, [1901] 1 Ch. 518, 70 L. J. Ch. 306, 49 W. R. 322, 84 L. T. 300, 17 T. L. R. 245; 8 Manson, 179—C. A.

**178 Meeting to confirm Resolution—Closure—Amendment Procedure.**—The chairman of a general meeting of a company can, in accordance with the vote of the majority of the shareholders present, terminate the discussion of any resolution after a reasonable time.

Where a resolution has been passed at an extraordinary general meeting of a company no amendment can be moved at a meeting called to confirm it; the resolution can only be confirmed or rejected.

*WALL v. LONDON AND NORTHERN ASSETS CORPORATION, LD.*, [1898] 2 Ch. 469; 79 L. T. 249, 14 T. L. R. 547—C. A.

**179. Notice—Amendment—Validity—Companies Act, 1862** (25 & 26 Vict. c. 89), s. 51.]—Sect. 51 of the Companies Act, 1862, requires a special resolution to be passed “at any general meeting of which notice specifying the intention to propose such resolution has been duly given.” Full notice was given of the intention to fix the directors’ remunera-

tion, and the only difference between the proposed resolution, as set forth in the notice of the first meeting, and the resolution actually passed was the reduction of the proposed remuneration from 40 to 30 per cent., the proportion allocated to the general manager being unaltered.

**HELD**—that the alteration did not invalidate the resolution, as it was not necessary that the resolution passed at the first meeting should be in the identical terms of the resolution specified in the notice.

*TORBOCK v. LORD WESTBURY*, [1902] 2 Ch. 871; [71 L. J. Ch. 845, 87 L. T. 165, 57 W. R. 133—Eady, J.

**XVII MEMORANDUM OF ASSOCIATION.****(a) General.**

**180. Interpretation—Principal and Primary Object—Separate and Independent Objects—General Words—Ultra vires.**—In construing a memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything, but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are.

One of the clauses of the memorandum of association defined the objects for which the company was established, and the twenty-fifth paragraph of the clause provided that “the objects specified in each paragraph of this clause shall, except when otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company.”

**HELD**—that this provision was not sufficient to make the object contained in each preceding paragraph a separate and independent object of the company, but that the provision must be read in conjunction with the other paragraphs, and with the principal and primary object for which the company was formed.

*In re German Date Coffee Co.* ((1882) 20 Ch. D. 169; 51 L. J. Ch. 564; 30 W. R. 717, 46 L. T. 327—C. A.) followed.

*STEPHENS v. MYSORE REEFS (KANGUNDY) MINING [Co., LD.]*, [1902] 1 Ch. 745; 71 L. J. Ch. 295; 50 W. R. 509; 86 L. T. 221; 18 T. L. R. 327; 9 Manson, 199—Eady, J.

**181. Powers—Ancillary Powers—Extent—Construction.**—A mining company’s memorandum of association stated its objects to be (1) to take over as a going concern a specified gold mining company; (2) to acquire gold mines and other mining rights in Mysore and elsewhere, or any interest in the same, and to work, develop and turn to account such properties. It also gave power to pro-

**Memorandum of Association—Continued.**

note any company to take over its property, rights and liabilities

The mine specified having proved unsuccessful, the directors proposed to enter into an agreement to purchase properties in Bombay, such properties to be conveyed either to the company or to another company to be promoted by it.

**HELD**—that the purposes of the company were to be gathered from both 1 and 2, and were gold mining in general, and that the proposed agreement was within the objects stated in the memorandum.

*Stephens v. Mysore Reefs, &c., Ltd.* ([1902] 1 Ch. 745, 71 L. J. Ch. 295; 50 W. R. 509, 86 L. T. 221, 9 Manson, 199, *supra*) discussed and explained.

*PEDLAR v. ROAD BLOCK GOLD MINES OF INDIA*, [Ld., [1905] 2 Ch. 427; 74 L. J. Ch. 753; 54 W. R. 44, 93 L. T. 665; 12 Manson, 422—Warrington, J

**182 Powers—Implied Power to Sell Land — Reasonably Necessary — “Incidental or Conducive.”**—The memorandum of association of a company, registered under the Companies Acts, stated its objects to be to take over a colliery, to purchase and lease other minerals, to work them, and to acquire real estate, and to do all such other things as were incidental or conducive to the attainment of the above objects. There was no express power to sell land. The company had purchased land with a view to build workmen's cottages, but found that it would be better to sell the land to a person who would build the cottages and lease them to the company.

**HELD**—that the company had implied power to sell the land, it being reasonably necessary to sell land from time to time and in a proper way

*Johns v Balfour* ((1889), 1 Megone, 191) applied.

*IN RE KINGSBURY COLLIERIES, LD., AND [MOORE'S CONTRACT, [1907] 2 Ch. 259; 76 L. J. Ch. 469, 96 L. T. 829; 23 T. L. R. 497, 14 Manson, 212—Kekewich, J*

**183. Powers—Promoting New Company—Underwriting Shares—Ultra vires.**—The memorandum of association of the defendant company empowered it to acquire land, mines, and other properties, grants, concessions, and options in any part of the world, to purchase the business of a mining company in the northern territories of Australia, to promote or form any company having objects similar to those of the defendant company, and to provide the capital by taking shares therein; and to subscribe for, acquire, hold, sell, and give guarantees by way of underwriting in relation to the shares of any company. The defendant company, which carried on the business of mining in the northern territories of Australia, agreed to acquire an option to

purchase a mine in Ballarat, Australia, to promote a new company which was to be formed to acquire the mine from the defendant company, and to underwrite and subscribe for shares in the new company.

**HELD**—that the defendant company were empowered to do so by their memorandum of association.

*BUTLER v. NORTHERN TERRITORIES MINES OF [AUSTRALIA, LD., (1906) 23 T. L. R. 179, 96 L. T. 41—Kekewich, J.*

**184. Power to Sell Assets for “Shares” — Partly Paid Shares in New Company—Power to Accept — Agreement not Stamped.**—Where a company is authorised by its memorandum of association to sell its undertaking for “shares” in another company, it may accept partly paid shares, unless there be something in the context or in the memorandum or articles confining the word “shares” to fully paid shares.

In such a case the Court may consider the validity of an agreement to sell the company's assets, although it is not stamped.

*MASON v. MOTOR TRACTION CO., LD., [1905] 1 [Ch. 419, 74 L. J. Ch. 273, 92 L. T. 234, 21 T. L. R. 238; 12 Manson, 31—Buckley, J.*

**185. Preference Shares—Increase of Capital by Issue of Shares with Preference *pari passu* with existing Preference Shares—Ultra vires—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 12.]**—Clause 5 of the memorandum of association of a limited company was as follows: “The capital of the company is £60,000, divided into 6,000 preference shares of £5 each and 6,000 ordinary shares of £5 each. Such preference shares shall confer a right to a fixed cumulative dividend at the rate of £7 per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed or have any special privilege or advantage, or may be deferred, and may be issued on such special conditions as to priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally in such terms as the company may from time to time determine.”

The whole of the original capital, both preference and ordinary, had been issued. The company desired to increase their capital by the issue of shares having a preference *pari passu* with the original £7 per cent. preference shares.

**HELD**—that it was competent for the company so to do, as the clause was not so obscure that the Court should decline to give effect to it.

*UNDERWOOD v. LONDON MUSIC HALL, LD., [1901] [2 Ch. 309; 70 L. J. Ch. 743; 49 W. R. 507, 84 L. T. 759; 17 T. L. R. 517; 8 Manson, 396 —Cozens-Hardy, J.*

**186. Sale of Undertaking to Another Company—Voluntary Winding-up — Dissentient**  
15—2

**Memorandum of Association—Continued.**

*Member—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 161]—A limited company, one of whose objects, as stated in its memorandum of association, was to sell its undertaking, agreed to sell the same and all its property, except £200, to another company in consideration of shares in the purchasing company, and of an indemnity to itself and its liquidators against certain obligations. The £200 was to be kept to defray the costs of the agreement and of the winding-up, and the balance was to be handed over to the purchasing company. This agreement was approved at an extraordinary general meeting of the company, and at the same meeting was passed a resolution (subsequently confirmed) to wind up the company voluntarily. The plaintiff, who was a shareholder in the company, objected to the sale, and claimed that it was *ultra vires*, unless his interest was purchased under sect. 161 of the Companies Act, 1862.

It was held by Buckley, J., that the sale was a sale by the company properly made under a clause contained in the memorandum of association, and it was not in disguise a sale by the liquidator upon terms not just, having regard to sect. 161 of the Companies Act, 1862; that although the balance of the £200 could not be ascertained until the costs of the winding-up had been ascertained, yet that did not make the sale any the less a sale by the company, as the same transaction could have been carried out by putting it in a different form, making the thing not dependent on the liquidation in any way, and which could have been carried out irrespective of the liquidation.

*Cotton v. Imperial and Foreign Agency and Investment Corporation* ([1892] 3 Ch. 454; 61 L. J. Ch. 684; 67 L. T. 342—Chitty, J.) followed.

*Payne v. Cork Co., Ltd.* ([1900] 1 Ch. 308, 69 L. J. Ch. 156; 48 W. R. 325; 82 L. T. 44; 16 T. L. R. 135—Stirling, J., No 495, *infra*) distinguished.

On appeal, the C. A. dismissed the appeal, on the ground that the purchasing company was not a party, and the agreement could not be set aside in its absence.

Decision of Buckley, J. ([1902] 2 Ch. 837; 71 L. J. Ch. 888; 51 W. R. 29; 88 L. T. 337) affirmed.

*DOUGHTY v. LOMAGUNDA REEFS, LD.*, [1903] 1 Ch. [673, 72 L. J. Ch. 331; 51 W. R. 564; 88 L. T. 337; 10 Manson, 189—C. A.

**187. Signatories—Liability to pay Calls—Special Payments on Allotment—Directors—Duty to make Calls on their own Shares—Breach of Duty—Companies Act, 1862** (25 & 26 Vict. c. 89), ss. 8, 11, 14, 15, 22, 23, 31, 38.]—Subscribers to a memorandum of association of a company limited by shares are only liable by virtue of their subscription to pay up the amount of their shares as and when called up. It follows that, in the absence of any special agreement or article requiring a

subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made on them. Where, however, directors who were subscribers to the memorandum of association of a company allotted to themselves the shares set opposite their names in the memorandum without payment on allotment, but required payment on allotment from other shareholders, and then proceeded to make a further call on the shares without paying the allotment money on their own shares,

**HELD**—that, as the other shareholders had not known or sanctioned the directors obtaining the advantage of deferring their own contributions to the company at the expense of the other shareholders, there was a distinct breach of duty on the part of the directors, and that they were bound to pay up the allotment moneys in the same manner as the other shareholders.

Decision of Cozens-Hardy, J. ([1899] 2 Ch. 302; 68 L. J. Ch. 514; 80 L. T. 753; 6 Manson, 443) reversed.

*ALEXANDER v. AUTOMATIC TELEPHONE CO.*, [1900] 2 Ch. 56; 69 L. J. Ch. 428, 48 W. R. 546; 82 L. T. 400; 16 T. L. R. 339—C. A.

**(b) Alteration.**

**188. Absence of Shares and Capital—Jurisdiction to confirm Resolutions—Companies (Memorandum of Association) Act, 1890** (53 & 54 Vict. c. 62), s. 1, sub-s. 1—*Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 1, sub-s. 1.]—Sub-section 1 of sect. 1 of the Companies (Winding-up) Act, 1890, defines the Courts which have jurisdiction to wind up all companies in England and Wales except so far as cut down by the following sub-sections. Sub-secs. 2 and 3 apply only to companies formed under sect. 8 of the Companies Act, 1862, and which, therefore, possess a capital.

The High Court has jurisdiction to wind up a registered unlimited company whose memorandum of association complies strictly with sect. 10 of the Companies Act, 1862, and which has no capital paid up or credited as paid up, and, therefore, has jurisdiction to sanction an alteration of the memorandum of association.

*IN RE NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCIATION*, [1900] 1 Ch. 481; 69 L. J. Ch. 211; 48 W. R. 604; 82 L. T. 598; 16 T. L. R. 172; 7 Manson, 364—

Cozens-Hardy, J.

**189. Alteration of Objects—Enlarging Objects of Company—Combining other Business—Companies (Memorandum of Association) Act, 1890** (53 & 54 Vict. c. 62), s. 1, sub-s. 5 (a) (d).]—The Cyclists' Touring Club, which was registered under the Companies Acts, was formed, according to its memorandum of association, to promote, assist, and protect the use of bicycles, tricycles, and



**Memorandum of Association—Continued.**

other similar vehicles on the public roads, to provide legal assistance to their riders, and to promote the comfort of its members while touring by furnishing information and in other ways. A special resolution was passed for altering the memorandum of association so as to make the objects of the club the promotion, assistance, and protection of the pastime of touring by the use of vehicles or otherwise, to provide legal assistance to tourists in protecting their rights, and to promote the comfort and safety of its members while touring by furnishing information and in other ways. It was admitted that the object of the alteration was the admission of motorists into the club.

**HELD**—that the proposed alteration was not within sect. 1, sub-sect. 5 (a) or (d) of the Companies (Memorandum of Association) Act, 1890, and the Court could not sanction it.

**IN RE CYCLISTS' TOURING CLUB**, [1907] 1 Ch. 269; [76 L. J. Ch. 172; 96 L. T. 780; 23 T. L. R. 220; 14 Manson, 52—Warrington, J.

**190. Alteration of Objects—Extension to New Business.**—A company carrying on the ordinary business of bankers petitioned the Court to confirm a resolution, passed unanimously, to alter its memorandum of association by empowering it to undertake the execution of trusts and to act as executors, administrators, trustees, or treasurers. The application was opposed by seven shareholders, who were solicitors, on the ground that the alteration would not be beneficial to the shareholders and would be injurious to the solicitors' profession.

**HELD**—that the alteration should be confirmed, with the modification that the powers were not to be exercised unless some part of the trust property was situate within the jurisdiction of the Court.

**IN RE MUNSTER AND LEINSTER BANK**, [1907] 1 [Ir. R. 237—M. R.

**191. Alteration of Objects—Practice—Summons—Advertisement—Companies (Memorandum of Association) Act**, 1890 (53 & 54 Vict. c. 62), s. 1.—Immediately after the presentation of a petition under the Companies (Memorandum of Association) Act, 1890, a summons should be taken out to have a day fixed for the hearing of the petition, and directions given for advertising the presentation of the petition. "Palmer's Company Precedents" (1906 ed.), Part I., p. 1163, correctly states the practice.

**IN RE MUNSTER AND LEINSTER BANK**, [1907] 1 [Ir. R. 237—M. R.

**192. Alteration of Objects—Practice—Companies (Memorandum of Association) Act**, 1890 (53 & 54 Vict. c. 62), s. 1.—The Court will not confirm a proposed alteration in a company's memorandum of association, effecting an extension of the company's ob-

jects, unless the name of the company is, if necessary, altered so as to indicate the extension of objects.

**RE EGYPTIAN DELTA LAND AND INVESTMENT CO.**, [51 Sol. J. 211—Parker, J.

**193. Confirmation by Court—Companies (Memorandum of Association) Act**, 1890 (53 & 54 Vict. c. 62)—*Joint-Stock Companies Act*, 1856 (19 & 20 Vict. c. 47)—*Companies Act*, 1862 (25 & 26 Vict. c. 89), ss. 176, 177.—The Court has jurisdiction to make an order under the Companies (Memorandum of Association) Act, 1890, to confirm a special resolution altering the memorandum of association of a company registered under the Joint-Stock Companies Act, 1856.

**IN RE COPIAPO MINING CO.**, (1899) 6 Manson, [320—Wright, J.

**194. Company registered under Companies Acts**, 1856, 1857—*Jurisdiction of Court—Companies (Memorandum of Association) Act*, 1890 (53 & 54 Vict. c. 62).—The Companies (Memorandum of Association) Act, 1890, applies to a company formed and registered under the Joint Stock Companies Acts, 1856 and 1857, and therefore the Court has jurisdiction to confirm an alteration in the memorandum of such company.

**In re Copiapo Mining Co.** ([1899] W. N. 25, 6 Manson, 320—Wright, J., *supra*) followed.

**In re General Credit Co.** ([1891] W. N. 153—Romer, J.) not followed.

**IN RE EUPHRATES AND TIGRIS STEAM NAVIGATION [Co., Ltd.]**, [1904] 1 Ch. 360; 73 L. J. Ch. 175; 90 L. T. 56; 11 Manson, 93—Eady, J.

**195. Enlargement of—Companies (Memorandum of Association) Act**, 1890 (53 & 54 Vict. c. 62), s. 1.—The Court can sanction resolutions for the enlargement of the objects of a company under the Companies (Memorandum of Association) Act, 1890, where there is no opposition to the petition.

**IN RE THE BERNICIA STEAMSHIP, LIMITED**, (1900) [69 L. J. Ch. 194; 81 L. T. 816, 16 T. L. R. 163; 7 Manson, 361—Cozens-Hardy, J.

**196. Extension of Local Area of Operations—Change of Name not Insisted on—Companies (Memorandum of Association) Act**, 1890 (53 & 54 Vict. c. 62), s. 1.—A laundry company known as the Kircaldy Steam Laundry Co., Ltd., presented a petition for confirmation of a special resolution altering its memorandum of association so as to enable it to extend its operations to the whole county of Fife.

**HELD**—that the petition might be granted without insisting on any change of name.

**IN RE KIRCALDY STEAM LAUNDRY CO., LTD.**, (1905) [6 F. 778—Ct. of Sess.

**197. Extension of Objects—Practice to be followed in Future—Definite Statement of Objects—Companies (Memorandum of Association) Act**, 1890 (53 & 54 Vict. c. 62), s. 1.—

**Memorandum of Association—Continued.**

In future, if directors wish the Court to sanction an extension of objects under sect. 1 of the Companies Act, 1890, they must bring their minds to bear upon the definite objects which they desire to undertake, and then see that they fall within sub-s 5 of sect. 1, and that they are expressed in definite language.

The present practice of setting out a great number of objects, many of them not seriously thought of, is to be deprecated.

IN RE D & D. H. FRASER, LD, (1903) 19  
[T. L. R. 364—Buckley, J]

198. *New Object Inconsistent with Original Objects—Companies Act, 1890* (53 & 54 Vict. c. 62).—A company was formed for the primary purpose of ranching in the United States. It passed resolutions to alter its memorandum so as to enable it to conduct banking operations of a somewhat speculative character. The Court refused to confirm the resolutions.

WESTERN RANCHES, LD v. NELSON'S TRUSTEES,  
[1899] 36 S. L. R. 576.

199 *Re-writing Objects in Modern Form—Sanction of Court—Companies (Memorandum of Association) Act, 1890* (53 & 54 Vict. c. 62), s. 1 (5).—A limited company registered in 1864 petitioned for confirmation of alterations in their memorandum of association enlarging the objects of the company. The proposed alterations were merely a repetition of the old objects in inflated phraseology or re-writing them in modern form.

HELD—that such alterations were not within the scope of the Companies (Memorandum of Association) Act, 1890.

IN RE CONSETT IRON CO., LD., [1901] 1 Ch. 236;  
[70 L. J. Ch. 198; 84 L. T. 258; 8 Manson,  
429—Cozens-Hardy, J.]

**XVIII. NOTICES.**

See also Sect. XVI—MEETINGS.

200. *Deceased Member—Registered Address—Service of Notice—Legal Personal Representatives*.—Notices addressed to a member at his registered place of address in the books of a company are not invalidated by the fact that the company was aware, at the time the notices were sent out, that such member was dead, so long as his executors have not been registered as the holders of the shares of such member.

Order of Kekewich, J. ([1899] 2 Ch. 40; 68 L. J. Ch. 540; 47 W. R. 558, 80 L. T. 750; 6 Manson, 449), varied.

ALLEN v. GOLD REEFS OF WEST AFRICA, LD.,  
[1900] 1 Ch. 656; 69 L. J. Ch. 266; 48  
W. R. 452; 82 L. T. 210; 16 T. L. R. 213—  
C. A.

And see No. 9, *supra*.

**XIX. PROMOTERS.**

See also Sect. XX. PROSPECTUS.

See also title AGENCY (SECRET COMMISSIONS).

201. *Fraud—Misrepresentation and Suppression of Fact—Underwriting—Evidence—Prospectus—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.—Where a person subscribes for shares in a company upon the faith of a prospectus in which the promoters of that company have as well made actual misrepresentations of material facts that were false to their knowledge as suppressed material facts that were within their knowledge, such person, if he takes no benefit under the contract, and repudiates within a reasonable time after he becomes aware of the fraud, can successfully rely on the fraud of the promoters as a defence to an action by the company for calls, can rescind his contract, and can recover all moneys paid in respect of the shares subscribed for by him.

The omission in a prospectus of the name of the real vendors of the undertaking, and the employment, to conceal their identity, of a nominee as the ostensible vendor, may, if misleading, amount to such fraud as will vitiate the contract. So may also the omission to state that money was to be spent in underwriting.

The measure of the obligation of disclosure in a company's prospectus discussed. Observations on Lindley on Company Law (5th ed.), p. 70.

COMPONENTS TUBE CO. v. NAYLOR, [1900] 2 Ir. R.  
[1—Q. B. Div.]

202. *Misfeasance—"Officer"—Secret Profit—Statement of Agreement in Prospectus—Statute of Limitations—Trustee Act, 1888* (51 & 52 Vict. c. 59), s. 8—*Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 10.—H., in 1888, acted temporarily as secretary of a company formed for the purchase of an hotel and gardens, the vendor of which had offered £2,000 to him and other persons if they would form such a company. H. received £250 of this amount to the knowledge of the other persons, who became the directors, and the date and parties to the agreement under which he took this profit were stated in the prospectus issued to the public inviting share subscriptions.

In May, 1894, the voluntary winding-up of the company was ordered to be continued under the supervision of the Court.

A summons was taken out by the liquidator, under sect. 10 of the Companies (Winding-up) Act, 1890, asking that H. might be ordered to contribute to the assets £250 and interest as secret profit made by him in a fiduciary position, for which he must be held liable.

HELD—that, although the facts showed that H. was in every sense of the word a "person who had taken part in the formation or promotion of the company," within the meaning of sect. 10 of the Companies (Winding-up)

**Promoters—Continued.**

Act, 1890, yet there was no legal obligation on him to account to the company for the money which he had received.

Decision of Wright, J. (77 L. T. 681, 46 W. R. 314) reversed.

RE THE SALE HOTEL AND BOTANICAL GARDENS, [LD., EX PARTE HESKETH, (1898) 78 L. T. 368; 14 T. L. R. 334; 46 W. R. 617—C.A.

203. *Sale by Promoters to Directors—Dual Relation—No Independent Board—Misrepresentations contained in Prospectus—Full Disclosure—Rescission—Change of Position*.—There is no obligation on promoters of an intended company to furnish the company with an independent board of directors, if the truth is disclosed to the persons who are induced to join the company. Consequently, if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors, or agents of the intended vendors, of property to the company, the company cannot set aside an agreement entered into by the directors for the purchase of such property simply because they are not an independent board.

In the absence of fraud, the right to rescind such a contract on the ground of misrepresentation contained in the prospectus of the company cannot be enforced where the property has been worked so as to materially alter the position of the parties. Directors who act within their powers and honestly for the benefit of the company, and with reasonable care, discharge both their legal and equitable duties to the company. The fact that they are both promoters and directors will not necessarily be held to prove that it was impossible for them to discharge their duties to the company, at any rate in a case where there was full disclosure of their position.

A syndicate formed a company to buy certain property of the syndicate. The directors of the company were the directors of the syndicate, and before a prospectus was issued they entered into an agreement with the syndicate to buy the property. A prospectus was subsequently issued, which disclosed the fact that the directors were vendors, but contained misrepresentations of fact. The company bought and worked the property. Subsequently fresh directors were appointed, and they commenced an action against the syndicate for misrepresentation. The company continued to work the property after the action had commenced.

HELD, by Lindley, M.R., and Collins, L.J. (Rigby, L.J., dissenting)—that the company were not entitled to rescission merely on the ground that the contract had been entered into without independent advice, and that the working of the property by the company had so altered the position of the parties as to deprive the company of its right to rescission on the ground of misrepresentations contained in the prospectus. The

directors of the company, having acted *intra vires* and with reasonable care and honestly for the benefit of the company, were not liable to make good any loss the company might have sustained through entering into the agreement with the syndicate.

Decision of Romer, J., affirmed.

*Erlanger v. New Sombraero Phosphate Co.* ([1878] 3 App. Cas 1218, 48 L. J. Ch. 73, 27 W. R. 65; 39 L. T. 269) and *Salomon v. Salomon & Co.* ([1897] A. C. 22, 66 L. J. Ch. 35; 45 W. R. 193; 75 L. T. 426; 4 Manson, 89)—H. L. (E.) discussed.

LAGUNAS NITRATE CO. v. LAGUNAS SYNDICATE, [1899] 2 Ch. 392; 68 L. J. Ch. 699; 48 W. R. 74; 81 L. T. 334; 15 T. L. R. 436—C. A.

204. *Secret Profits by Promoters—Duty of Disclosure—Liability to Account*.—In the year 1892 the freehold grounds and building known as "Olympia" were the property of a company which, in that year, was being wound up. That company had issued debentures to the extent of £100,000 as a first charge, and a mortgage as a second charge for £10,000. Four persons who knew that the property would have to be sold combined to buy it in order that they might resell it to a company to be formed by themselves. The combination called themselves the Freehold Syndicate, and bought up so far as they could the incumbrances on the property called "Olympia." They expended £27,000 in buying debentures, and gave £500 for the mortgage of £10,000, and realised a profit thereon of £20,734 6s. 1d., and proceeded to form a company, and the four persons were made by the articles of association the first directors.

The property was sold for £140,000 by the Court, and nominally purchased by the syndicate for that sum—that sum, however, was £20,734 6s. 1d. less than what they appeared to give. They completed as directors the purchase of the property for £180,000, and they, as directors, paid to themselves as members of the syndicate £171,000 in cash, and £9,000 in fully paid-up shares—in all £180,000.

The prospectus disclosed the supposed profit which the vendors were making of £40,000, while in truth their profit was £60,734 6s. 1d., and their right to retain this undisclosed profit of £20,734 6s. 1d. was disputed.

HELD—that these directors, vendors, syndicate, associates, had no claim to retain, and must replace the undisclosed profit of £20,734 6s. 1d., as the company should have been informed of what was being done, and consulted whether they would have allowed this profit.

The decision of the Court of Appeal *In re Olympia, Ltd.* ([1898] 2 Ch 153; 67 L. J. Ch. 433; 78 L. T. 629; 14 T. L. R. 451, 5 Manson, 139—C. A.) affirmed.

GLUCKSTEIN v. BARNES, [1900] A. C. 240; 69 [L. J. Ch. 385; 82 L. T. 393, 16 T. L. R. 321; 7 Manson, 321—H. L. (E.)

**Promoters—Continued**

205. *Secret Profit—Fiduciary Relation—Duty of Disclosure—Liability to Account—Misfeasance Summons.*—A syndicate acquired a mine absolutely and entirely for themselves, and not in the least degree with any then present intention of selling it to any other company, or of forming any other company whatever. They did regard it as a possible event in the future that another company with a larger capital would be formed, but they plainly contemplated working the mine themselves for their own profit in the first instance, and only forming another company if they wanted further working capital, or found that the matter grew so large that they could sell it at a greatly enhanced price to another company. There was no present intention then of doing anything of the kind. Within a year of the formation of the syndicate its directors promoted and brought out a company with a larger share capital than that of the syndicate to purchase the mine. The same persons were the directors of the syndicate and the company. S. was one of such directors, and as director of the company he assisted in paying out of its coffers £75,000, part of which was for himself and co-syndicators, and he never told the company how much he and his co-syndicators were to get. It was sought to make S. liable on a misfeasance summons.

**HELD**—that the syndicate could not be regarded as having acquired the mine in such a way as to affect their acquisition with the character of an acquisition by promoters of an intending company; therefore they could not be said to have been in a fiduciary relation to the vendee company at that time; that the directors were guilty of a breach of duty, but not of fraud, that they disclosed the fact that they were directors of the vendor syndicate, and thereby they necessarily disclosed that they were making some profit, but they were wrong and guilty of a breach of duty in not disclosing what profit they were making; that although there was a breach of duty sufficient to entitle the vendee company to rescind or repudiate the contract if matters had not been too much altered in the meantime, nevertheless there was no sufficient ground for requiring payment of the profit or benefit received by S. out of the sale; that the misfeasance summons must be dismissed.

*In re Cape Breton Co.* ((1885) 29 Ch. D. 795; 54 L. J. Ch. 822; 33 W. R. 788; 53 L. T. 181—C. A.); *Ladywell Mining Co. v. Brookes* ((1887) 35 Ch. D. 400; 56 L. J. Ch. 684; 55 W. R. 785; 56 L. T. 677—C. A.); and dicta of Lord Cairns in *Erlanger v. New Sombrero Phosphate Co.* ((1878) 3 App. Cas. 1218, 1235, 48 L. J. Ch. 73; 26 W. R. 65; 39 L. T. 269—H. L. (E.)) followed.

*Gluckstein v. Barnes* ([1900] A. C. 240; 69 L. J. Ch. 385; 82 L. T. 393; 16 T. L. R. 321; 7 Manson, 321—H. L. (E.)), *supra* distinguished.

*IN RE LADY FORREST (MURCHISON) GOLD MINE*, [Ld., [1901] 1 Ch. 582; 70 L. J. Ch. 275; 84 L. T. 559; 17 T. L. R. 198; 8 Manson, 438—Wright, J.

206. *Fiduciary Relation—Secret Profit—Prospectus—Non-disclosure of Promoters' Interest—Misrepresentation—Measure of Damages—Profit Made by Promoters.*—A company bought two music-halls, the conveyance being taken to R., a nominee of the company, who afterwards executed a declaration of trust in favour of the company. He then purported to re-sell the halls at a greatly enhanced price to W. O. C., another nominee of the company, as trustee for another company not yet formed, which was intended to work the halls. The original purchase price was paid and the purchase price on the re-sale received by the first company, which settled the memorandum and articles of the second company and registered it, and nominated the signatories to its memorandum and most of its directors, one of whom was a director of the first company. The prospectus of the second company represented the nominee of the first company as vendor of the halls, concealing the interest of the first company in them, and contained material misrepresentation.

**HELD**—that the first company were promoters, as from first to last it was their intention to buy the music-halls for the purpose of selling them to a company which they would create, to create a board of directors, which should be under their control and carry out their desire, and to sell the music-halls at an inflated price; that, therefore, throughout this period, the first company stood in a fiduciary relation towards the second company—i.e., to the future allottees of shares—to the persons who were invited to come and take up the shares of the company; that it was the plain duty of the first company to disclose the fact that they themselves were interested as the beneficial vendors of the music-halls; that the prospectus was issued with the knowledge and privity of the first company; that a positive *suggestio falsi* was made in relation to the interests of R.; that the second company were entitled to a remedy in the nature of damages for the clear breach of the fiduciary duty of the first company; and that the true measure of damages was the amount of the profit which was made by the first company—viz., £12,000.

*IN RE LEEDS AND HANLEY THEATRES OF VARIETIES*, [Ld., [1902] 2 Ch. 809; 51 W. R. 5; 72 L. J. Ch. 1; 87 L. T. 488; 10 Manson, 72—C. A.

**XX. PROSPECTUS.****(a) General.**

*And see* LIMITATION OF ACTIONS, 2.

207. *What is—Document not Issued to Public—No Invitation to Subscribe.*—Before the incorporation of a company the future directors distributed among their business

*Prospectus—Continued.*

acquaintances some forty copies of a document which stated that the company was to be a private one, and did not invite subscriptions; it was intended that the recipients should show the document to their friends.

A. received a copy, together with a letter advising him to take shares, from one of the future directors who was a personal friend, and he acted upon the advice.

Subsequently A. brought an action to have his name removed from the register on the ground that the document was a prospectus and contained mis-statements of fact and did not comply with the Companies Act, 1900.

HELD—(1) that the document, not being issued to the public generally, was not a prospectus within the meaning of the Act; and (2) that the company could not be held responsible for mis-statements contained in a document which they had never adopted.

SLEIGH *v.* GLASGOW AND TRANSVAAL OPTIONS, [1904] 6 F. 420—Ct. of Sess.

208 *Amount Paid to Vendor—Sub-Purchaser—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 10, sub-s. 1 (f).—Under sect. 10, sub-sect. 1 (f), of the Companies Act, 1900, the prospectus of a company must state the whole of the consideration, whether cash, shares, or debentures, payable to any one by the company in respect of the purchase or acquisition of any property by the company; but, speaking generally, the sub-section does not require a statement of any consideration paid or to be paid by any one other than the company, and a company is not a sub-purchaser within the meaning of the sub-section so as to require the consideration paid or to be paid to each vendor to be stated, unless it has to pay purchase-money to some one other than its own vendor.

Where, therefore, a company's vendors were in law and equity absolute owners of the property, having themselves purchased from another person, and having paid to him the amount of the purchase-money before the issue of the prospectus,

HELD—that the amount of the purchase-money paid by them need not be stated in the prospectus, and that the fact that the company's vendors borrowed the money for the purpose of making such payment was immaterial.

BROOKES *v.* HANSEN, [1906] 2 Ch. 129; 75 [L. J. Ch. 450, 54 W. R. 502; 94 L. T. 728; 22 T. L. R. 475; 13 Manson, 172—Joyce, J

**(b) Liability of Directors.**

*See also under sub-heading (c) OMISSION TO STATE MATERIAL CONTRACT,* col. 469

209. *Material Statement—Becoming Untrue before Allotment—Relief to Allottees.*—If an application for shares is made on the faith of a statement which is true when

made, but which is not true when shares are allotted to the applicant, he may refuse to take them.

A prospectus stated that D., an expert of great ability, was to be chairman. At the date of allotment the promoters and directors knew that D. would not remain on the board.

HELD—that allottees who had been influenced by D.'s reputation were entitled to rescission, though he had not formally resigned at the date of allotment.

RE KENT COUNTY GAS LIGHT AND COKE CO., [Ld., (1907) 95 L. T. 756—Joyce, J.

210. *Misrepresentation—Fraud—Conditional Application for Shares—Non-performance of Condition—Election to Rescind—Waiver.*—T. made a conditional application for shares in a company whose prospectus he had read, and these were allotted to him, but no notice of such allotment was given him, and he never paid anything in respect of the shares. The condition on which he applied for the shares was not fulfilled. T. subsequently discovered that there was something wrong with the company, and served notice of motion for rectification of the register by removing his name therefrom on the ground of misrepresentations in the prospectus. Before this motion came on, a petition was presented to wind up the company, which T. unsuccessfully opposed as a contributory both in the Court below and the Court of Appeal.

T. now applied to have his name struck off the list of contributories in the winding-up.

HELD—that, owing to the non-performance of the condition, there was no contract at first between T. and the company, and that the condition was not waived by the subsequent conduct of T., who was entitled to have his name taken off the list of contributories.

The decision of the Court of Appeal in *Foulkes v. Quartz Hill Consolidated Gold Mining Company* (noted in *Emden's Digest for 1884*, p. 102; *Cababé and Ellis's Reports*, 156) commented on.

RE BRINSMEAD (THOMAS EDWARD) & SONS, LD.; [TOMLIN'S CASE [1898] 1 Ch. 104; 67 L. J. Ch. 11; 77 L. T. 521; 4 Manson, 385; 14 T. L. R. 53, 46 W. R. 171—Wright, J.

211. *Offer of Shares "to the Public"—Circulation of Prospectus by Directors among Friends—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 4.—A syndicate was formed for the purpose of securing an option to purchase certain property, the syndicate not intending to work the property, but to promote a company for the purpose. The syndicate was incorporated under the Companies Acts, and a prospectus, marked "Strictly private and confidential; not for publication," was printed, and some of the directors, without the authority of the company, sent copies of it to their friends to

**Prospectus—Continued.**

see if they would join the syndicate. Certain shares in the syndicate were subscribed for and allotted, but the amount named in the prospectus as the *minimum* subscription was not subscribed. The plaintiff, who had subscribed for shares, brought an action, under sect. 4, sub-sect. 4, of the Companies Act, 1900, to recover the amount paid by him for his shares.

HELD—that on the facts, there had been no offer of shares to the public within the meaning of sect. 4, sub-sect. 4, of the Act, and that therefore the plaintiff was not entitled to succeed. An offer of shares to the public, within the meaning of the section, means an offer by the company, and not by an individual, to anyone who chooses to come in and take shares.

SHERWELL v. COMBINED INCANDESCENT MANTLES [SYNDICATE, LD, (1907) 23 T. L. R. 482—Warrington, J.]

212 *Contribution from Co-Director—Death of Co-Director—Liability of Executor—Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), ss. 3, 5]—Warrington, J., having decided that where a director of a company has become liable to make a payment under the Directors' Liability Act, 1890, in respect of an untrue statement contained in a prospectus, he is entitled under sect 5 of the Act to recover contributions from the executors of a deceased co-director who would himself, if alive, have been liable to make the same payment, and having also decided what sums the contribution in the particular case was to include,

On appeal, the action was settled, the Court being inclined to question the correctness of the judgment.

Decision of Warrington, J. ([1906] 2 Ch 285; 75 L. J. Ch. 633; 54 W. R. 556; 95 L. T. 414; 22 T. L. R. 625; 13 Manson, 279; reversed by consent).

SHEPHEARD v. BRAY, [1907] 2 Ch. 571, 76 L. J. [Ch. 692; 24 T. L. R. 17—C. A.]

213. *Director—Promoter—Fraudulent Misrepresentation in Prospectus—Action of Deceit—Third Party Notice—Contribution from Co-Director or from Co-Promoter—Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 5.]—Sect 5 of the Directors' Liability Act, 1890, gives a director of a company a right of contribution from his co-directors and other persons specified in the section, in respect of liability for fraudulent misrepresentations in a prospectus of a company, as well as in respect of liability under sect 3 of the Act for an untrue statement apart from fraud.

If one director is sued alone, he may bring in his co-directors by a third party notice.

GERSON v. SIMPSON, [1903] 2 K. B. 197, 72 [L. J. K. B. 603; 51 W. R. 610, 89 L. T. 117; 19 T. L. R. 544; 10 Manson, 382—C. A.]

214 *Misrepresentation—Representations Subsequently Made Good—Measure of Damages—Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3—*Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.]—Damages in respect of a fraudulent prospectus ought to be assessed as at the date of allotment to the plaintiff, and, *prima facie*, it must be assumed that, had the prospectus been correct, the shares would have been worth the money paid for them. No damage can be given in such an action for loss of prospective gains.

A plaintiff successfully assailed a prospectus under sect. 38 of the Companies Act, 1867, and also under the Directors' Liability Act, 1890, the serious complaint being that certain property, alleged in the prospectus to belong to the company, was not acquired until ten days after the allotment to the plaintiff.

HELD—that in such a case the subsequent acquisition was no defence, unless it could be shown that at the date of allotment to the plaintiff there was no real risk of the property not being acquired. The question is, what on the date of allotment was the true value of the shares in the absence of the advantages held out by the prospectus, but in fact not existing?

M'CONNEL v. WRIGHT, [1903] 1 Ch. 546; 72 [L. J. Ch. 347, 51 W. R. 661; 88 L. T. 431; 10 Manson, 160—C. A.]

215. *Prospectus improperly issued—Defendants—Cause of Action—Rescission of Contract—Damages—Executors of a Deceased Director—Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3.]—Where an action is brought by a person against a company and its directors for relief in respect of an improperly issued prospectus, there is but one cause of action in the wide sense, though the relief is various in detail, as against the company he asks for rescission of contract, because by rescission he will get all he wants as against the company—that is, he will get rid of his shares and get his money back. The company may, however, be in such a state of impecuniosity that it cannot give him his money back, and therefore he asks for damages against the directors. The executors of a deceased director may be made defendants. The proper way is to let the action proceed, and see whether those defendants are liable under the Directors' Liability Act, 1890.

Gover v. Couldridge ([1898] 1 Q. B. 348; 67 L. J. Q. B. 251; 46 W. R. 214, 77 L. T. 707—C. A., see PRACTICE AND PROCEDURE, No. 73) and Thompson v. London County Council ([1899] 1 Q. B. 840; 68 L. J. Q. B. 625; 47 W. R. 433; 80 L. T. 512—C. A., see PRACTICE AND PROCEDURE, No. 51) explained.

FRANKENBURG v. GREAT HORSELESS CARRIAGE [Co., [1900] 1 Q. B. 504, 69 L. J. Q. B. 147; 81 L. T. 684; 7 Manson, 347—C. A.]

**Prospectus—Continued.****(c) Omission to state Material Contract.**

216. "*Knowingly Issue*"—*Director not Making Inquiries about the Contracts—Waiver Clause—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.]—The plaintiff applied for shares upon the faith of a prospectus, containing a "waiver clause" as to contracts not disclosed in accordance with sect. 38 of the Companies Act, 1867. There were, in fact, a number of undisclosed contracts material to be known by an intending applicant for shares. The defendant took part in the preparation of the prospectus.

HELD—that there was ample evidence that the defendant knew of the existence of the undisclosed contracts, and, that being so, that he came within the words of sect. 38, "knowingly issuing," although it was not suggested that he knew that there was any statutory requirement as to disclosing contracts.

*Twycross v. Grant* ((1877) 2 C. P. D. 469, 46 L. J. C. P. 636, 25 W. R. 701, 36 L. T. 837—Judgment of Cockburn, C.J.) approved.

A waiver clause, to be of any avail to a director, must give an applicant notice not only of the existence of a contract, but also of its contents.

Judgment of Stirling, L.J., in *Cockett v Keswick* ([1902] 2 Ch. 456, 71 L. J. Ch. 641; 51 W. R. 69; 87 L. T. 11, No. 225, *infra*) approved.

The waiver clause may itself fix a director with notice of contracts referred to in it, and yet not give to an applicant the notice to which sect. 38 entitles him.

Decision of Byrne, J. ([1902] 2 Ch. 628; 71 L. J. Ch. 903, 51 W. R. 44; 87 L. T. 428, 18 T. L. R. 806) affirmed.

*WATTS v. BUCKNALL*, [1903] 1 Ch. 766; 72 [L. J. Ch. 447, 51 W. R. 433, 88 L. T. 845, 19 T. L. R. 320; 10 Manson, 176—C. A.

217. *Liability of Directors—Cancelled Contract — Directors' Liability — Reasonable Grounds for believing statement to be true—Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3.]—A prospectus may be legally fraudulent, although no moral fraud be alleged against the directors, thus they will be liable if they omit to mention material contracts, which they honestly believe to be immaterial.

A letter of September 21st, 1898, and a minute and letter of October 1st, 1898, constituted a contract between the London and Northern Bank, Ltd., and one of the promoters thereof for repayment of a deposit of £14,250, advanced by him (for the purchase of the business), together with a bonus of £7,500. A minute of October 10th, 1898, and a letter of October 18th, 1898, formed another contract, putting an end to the earlier contract so far as regarded the payment of the bonus, and substituted a binding obligation to pay a fair and proper amount to be afterwards ascertained. None of these letters or

minutes were disclosed in the prospectus, although the defendants knew of their existence.

Buckley, J., held that the prospectus ought to have contained the dates and names of the parties to the letter of September 21st, the minute of October 1st, 1898, and the letter of October 1st, 1898; that the minute of October 10th and letter of October 18th, 1898, should also have been disclosed; and that the plaintiff was, therefore, entitled to succeed under sect. 38 of the Companies Act, 1867. He also held that he was entitled to succeed under sect. 3 of the Directors' Liability Act, 1890, on the ground that the directors had no ground for believing that all material contracts were disclosed in the prospectus, as stated therein.

HELD—that the contracts were clearly material; and that as their materiality was a question of law, the belief of the defendants to the contrary afforded no answer to the claim.

*Twycross v. Grant* ((1877) 2 C. P. D. 469; 46 L. J. C. P. 636, 25 W. R. 701; 36 L. T. 837)—approved.

Decision of C. A. *sub nom. Broome v. Speak* ([1903] 1 Ch. 586; 72 L. J. Ch. 251, 51 W. R. 258, 88 L. T. 580; 19 T. L. R. 187; 10 Manson, 38) affirmed.

*SHEPHEARD AND ANOTHER v. BROOME*, [1904] [A. C. 342, 73 L. J. Ch. 608; 91 L. T. 178; 20 T. L. R. 540, 11 Manson, 283; 53 W. R. 111—H. L. (E.)

218. *Liability of Directors—Mis-statements of Fact—Combination of Businesses—Agreement between Vendors (Directors of New Company) not to Inquire as to Price Paid for Each Other's Businesses—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38—*Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3.]—Where the owners of a number of businesses sell them to an amalgamating company, of which they are directors, and agree among themselves to abstain from making any inquiries as to the price which the others are obtaining; then, if the prospectus issued by them contains an untrue statement as to the basis on which the various purchase prices have been calculated, they cannot be treated as having had any real belief as to the truth of such statements, and are liable to an action for deceit.

The prospectus of an amalgamating company stated (*inter alia*) that the "bases upon which the various undertakings have been united are: (a) as to the commission combers, a valuation of the assets, with an allowance for goodwill dependent upon profits computed upon an average of the last four years, and (b) as to the top-makers, the average profit earning capacity of the respective businesses computed on an average of the last three years." It concealed the fact that in each case the goodwill of the commission combers included a fixed percentage (10 per cent.) on the value of their machinery, so that goodwill might be paid for in cases where no annual profit had been made.

**Prospectus—Continued.**

HELD—that the prospectus contained an untrue statement, and that those of the directors who were party to an agreement of the nature set out above were liable in an action for deceit; and that under the circumstances all the directors were liable under the Act of 1890.

The Court also held that there were other mis-statements in the prospectus, and that a material contract was not disclosed.

J. & P. COATS, LD., AND OTHERS v. CROSSLAND [AND OTHERS, (1904) 20 T. L. R. 800—Eady, J.

219. *Liability of Directors—Mis-statements in Prospectus—Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3.—*Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.]—In an action for compensation under the Directors' Liability Act, 1890, the measure of damages is the difference between the price paid for the shares and their real value upon the day of the receipt of the notice of allotment. The plaintiff must show some damage before an inquiry as to damages should be ordered. Effect of a waiver clause discussed.

HELD (on the facts)—no cause of action.

STEVENS v. HOARE, (1904) 20 T. L. R. 407—[Joyce, J.

220. *Liability of Directors—Mis-statements in Prospectus—Proof of Damage—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.]—Where damages are claimed from the directors of a company by a shareholder on the ground that the prospectus did not disclose contracts which ought to have been disclosed pursuant to sect. 38 of the Companies Act, 1867, the plaintiff must show that he has been damaged by the omission. If he fails to do so, he cannot succeed.

Nash v. Calthorpe, [1905] 2 Ch. 237 (per Vaughan Williams and Romer, L.J.J., at pp. 246, 251, No. 223, *infra*), followed.

MARSHALL v. MORRISON, [1907] W. N. 29—[Warrington, J.

221. *Liability of Directors—Omission to Make Inquiry—"Knowingly issues"—Waiver Clause—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.]—Where a material contract is omitted from a prospectus of a company, the prospectus is, by sect. 38 of the Companies Act, 1867, to be deemed fraudulent, but it is not enough for a plaintiff, who has applied for shares on the faith of the prospectus, to show that it is fraudulent; he must further prove damage occasioned to himself by the fraud of which he complains—that is to say, he must prove that he was misled into applying for the shares by the omission to disclose the contract. Section 38 does not brand with fraud a director who issues a prospectus, but who never knew of the existence of a contract which ought to have been disclosed.

The plaintiffs had applied for shares on the faith of a prospectus which omitted to disclose a material contract.

HELD—not entitled to recover damages, upon the ground that they had not shown that if the contract had been disclosed they would not have applied for the shares; and, further, upon the ground that the directors had acted honestly in the matter, and the waiver clause in the prospectus protected them.

Decision of C. A. ([1904] 2 Ch. 631; 20 T. L. R. 710) reversed.

CALTHORPE v. TRECHMAN; MACLEAY v. TAIT, [1905] 22 T. L. R. 149—H. L. (E.)

222. *Liability of Directors—Prospectus issued without Director's Authority—Ratification—Liability of Director—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.—*Directors' Liability Act, 1890* (53 & 54 Vict. c. 64), s. 3.]—In an action against a director in respect of a prospectus, which omitted to mention admittedly material contracts, it appeared that one of the promoters took upon himself to issue a prospectus, which was still awaiting final revision and approval by the directors.

HELD—that his act did not render the directors liable for the prospectus.

Before the plaintiff applied for his shares, the directors ratified the issue of this prospectus,

HELD—that the doctrine of ratification did not apply so as to make the directors liable.

HOOLE v. SPEAK, [1904] 2 Ch. 732; 73 L. J. Ch. [719; 91 L. T. 183, 20 T. L. R. 649; 11 Manson, 421—Kekewich, J.

223. *Liability of Directors—Shares subscribed for in Reliance on Prospectus—Evidence Necessary—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 38.]—Where a material contract has been knowingly omitted from a company's prospectus contrary to s. 38 of the Companies Act, 1867, and a shareholder claims damages on the ground of such omission,

HELD—that in order to succeed, such a plaintiff must prove that he has suffered damage from the omission, and give evidence from which the Court may fairly and reasonably infer that, if the omitted contract had been mentioned in the prospectus, he would not have applied for shares.

The mere fact that the omitted contract was a material one is not sufficient; on the other hand, the plaintiff is not called upon to demonstrate to a certainty that he would not have applied, had he known of the contract.

Broome v. Speak ([1903] 1 Ch. 586; 72 L. J. Ch. 251; 51 W. R. 258; 88 L. T. 580; 19 T. L. R. 187; 10 Manson, 38—observations of Collins, M.R., see No. 217, *supra*) discussed.

NASH v. CALTHORPE, [1905] 2 Ch. 237; 74 [L. J. Ch. 493; 21 T. L. R. 587; 12 Manson, 260; 93 L. T. 585—C. A.

224. *Promoters and Directors—Shareholder—Careful Investor—Companies Act, 1867* (30



**Prospectus—Continued.**

& 31 Vict. c. 131), s. 38.]—In order that a shareholder may obtain relief under sect. 38 of the Companies Act, 1867, for non-disclosure in the prospectus of a material contract he must show that he applied for his shares on the faith of that prospectus, and that such prospectus had been "knowingly issued" by the promoters and directors of the company before he acted upon it.

An underwriter who pays attention to nothing in the prospectus but the names of the directors will not be considered by the Court as a careful investor in determining the materiality of a contract not disclosed in the prospectus.

BATY v. KESWICK, (1901) 50 W. R. 14; 85 L. T. 18; 17 T. L. R. 664—Farwell, J.

225. *Promoters and Directors — Waiver Clause—Liability of Director and Promoter—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38*—An arrangement under which the promoters and directors of a company about to be formed agreed with a firm that, in consideration of the latter's underwriting 10,000 shares in the company, the firm was to receive 12,000 vendor's shares as commission therefor, but 10,000 shares were in fact for the use of the firm's name on the prospectus on their approving of the soundness of the undertaking, and further, that the firm was to be appointed commercial agents of the company, whose registered office was to be located at its address, while a member of the firm was to go on the prospectus as chairman of the company. The prospectus issued by the defendants stated that there might be various trade contracts and business arrangements in addition to what was mentioned therein, and the form of application for shares concluded "and I agree with the company as trustee for the directors and other persons liable to waive any further compliance with the 38th sect. of the Companies Act, 1867, than that contained in such prospectus." The prospectus contained no disclosure of the first-named underwriting arrangement between the promoters and directors and the firm.

HELD—that the underwriting arrangement was one which, under the provisions of sect. 38 of the Companies Act, 1867, ought to have been specified in the prospectus, and that the omission of it from that prospectus compelled the Court to deem the prospectus fraudulent on the part of the defendants.

Decision of Farwell, J. ((1901) 50 W. R. 10; 85 L. T. 14; 17 T. L. R. 664), affirmed.

CACKETT v. KESWICK, [1902] 2 Ch. 456; 71 [L. J. Ch. 641; 51 W. R. 69; 87 L. T. 11, 18 T. L. R. 650; 9 Manson, 388—C. A.

**XXI. PROXIES.**

And see No. 136.

See also Sect. XXXII. VOTING, col. 536.

226. *Articles of Association—Meeting of Company—Qualification of Proxy.*—By

Art. 65 of the articles of association of the appellant company "no person shall be appointed or have authority to act as a proxy who is not a shareholder in the company."

HELD—that the person appointed need not be a shareholder when the form of proxy is signed; it is sufficient if he is a shareholder when the form of proxy is required to be lodged with the company and when he acts as proxy.

The articles of association do not require the name of the person appointed to appear in the form of proxy if he is sufficiently described for all business purposes, e.g., as any one of the partners for the time being of a named firm.

Decision of the High Court of Bombay (27 I. L. R. (Bom.) 113) reversed.

THE BOMBAY-BURMAH TRADING CORPORATION, [Ld. v. SHROFF, [1905] A. C. 213; 74 L. J. P. C. 41; 91 L. T. 812, 21 T. L. R. 148; 12 Manson, 169—P. C.

227. *Class of Persons Capable of Holding Proxies.*—For the purposes of a meeting of any particular class of persons proxies can only be given to, and held by, members of that class.

In re Madras Irrigation Co. ((1881) W. N. 120) followed.

IN RE CENTRAL BAHIA RY. CO., LD., (1902) 18 [T. L. R. 503—Buckley, J.

228. *Filling in Blanks after Stamping—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 80.*—A shareholder in a company gave a form of proxy to another shareholder, the proxy being properly stamped when executed, but with the date of the meeting at which it was to be used and the date of its execution left in blank. The question whether there would be a meeting or not was undetermined. Subsequently a meeting was called, and the shareholder by telegram authorised the person who held the proxy to fill in the blanks and to use it at the meeting.

HELD—that the proxy was valid, though the blanks were filled in after it had been stamped and executed.

SADGROVE v. BRYDEN, [1907] 1 Ch. 818; 76 [L. J. Ch. 184; 96 L. T. 361; 23 T. L. R. 255; 14 Manson, 47—Parker, J.

229. *Sending Out Stamped Proxies to Shareholders—Payment Out of Funds of Company—Ultra vires.*—The directors of a railway company whose policy is attacked are entitled to send out circulars, stamped proxy forms with the names of certain persons inserted therein as proxies, and stamped envelopes for return postage to shareholders, explaining their policy and asking for the shareholders' support at the ensuing meeting of the company, and to pay the costs thereof out of the funds of the company, if they honestly believe that their policy is for the benefit of the company. Such an expense is fairly and reasonably

**Proxies—Continued.**

incidental to or consequential on the business expressly authorised by the Acts under which the company was incorporated.

*Studdert v. Grosvenor* ((1886) 33 Ch. D. 528, 55 L. J. Ch. 689; 50 J. P. 710; 34 W. R. 754; 55 L. T. 171; 2 T. L. R. 811—Kay, J.) not followed.

*PEEL v. LONDON & NORTH-WESTERN RY. CO.*,  
[1906] 23 T. L. R. 85—C. A.

**XXII. RECEIVERS.**

**230. Borrowing Powers—Amount Limited—Overdraft.**—Power was given to the receiver and manager in a debenture-holders' action to borrow £700. He borrowed from a bank £500, and this sum he subsequently repaid to them.

**HELD**—that his borrowing power was not to that extent exhausted.

*MILWARD v. AYILL AND SMART, LD.*, (1898) 4  
[Manson, 403—Wright, J.]

**231. Debenture-holders' Receiver — Receiver's Remuneration—Jurisdiction to Fix.**—Mortgage debentures of a company were in a peculiar form. There was no covering deed, each debenture-holder had a separate debenture charging, in the most general terms, the present and future property of the company with the debenture. There were none of those provisions usually found in an ordinary receivership deed. The debentures gave power under certain conditions to the holders to appoint a receiver to realise the assets of the company. This power differed in almost every respect from the ordinary power which is given to mortgagees. There was nothing to say that the receiver was to be the agent of the mortgagor, who was solely to be responsible for his acts and defaults, as in the Conveyancing Acts. There was no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There were none of those provisions that are found in an ordinary receivership deed. The receiver claimed to retain surplus assets as his remuneration.

**HELD**—that the receiver in the circumstances was the agent of the persons who appointed him, not the agent of the mortgagor, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver, and that the liquidator had no right to get the remuneration of the agent, not of the company, but of the debenture-holders, assessed by the Court. The liquidator should bring an action against the agent, claiming the surplus assets as the money of the company, and the agent could then assert his claim to remuneration.

*IN RE VIMBOS, LD.*, [1900] 1 Ch. 470; 69  
[L. J. Ch. 209, 48 W. R. 520; 82 L. T. 597—  
Cozens-Hardy, J.]

**232. Borrowing Powers—Order Authorising Manager to Borrow Money—Debts Incurred by him Beyond Amount—Right to Indemnify out of Assets**—Where in an ordinary debenture-holders' action a receiver and manager is appointed by the Court to carry on the business of the company, and an order is made authorising him to borrow a sum not exceeding a certain amount for the general purposes of the business which he is to carry on, the order is intended to limit his general authority to incur expenses for carrying on the business. If he finds that the fund provided by the Court is not sufficient for the purpose, it is his duty to apply to the Court to increase the sum or to give him leave to incur further liabilities. If, without such an application, he incurs liabilities exceeding the limit, he is not entitled to be indemnified out of the assets unless he can show that, having regard to all the circumstances, he was justified in incurring them without first obtaining leave, and, in determining what circumstances would justify him in increasing the liabilities without leave, it is not enough to show that the liabilities were incurred *bonâ fide* and in the ordinary course of business.

*Warrington, J.*, having so held ([1906] 1 Ch. 497, 75 L. J. Ch. 248; 54 W. R. 387; 94 L. T. 479, 22 T. L. R. 268, 13 Manson, 74)

**HELD**—at a later date, that the receiver was entitled to be indemnified in respect of (1) rent of business premises, and (2) bodies supplied for motor cars ordered by customers before and after his appointment, for it would not have been practicable to apply to the Court, and he had reasonable ground for thinking that he could pay these sums out of the purchase-moneys of the cars, but not in respect of (3) motor car bodies prepared as a speculation for a motor car show, or (4) an overdraft of £1,500 incurred in keeping the business going, for under the circumstances he ought to have applied to the Court.

*IN RE BRITISH POWER TRACTION AND LIGHTING*  
[Co., LD., HALIFAX JOINT STOCK BANKING  
Co., LD. *v* THE Co., [1907] 1 Ch. 528; 76  
L. J. Ch. 423; 97 L. T. 198, 14 Manson, 149  
—Warrington, J.]

**233. Bankruptcy of Receiver and Manager for Debenture-holders—Funds in Court—Insufficiency of—Order of Payment—Creditors.**—A receiver and manager appointed in a debenture-holder's action was adjudicated bankrupt. He had incurred liabilities to various creditors in carrying on the company's business, and the funds in Court in the action were not sufficient to discharge all the company's liabilities.

**HELD**—that the costs of realising the assets must be taxed and paid first; that an inquiry should then be directed as to outstanding liabilities properly incurred by the receiver, and the funds dealt with in the order laid down by *Pearson, J.*, in *Batten v. Wedgwood*

**Receivers—Continued.**

*Coal and Iron Co.* ((1884) 28 Ch. D. 317; 54 L. J. Ch. 686).

In such a case the Court will make payment direct to those creditors to whom the bankrupt receiver has properly incurred liabilities, and will not pay over the money due to them to the receiver's trustee in bankruptcy.

*IN RE LONDON UNITED BREWERIES, LD., SMITH v. THE CO.,* [1907] 2 Ch. 511; 76 L. J. Ch. 612; 97 L. T. 541; 14 Manson, 250—Neville, J.

**234. Receiver for Debenture-holders—Agent—Liability of Debenture-holders**—Debentures issued by a company gave the registered holder of a debenture, with the consent of a majority in value of the outstanding debentures, power, after the principal moneys thereby secured became payable, to appoint a receiver, such appointment to be as effective as if all the debenture-holders had concurred in the appointment; the receiver to have power to take possession of the property charged, to carry on or concur in carrying on the business of the company, to sell or concur in selling any of the property charged, to make any arrangement or compromise he might think expedient in the interests of the debenture-holders, and all moneys received by him should, after providing for the matters specified in the first three paragraphs of sect. 24, sub-sect. 8, of the Conveyancing Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction of the debentures.

A receiver appointed under this power assigned to the plaintiffs the company's book debts as payment for certain work.

A new receiver repudiated the agreement, but offered to pay for certain specified work, which was subsequently done.

**HELD**—that the receiver was agent for the debenture-holders, and that the assignment was valid; that the debenture-holders were personally liable to pay the plaintiff's account, and that the new receiver was also personally liable for the work ordered by him.

*In re Vimbos* ([1900] 1 Ch. 470, 69 L. J. Ch. 209; 48 W. R. 520; 82 L. T. 597—Cozens-Hardy, J., No. 231, *supra*), followed

*ROBINSON PRINTING Co., LD. v. CHIC,* [1905] 2 Ch. 123; 74 L. J. Ch. 399, 53 W. R. 681; 93 L. T. 262, 21 T. L. R. 446; 12 Manson, 314—Warrington, J.

**235. Receiver in Debenture-holder's Action—Action against Company in Scotland—Plaintiff "Arresting" English Debt Due to Company—Interference with Receiver—Injunction—Jurisdiction of English Court.**—In October, 1902, H., a second debenture-holder in an English company, sued the company in Scotland for £500 alleged to be due (as an unsecured debt) on a bill of exchange. The company had supplied goods to the Glasgow office of B. & Co., whose

registered office was in London, but who had branch offices in England and Scotland: for these goods B. & Co. owed to the company £561, and H. "arrested" this debt *jurisdictionis fundandæ causa*.

In March, 1903, the plaintiffs, the first debenture-holders, had obtained the appointment of a receiver in an action to which H. was a party.

**HELD**—that an English Court had jurisdiction to grant an injunction to restrain H. from continuing her "arrest," and so interfering with the receiver, whose duty it was to get in this debt of £561.

*In re Maudslay, Sons & Field* ([1900] 1 Ch. 602; 48 W. R. 568; 82 L. T. 378—Cozens-Hardy, J., No. 32, *supra*), discussed.

**BUT HELD**—that, in the particular case, as the plaintiffs had waited until the Scotch action was ripe for trial, and as the receiver had been made a party thereto, the Court ought to await the result of such trial.

Decision of Kekewich, J. ((1905) 21 T. L. R. 81), affirmed.

*IN RE DERWENT ROLLING MILLS CO., YORK CITY [AND COUNTY BANKING Co. v. THE COMPANY,* (1905) 21 T. L. R. 701—C. A.

**236. Receiver and Manager—Debentures—Money Raised by Receiver—Expenses of Receiver—Right to Indemnity—Priority.**—A company issued debentures which gave a floating charge upon the undertaking and property of the company. A receiver and manager was appointed in a debenture-holders' action, and various orders had been made in the action giving the receiver liberty to borrow various sums of money for the purpose of preserving the property of the company comprised in the debentures, the moneys so borrowed being declared to be a first charge on such property. All the advances were made by the plaintiffs in the debenture-holders' action. In each of the formal charges executed in favour of the plaintiffs for the advances it was declared that the receiver should not be personally liable to repay the advances out of his own moneys. The company's assets eventually proved insufficient to repay these advances after payment of the expenses of receivership and management.

**HELD**—that the expenses of receivership and management had priority over the charges given to the plaintiffs in respect of the sums advanced by them.

*Strapp v. Bull* ([1895] 2 Ch. 1; 64 L. J. Ch. 658; 43 W. R. 641; 72 L. T. 514; 2 Manson, 441—C. A.) followed.

*Quære*, whether the same rule would apply if strangers had advanced the moneys.

Orders giving leave to borrow should expressly deal with the point.

Per Vaughan Williams, L.J.—A receiver and manager appointed by the Court on behalf of debenture-holders is a principal, and no one's agent for the purpose of contracting.

Decision of Joyce, J. (21 T. L. R. 354), affirmed.

### Receivers—Continued.

IN RE GLASDIR COPPER MINES, LD.; THE  
[ENGLISH ELECTRIC METALLURGICAL CO., LD  
v. THE GLASDIR COPPER MINES, LD., [1906]  
1 Ch. 365; 75 L. J. Ch. 109; 94 L. T. 8;  
22 T. L. R. 101, 13 Manson, 41—C. A.

237. *Receiver and Manager—Contract of Company—Unexecuted Contract—Liability on.*—A limited company entered into a contract with the defendants to supply them with pit props to be delivered during the twelve months ending June 30th, 1905. The company became in arrears with the deliveries, and it was agreed that the time should be extended to June 30th, 1906. In November, 1905, the plaintiff was appointed by the Court receiver and manager of the company on behalf of the debenture-holders, and notice thereof was given to the defendants. The plaintiff delivered a quantity of props at various times in pursuance of the contract, and then gave the defendants notice that he could not undertake to carry out their contract with the company. In an action by the plaintiff to recover the price of the props supplied by him,

HELD—that, as the plaintiff delivered the props under the contract between the company and the defendants and not under a new contract with him, he did so as assignee of the company, and he could only recover subject to the right of the defendants to set off any claim which they might have against the company arising out of same matter; and that the defendants were therefore entitled to set off as against the plaintiff's claim the difference between the contract price and the market price of the props not delivered

FORSTER v. NIXON'S NAVIGATION CO., LD.,  
[(1906) 23 T. L. R. 138—Channell, J.]

238. *Sale of Property—Poor Rate—Distress—Payment out of Proceeds of Sale.*—A receiver and manager, appointed in a debenture-holders' action, of all the property comprised in the debentures of a company, sold the property under an order of the Court. The overseers of a parish in which the property was situate applied for an order that, in default of recovery by distress of the amount of a rate, the receiver might be ordered to pay them the amount out of any money in his hands.

HELD—that the overseers could not distrain on the money which represented the proceeds of sale; they were only creditors of the company, and that the overseers were not entitled to the order asked for.

IN RE BRITISH FULLER'S EARTH CO., LD.;  
[GIBBS v. SAME CO., (1901) 17 T. L. R. 232—  
Buckley, J.]

### XXIII. RECONSTRUCTION.

239. *Ultra vires—Sale for Partly-paid Shares in view of Winding-up—Vendor Com-*

*pany or its Nominees to apply for the Shares—Distribution among Shareholders—Sale of Dissident Shareholders' Shares.*—A company, by its memorandum of association, had power to sell its undertaking for shares fully or partly paid up. The company agreed to sell its undertaking to a new company, and as part of the consideration the purchasing company agreed, if the vendor company within six months passed a resolution for a voluntary winding-up, to pay all the costs of the winding-up; and as further consideration the purchasing company agreed to allot to the vendor company or to its nominees a certain number of partly-paid shares in the purchasing company, the vendor company to apply, or find substantial nominees to apply for shares, and in the event of the vendor company failing to do so the shares unapplied for to be at the disposal of the purchasing company, but the vendor company to be under no liability to become a member of the purchasing company. At a meeting of the vendor company resolutions were passed approving of the amalgamation scheme, and that the vendor company should be wound up voluntarily, that the liquidator of the company should offer the shares of the purchasing company rateably to the shareholders of the vendor company, and that in the event of any shareholder not accepting his proportion the liquidator should sell the shares and hold the proceeds for distribution among such shareholders.

HELD—(1) that the fact that the sale was for partly paid shares and was a sale in view of a winding-up did not cause it to be *ultra vires*; and (2) that the provisions of the agreement as to the taking up by the company or its nominees of the partly-paid shares and their distribution among the shareholders were not *ultra vires* the memorandum of association, and were otherwise regular.

FULLER v. WHITE FEATHER REWARD, LD., [1906]  
[1 Ch. 823; 75 L. J. Ch. 393; 95 L. T. 404;  
22 T. L. R. 400; 13 Manson, 136—  
Warrington, J.]

240. *Ultra vires—Sale to New Company—Option to Shareholders to take Shares in New Company—Time Limit—Forfeiture of Shares.*—One of the objects of a company incorporated under the Companies Acts, 1862 to 1890, was, as stated in the memorandum of association, to sell its undertaking and assets for shares in any other company, and to distribute among the members the proceeds of the sale. The shares issued by the company were £1 shares, and were fully paid up. The company being in want of funds, a scheme of reconstruction was adopted, whereby the assets and undertaking were to be sold to a new company in consideration of the allotment by the new company to the old company or its nominees of the same number of £1 shares in the new company as had been issued by the old company, the shares in the new company being credited with 16s. paid

**Reconstruction—Continued.**

up. The scheme further provided that, in the event of the old company going into liquidation before the shares should have been allotted to the old company or its nominees, every member of the old company should be entitled to claim an allotment to himself of one £1 share in the new company, with 16s. credited as paid up, and that within fourteen days of the commencement of the winding-up the liquidator should give notice thereof to the members, and the members must claim within fourteen days from the date of the notice, and the liquidator was to sell any shares unclaimed, and divide the proceeds of the sale, after payment of expenses, rateably among the members who would have been entitled to the shares.

**HELD**—that the scheme was not one contemplated by the memorandum of association, and was *ultra vires*, as it constituted a forfeiture of the shares of the dissentient shareholders, and therefore an injunction would be granted to restrain the company from carrying out the scheme.

*Manners v. St. David's Gold and Copper Mines* ([1904] 2 Ch. 593; 73 L. J. Ch. 764; 91 L. T. 277; 20 T. L. R. 661, 729—C. A., No. 468, *infra*), followed.

*BISGOOD v. NILE VALLEY CO., LD.*, [1906] 1 Ch. [747; 75 L. J. Ch. 379; 54 W. R. 397; 94 L. T. 304; 22 T. L. R. 317; 13 *Manson*, 126—*Kekewich*, J.

**XXIV. REDUCTION OF CAPITAL.****(a) General.**

**241. A less Interval than Fourteen Days between Resolutions—Order of Court and Minute Registered—Conclusive Evidence—Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 15 and 16**—Where the Court has made an order for reduction of capital of a company and the order and minute have been registered, sects. 15 and 16 of the Companies Act, 1867, both come into effect. By their operation the memorandum of association is altered, and the new minute has the same force as if it had formed part of the original memorandum; so that not only is there conclusive evidence that all the requisitions of the Act in respect of the reduction of capital have been complied with (sect. 15), but the original memorandum is gone and a different memorandum is put in its place (sect. 16). This is so, although an interval between the passing and the confirmation of the resolutions was less than fourteen days.

*Decision of Ridley, J.*, (1899) 68 L. J. Q. B. 871; 81 L. T. 300—affirmed.

*LADIES' DRESS ASSOCIATION v. PULBROOK*, [1900] [2 Q. B. 376; 69 L. J. Q. B. 705; 49 W. R. 6—C. A.

**242. Arrears of Preferential Dividend—Scheme including Cancellation of Arrears—Sanction of Court.**—A company's articles

provided that the rights and privileges attached to any class of shares might be modified by an extraordinary resolution passed at a meeting of holders of such shares.

At a time when two years' dividends on the cumulative preference shares were in arrear, a scheme was proposed to reduce the capital, and (*inter alia*) cancel the arrears due and make different provision as to the distribution of future profits. The preference shareholders duly gave their approval.

**HELD**—that there was no reason why the Court should not sanction the scheme.

*IN RE OBAN AND AULTMORE-GLENLIVET DISTILLERIES, LD.* (1904) 5 F. 1141—Ct. of Sess.

**243. Cancellation of Paid-up Shares—Founders' Shares—No Capital Lost or Unrepresented by Available Assets or Repaid—Provision for Debt due to Creditors—Equilibrium of Balance-Sheet—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 9—Companies Act, 1877 (40 & 41 Vict. c. 26), s. 3.**—In speaking of reduction of capital the word "capital" must be understood as meaning neither nominal capital to the exclusion of paid-up capital nor the latter to the exclusion of the former. The nominal capital (A) of every company limited by shares (that is to say, the amount stated in the memorandum of association or as modified by subsequent increase) must be represented by (B) capital called and paid upon shares issued, and (C) capital uncalled upon shares issued, and (D) the amount of unissued shares, or by some one or more of those. Every reduction of capital must reduce (A)—that is, the nominal capital—and must reduce some one or more or all of (B), (C), and (D).

The key to the solution of all questions as to reduction of capital lies in remembering that the corporation owes a duty, not to its shareholders only, but to its creditors also.

Neither paid-up capital (B) nor uncalled capital (C) is to be reduced without provision being made for the debts due to creditors or the protection which the Acts provide being extended to them. Their rights are founded upon the fact that capital paid up can, except as permitted by the Acts, be applied only for capital purposes, and that uncalled capital can only be reduced by proceedings under the Acts. If the reduction be by reducing (A) and (D), or, in other words, by the cancellation of unissued shares, this may be effected without coming to the Court at all (Companies Acts, 1877, s. 5). To such a case the provisions of the Act of 1867 do not apply. The statute excludes this case, because unissued capital is a thing to which the creditor has no right to look. If the reduction be effected by reducing (A) and (C), the case is governed by the Act of 1867, and the creditors must be provided for and their consent obtained. What are the rights of the creditors where the reduction is made by reducing (A) and (B)—by reducing, that is, nominal and paid-up capital? The answer

**Reduction of Capital—Continued.**

to that question is that the reduction must in this case be so made as not to affect the equilibrium of the balance-sheet to the prejudice of the creditors.

A company was incorporated in 1889 under the Companies Act, 1862. Its nominal capital was £1,000,300, divided into 500,000 preference shares of £1 each, 500,000 ordinary shares of £1 each, and 300 founders' shares of £1 each. Part of this nominal capital, namely, 150,000 of the preference shares and 150,000 of the ordinary shares, had been recently created but not issued. All the other shares had been issued and were fully paid up, and the paid-up capital was, therefore, £700,300.

The Company petitioned the Court for an order confirming the reduction of capital. The minute to be approved was one in which the shares issued and paid up were less by £300 than they were before. The agreement to take new shares was conditional upon and did not take effect until after the reduction had been made.

**HELD**—that if the order asked for were made, the debit in the balance-sheet in respect of the paid-up capital would be reduced by £300, and the amount was only to be brought up to, or rather to an amount in excess of, the previously existing debit by something which was to be done thereafter; and that that was not within the Act.

The Court, however, suggested that the parties could so vary the circumstances as to put the Court in a position to make an order, and liberty to amend the petition was granted. The petition was amended, and the holders of the founders' shares were joined as petitioners.

**HELD**—that the reduction should be confirmed on the following terms: The capital of the company to be £1,000,000, divided in 500,000 preference shares of £1 each, and 500,000 ordinary shares of £1 each, instead of the former capital of £1,000,300, the 300 founders' shares of £1 each being cancelled. At the time of the registration of the minute approved by the Court, 350,000 of the preference shares and 428,000 of the ordinary shares had been issued and were outstanding. All the 350,000 preference shares had been and were to be deemed to be fully paid up. Of the said 428,000 ordinary shares all but 780 thereof had been and were to be deemed to be fully paid up, and on the said 780 no amount had been or was to be deemed to be paid: and as the reduction of the capital was a small one and led in fact to a large increase of capital, the use of the words "and reduced" might be discontinued.

*British and American Trustee and Finance Corporation v. Couper* ([1894] A. C. 399; 63 L. J. Ch. 425; 70 L. T. 882; 42 W. R. 652; 1 Manson, 256—H. L. (E.) distinguished.

*IN RE ANGLO-FRENCH EXPLORATION CO.*, [1902] 2 [Ch. 845; 71 L. J. Ch. 800; 51 W. R. 8; 18 T. L. R. 750; 9 Manson, 432—Buckley, J.

244. *Company Registered under 7 & 8 Vict. c. 110—Subsequent Registration under Companies Act, 1862—Capital Repaid to Shareholders—Capital only Capable of being Called up in Winding-up—Companies Act, 1877 (40 & 41 Vict. c. 26), s. 5.*—The Court sanctioned the reduction of capital of a company originally formed under 7 & 8 Vict. c. 110, and subsequently registered as a limited company under the Companies Act, 1862, in respect of (1) uncalled capital which could not be called up except in the event of and for the purposes of a winding-up, the company being in a prosperous condition; and (2) capital which had before the registration of the company as a limited company been repaid to the shareholders.

*IN RE MIDLAND RAILWAY CARRIAGE AND WAGON [Co.]*, (1907) 23 T. L. R. 661—Warrington, J.

245. *Dissentient Stockholders—Sanction of the Court—Companies Acts, 1867 (30 & 31 Vict. c. 131), s. 11, and 1877 (40 & 41 Vict. c. 26).*—A scheme for the reduction of capital is not necessarily unfair or inequitable because it involves the alteration of voting rights, and of priorities, as between the different classes of stockholders.

The capital of a company was £3,300,000, divided into £1,100,000 cumulative preference stock with preference as to capital, but no voting power; £1,100,000 non-cumulative preferred ordinary stock, with no voting power, and £1,100,000 deferred ordinary stock with all the voting power.

A large portion of the capital had been lost, and no dividends were being paid, and the question was how to reconcile the interests of the different classes: the deferred stockholders were unlikely to vote for a winding up in which the other classes would take all the assets; or for any scheme which wiped them out entirely, and yet in the existing state of affairs no one, certainly not the deferred stockholders, was ever likely to get a dividend, unless a reduction could be carried through.

The C. A. reversing Byrne, J., approved the following scheme: The preference stockholders to surrender claims to certain arrears of cumulative dividends, and to have seven votes for every £100 stock—10s. in the £1 to be written off the preferred, and 16s. off the deferred stock, and these two stocks to be consolidated into £77,000 new ordinary stock with ten votes to every £100 of stock.

*RE SAMUEL ALLSOPP AND SONS, LD.*, (1903) 51 [W. R. 641; 19 T. L. R. 636—C. A.

246. *Grounds for—Points to be Considered.*—The jurisdiction of the Court under the Companies Act, 1867, to confirm a resolution for reduction of capital is not limited to those cases specified in sect. 3 of the Companies Act, 1877—namely, where the capital proposed to be cancelled is lost or unrepresented by available assets, or where the capital is in excess of the wants of the company.

**Reduction of Capital—Continued.**

Where the interests of creditors of the company are not concerned, and the reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the only questions to be considered are—(1) ought the Court to refuse its sanction to the reduction cut of regard to the interests of those members of the public who may be induced to take shares in the company; and (2) is the reduction fair and equitable as between the different classes of shareholders.

POOLE AND OTHERS v. THE NATIONAL BANK OF [CHINA, LD., [1907] A. C. 229; 76 L. J. Ch. 458; 96 L. T. 889; 23 T. L. R. 567; 14 Manson, 218—H. L.

247. *Surrender of Deferred Shares—Scheme Involving Increase of Capital without any Consideration to the Company—Illegality—Ultra vires.*—The rights of deferred shareholders were found to be onerous. A scheme was proposed whereby in substance the 700 £1 deferred shares were to be surrendered to the company, with all their rights, and in exchange therefor the deferred shareholders were to have 70,000 £1 ordinary shares allotted to them, so that each holder of a deferred share was to have 100 ordinary shares in exchange for his deferred share. The mode in which it was proposed to carry through this transaction was by reducing the capital of the company in the first instance—by extinguishing the 700 deferred shares, and then increasing the capital of the company and allotting 70,000 ordinary shares, part thereof, to the persons who were holders of the deferred shares, without any further consideration or payment to the company. In form the petition asked that a reduction only should be sanctioned—that was, a reduction by the extinction of 700 deferred shares. It was not suggested that any part of the capital was lost or unrepresented by available assets, or that any sum should be returned to the shareholders as being in excess of the wants of the company. The only debts of the company were for costs, salaries, and office rent not exceeding £300.

Held—that the scheme was illegal and wholly *ultra vires*, as it involved the issue of £70,000 nominal capital for a surrender of £700 nominal capital without any consideration to the company that it was not sufficient for the bargain to be beneficial or adequate as between the shareholders; and that the petition must be dismissed.

*British and American Trustee and Finance Corporation v. Couper* ([1894] A. C. 399; 6 R. 146; 63 L. J. Ch. 425; 42 W. R. 652; 70 L. T. 882; 1 Manson, 256—H. L. (E.)) distinguished.

IN RE DEVELOPMENT COMPANY OF CENTRAL AND [WEST AFRICA, [1902] 1 Ch. 547; 71 L. J. Ch. 310; 50 W. R. 456; 86 L. T. 323; 18 T. L. R. 337; 9 Manson, 151—Swinfen Eady, J.

**(b) Loss of Capital.**

248. *Capital Lost or Unrepresented by Available Assets—Arrears of Dividends on Preference Shares—Inequality of Reduction—Conversion of Preference into Ordinary Shares.*—An incorporated society whose articles of association did not give power to modify rights, or to subdivide shares, or to reduce capital, having issued both preference and ordinary shares of £5 each, finding that, owing partly to the defalcations and mismanagement of a former manager and partly to depreciation of property, its capital had been lost or was unrepresented by available assets to the extent of a large amount, and also that the arrears of dividends on the preference shares amounted to a considerable sum, added to its articles of association articles for the above-mentioned purposes, and then prepared a scheme which was approved by a majority of each class of shareholders, under which some ordinary shares which had been transferred to the society were cancelled, the preference shares were reduced to £2 shares and then divided into £1 shares, the ordinary shares were reduced to shares of 10s. each and then consolidated into £1 shares, the arrears of dividends on the preference shares were cancelled, and the preference shares were made to rank *pari passu* with and to have only the rights and privileges of ordinary shares.

The society then petitioned the Court to confirm the reduction of its capital and to approve minutes for registration. The petition was unopposed.

The Court confirmed the reduction and approved the minutes.

NATIONAL DWELLINGS SOCIETY, LD., (1898) 78 [L. T. 144—North, J.]

249. *Confirmation by Court—Proof of Alleged Extent of Loss—Points of Law.*—In support of a petition for the confirmation by the Court of special resolutions for the reduction of the capital of the company by the sum of £764,000, which was alleged to have been lost, the evidence of valuers was adduced to the effect (*inter alia*) that the company's iron ore mines had become depreciated in value to the extent of £177,000, and that their works had fallen in value to the extent of £486,000. Cozens-Hardy, J., dismissed the petition on the short ground that the company had not satisfied him that the last mentioned items had been proved, and he also dealt with various points of law which arose in the case.

Held—that there was not sufficient evidence to establish the alleged extent of loss of capital; that the resolutions ought not to be confirmed; and that the Court was not called upon to decide any points of law.

Appeal from decision of Cozens-Hardy, J. ([1900] 2 Ch 846; 69 L. J. Ch. 869; 83 L. T. 397; 16 T. L. R. 569) dismissed.

**Reduction of Capital—Continued.**

IN RE BARROW HÆMATITE STEEL Co., [1901] 2 Ch. 746; 50 W. R. 71; 85 L. T. 493; 18 T. L. R. 9; 71 L. J. Ch. 15; 8 Manson, 35—C. A.

**250. Losses, how Borne—Ordinary Shares with different Amounts paid up thereon—Deferred Shares—Special Provision in Articles of Association—Discretion of Court—Jurisdiction to Sanction Scheme—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 11.**—A company was incorporated with a capital divided into deferred shares and ordinary shares. The profits were to be applied, after carrying sums to reserve, in paying a dividend upon the ordinary shares of 10 per cent. per annum on the amount paid up for the time being, one-half the surplus to be paid to the holders of deferred shares and the other half, subject to payment thereof of remuneration to the directors, to the ordinary shareholders. The deferred shares were issued as fully paid. Some of the ordinary shares were issued as paid up to the extent of £5 and others had only £2 called up and paid. The company had had losses and passed resolutions that the capital of the company should be reduced. By the articles of association if the corporation should be wound up the losses were to be borne by the members in proportion to the capital paid up, or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up.

**HELD**—that as regards inequality between the ordinary and deferred shares, inasmuch as the moiety of profits after 10 per cent. had been paid on the ordinary shares was to go to them, it did not much matter, so far as dividend was concerned, how much was deemed to be paid up; that with regard to the return of capital on a winding-up, the sum concerned was so very small that the inequality ought not to be regarded as a reason for not approving the reduction in a case where the Court had a discretion and could consider whether it was fair or not; and that as regards the inequality paid upon the ordinary shares the losses were to be borne by the members in proportion to the capital paid up as provided for by the articles in the case of a winding-up.

IN RE CREDIT ASSURANCE AND GUARANTEE CORPORATION, LD., [1902] 2 Ch. 601; 71 L. J. Ch. 629; 86 L. T. 650—Farwell, J.

**HELD**—on appeal (reversing the decision of Farwell, J.)—that the scheme as proposed would not work inequitably or unjustly, and, that being so, the Court had jurisdiction to sanction it.

IN RE CREDIT ASSURANCE AND GUARANTEE CORPORATION, LD., [1902] 2 Ch. 601; 71 L. J. Ch. 775; 51 W. R. 20; 87 L. T. 216; 18 T. L. R. 787—C. A.

**251. Reserve Fund—Apportionment of Loss between Capital and Reserve—Jurisdiction of**

**Court to Sanction—Companies Acts, 1867 (30 & 31 Vict. c. 131), s. 9, and 1877 (40 & 41 Vict. c. 26), s. 3.**—Where a company, having a reserve fund properly created, has lost part of its capital, the loss ought to be treated as apportioned between reserve fund and capital account; and the company need not, though they may, attribute to the reserve fund more than the due proportion of the loss. The Court has jurisdiction to sanction a reduction scheme which apportions the loss in this way, without absorbing all the reserve to replace lost capital.

IN RE HOARE & Co., LD., [1904] 2 Ch. 208; 73 [L. J. Ch. 601; 53 W. R. 51; 91 L. T. 115; 20 T. L. R. 531; 11 Manson, 307—C. A.

**252. Reserve Fund—Loss Written off Capital Account.**—A company had created reserve funds for special purposes out of profits. Paid-up capital to the extent of £88,000 had been lost, and it was proposed to charge the greater part of the loss against the capital account, and to take a small sum out of the balance standing to the credit of the profit and loss account.

**HELD**—that the Court could sanction the reduction without any part of the loss being taken out of the reserve funds.

ROWLAND AND MARWOOD'S STEAMSHIP Co., RE, [(1907) 51 Sol. Jo. 131—Warrington, J.]

**(c) Power to reduce.**

**253. Articles of Association—No Power to Reduce Capital—Resolution to Reduce Capital—Confirmation by Court—Certificate of Registration—"Conclusive Evidence"—Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 9, 15.**—The articles of association of a company contained no power enabling the company to reduce its capital. Without having altered the articles, a special resolution was passed purporting to reduce the capital of the company. The reduction was confirmed by an order of the Court; and the Registrar of Joint-Stock Companies registered the order and a minute giving particulars of the capital as reduced, and gave his certificate of the registration.

**HELD**—that the Registrar's certificate was "conclusive evidence" under sect. 15 of the Companies Act, 1867, that the reduction of capital had been duly made.

*Ladies Dress Association v. Pulbrook* ([1900] 2 Q. B. 376; 69 L. J. Q. B. 705; 49 W. R. 6; 7 Manson, 465—(C. A.) No. 293, *infra*, followed.

*In re National Debenture Assets Corporation* ([1891] 2 Ch. 505; 60 L. J. Ch. 533; 39 W. R. 707; 64 L. T. 512—(C. A.)) distinguished.

IN RE WALKER & SMITH, LD., (1903) 72 L. J. Ch. [572; 51 W. R. 491; 88 L. T. 792; 19 T. L. R. 429; 10 Manson, 333—Byrne, J.]

**254. Memorandum of Association—Rights of Shareholders inter se—Power of Altera-**



**Reduction of Capital—Continued.**

*tion—Confirmation—Companies Acts, 1867 (30 & 31 Vict. c. 131), ss. 9, 11, and 1877 (40 & 41 Vict. c. 26), s. 3*—It is not necessary that a company should in its memorandum of association state definitely anything as to the priorities, *inter se*, of the different classes of shares therein enumerated.

A company's memorandum of association, after specifying the respective rights of the preference, ordinary, and deferred shareholders, provided that such rights might be modified as mentioned in the articles of association.

**HELD**—that such power of modification was valid.

*Ashbury v. Watson* ((1885) 30 Ch. Div. 376; 54 L. J. Ch. 985; 33 W. R. 882; 54 L. T. 27—C. A.) distinguished.

The company passed a special resolution to reduce its capital, and to vary the rights of the shareholders *inter se*, at the expense of the preference shareholders, some of whom opposed the scheme.

**HELD**—that, on the facts, the scheme was an equitable one, and ought to be confirmed. The Court is not bound to confirm a scheme by whatever majorities it has been approved, but it will be careful how it interferes with the judgment of business men in a matter of business affecting their own interests.

*IN RE WELSBACH INCANDESCENT GAS LIGHT CO.*, [Ld., [1904] 1 Ch. 87; 73 L. J. Ch. 104; 52 W. R. 327; 89 L. T. 645; 20 T. L. R. 122; 11 Manson, 47—C. A.]

**255. Power to Reduce in Memorandum, but not in Articles of Association**—"Regulations"—*Companies Act, 1867 (30 & 31 Vict. c. 131), s. 9.*—The word "regulations" in sect. 9 of the Companies Act, 1867, means articles, and not memorandum of association.

Therefore a company, whose memorandum does, but whose articles do not, contain a power to reduce capital, must alter its articles by inserting a power to reduce, before it can pass a special resolution for reduction.

*RE DEXINE PATENT PACKING AND RUBBER CO.*, [(1903) 88 L. T. 791—Byrne, J.]

(d) **Return to Shareholders of Capital not required.**

**256. Procedure**—*Companies Acts, 1867 (30 & 31 Vict. c. 131), s. 15, and 1877 (40 & 41 Vict. c. 26), s. 3.*—When the Court is willing to approve the reduction of a company's capital by the return to shareholders of capital not required, the following is the proper procedure: After order made confirming the reduction, allow the petition to stand over till the capital to be paid off shall have been actually returned to the shareholders. Upon proof of this having been done, postdate the order confirming the reduction, and approving a minute showing the statutory particulars.

Observations as to the form of minute in ordinary cases, and where the sum returned is liable to be recalled.

*IN RE CALGARY AND EDMONTON LAND CO., LD.*, [1906] 1 Ch. 141; 75 L. J. Ch. 138; 94 L. T. 132; 13 Manson, 55—Buckley, J.]

**257. Form of Order—Form of Minute**—*Companies Acts, 1867 (30 & 31 Vict. c. 131), ss. 9, 15, and 1877 (40 & 41 Vict. c. 26), ss. 3, 4.*—Where the Court is asked to make an order confirming a reduction of capital in a company by paying off capital in excess of the wants of the company, the proper procedure is to make an order confirming the reduction and approving a minute in which the reduced amount of the capital is stated, before the capital has, in fact, been reduced by the proposed repayment.

Form of minute approved

*In re Calgary and Edmonton Land Co. (supra)*, not followed.

*IN RE LEES BROOK SPINNING CO., LD.*, [1906] 2 Ch. 394; 75 L. J. Ch. 565; 54 W. R. 563; 95 L. T. 54; 22 T. L. R. 629; 13 Manson, 262—Eady, J.]

**258. Form of Order—Companies Acts, 1867 (30 & 31 Vict. c. 131), ss. 9, 15; and 1877 (40 & 41 Vict. c. 26) ss. 3, 4.**—Where the Court was asked to confirm a reduction of capital from £50,000 in £5 shares to £10,000 in £1 shares,

**HELD**—following *In re Lees Brook Spinning Company*, [1906] 2 Ch. 394, *supra*, that the order should be made approving a minute in which the reduced amount of capital is stated, before the capital has in fact been reduced by the proposed repayment. Form of minute approved.

*In re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141 (*supra*), not followed.

*IN RE ANGLO-ITALIAN BANK*, [1906] W. N. 202. [—Warrington, J.]

[NOTE: This case was followed by Parker, J., in *In re General Industrial Developments Syndicate*, [1907] W. N. 23.]

## XXV. REGISTER OF MEMBERS.

**259. Bankruptcy of Member—Transmission of Interest to Trustee of Bankrupt—Right of Trustee to be Registered—Claim by Company of Lien on Shares and of Right to put a Memorandum to that effect on Register—Rectification of Register—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 25, 30, 35; sched. I., Table A., Clauses 2, 13.**—N. was registered and held a certificate in respect of 4,000 shares in the usual and ordinary form—that is to say, that they were held as "fully paid ordinary shares of £1 each," "subject to the memorandum and articles of association, and the rules and regulations of the said company." The applicant, who was his trustee in bankruptcy, said there had been a transmission of interest, and by virtue of that transmission he was entitled to be registered as a member. The company did

**Register of Members—Continued.**

not decline to register, but said they would put upon the certificate and register a memorandum to the effect that they claimed a sum as being due under the clause in the articles giving them a lien and an action for which was pending. The claim to a lien was altogether denied. The trustee applied under sect. 35 of the Companies Act, 1862, for rectification of the register.

**HELD**—that *prima facie* the applicant was entitled to a “clean” certificate like that possessed by the person from whom he derived his title; that it was not necessary for the protection of the company in any way that they should enter the memorandum upon the register; and that the register ought to be rectified by striking out any reference to the specific claim on the register.

**IN RE W. KEY & SON, LD.**, [1902] 1 Ch. 467; 71 L. J. Ch. 254; 50 W. R. 234; 86 L. T. 374; 18 T. L. R. 263; 9 *Manson*, 181—Byrne, J.

**260. Inspection of Register—Members who have forfeited their shares—List of members—Right to take notes and copies—Injunction to enforce right—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32**—[A company in response to an application by a member for a list of shareholders, supplied him with a list containing the names in the register of members, of the persons who then held shares of the company, but omitting the names of those whose shares had been forfeited, which remained on the register, but had a red line drawn through them; and refused to supply him with a complete list of all the persons whose names appear in the register. The company also, in compliance with an order for inspection of the register, allowed him to inspect it, but refused to allow him to take notes or copies therefrom, on the ground that he was not entitled to a copy except by paying for it in accordance with the provisions of sect. 32 of the Companies Act, 1862.

On a motion for an injunction against the company to prohibit such refusal,

**HELD**—that the right of inspection given by the common law or by statute, in the absence of express prohibition to the contrary, carries with it the right to take notes and copies of the whole or any part of the document which there is power to inspect, that the right given by sect. 32 of the Companies Act, 1862, of obtaining a copy of the register of members on paying for it, is an additional privilege and does not take away the right to make copies of a document which is implied by the right to inspect it; and that the applicants had, notwithstanding the provisions of that section, a right to make copies of the register of members if accomplished in a reasonable time; and the injunction asked for was granted.

**BOORD v. AFRICAN CONSOLIDATED LAND AND TRADING COMPANY**, [1898], 1 Ch. 596; 67 L. J. Ch. 451; 77 L. T. 553; 14 T. L. R. 116; 46 W. R. 150—North, J.

**OVERRULED—In re Balaghât Gold Mining Co.**, [1901] 2 K. B. 665; 70 L. J. K. B. 866; 49 W. R. 625; 85 L. T. 8; 17 T. L. R. 660—C. A. *infra*.

**261. Inspection—Right to Obtain Copies—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32.**—[A person paying a shilling for inspection of the register of members of a company, under sect. 32 of the Companies Act, 1862, is not entitled to take copies on his own account. His only right with regard to copies is to be furnished by the company with copies on payment of sixpence for every hundred words required to be copied.

**Boord v. African Consolidated Land and Trading Co.** [1898] 1 Ch. 596; 67 L. J. Ch. 451; 46 W. R. 150; 77 L. T. 553; 14 T. L. R. 116—North, J., *supra* overruled.

**IN RE BALAGHÂT GOLD MINING CO.**, [1901] 2 K. B. 665; 70 L. J. K. B. 866; 49 W. R. 625; 85 L. T. 8; 17 T. L. R. 660—C. A.

**262. Right to Inspect—Voluntary Winding-up—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32.**—[When a company is being wound-up voluntarily an order for inspection of the register of members cannot be made under sect. 32 of the Companies Act, 1862.

**RE KENT COALFIELDS SYNDICATE, LD.**, [1898] 1 Q. B. 754, 67 L. J. Q. B. 500; 78 L. T. 443; 5 *Manson*, 88; 14 T. L. R. 305; 46 W. R. 453—C. A.

**263. Rectification of Register—Form of Order.**—[Disputes had arisen as to the conduct of a small company (with only seven shareholders), and shares had been transferred by one shareholder to other persons with a view to the acquisition of voting power. Subsequently all the directors resigned *en bloc*, and all the company's books, except the share register, were deposited with the company's bankers to the order of the new directors when appointed. The secretary of the company had also resigned, but still retained the register of members in his possession. The consequence was that there was no one having authority to carry out any order which the Court might make for rectification of the register. Upon an application by the transferor and transferees of the shares for an order for rectification of the register of shareholders by the removal therefrom of the name of the transferor and the substitution of the names of the transferees in respect of the shares transferred, the Court made an order directing that the company should rectify the register within four days from service of the order on them. That was a mandatory order, and the applicants would have liberty to apply to the Court again under Order xlii. r. 30, or otherwise.

**IN RE L. L. SYNDICATE, LD.**, [1901] W. N. 164; [36 L. J. N. C. 404; 111 L. T. Jour. 322—Kekewich, J.

## XXVI. REGISTERED NAME.

*And see BILLS OF SALE, 29.*

264. *Trade Name—Resembling that of Substituting Registered Company—“Calculated to Deceive” — Dissimilarity of Business — Attempt to Monopolise Word in Ordinary Use—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20.*—The plaintiffs carried on business mainly in the sale of “sparklets,” which word was their registered Trade Mark, “sparklets” being a small apparatus containing carbonic acid gas for the purpose of aerating the contents of bottles. The plaintiffs brought an action to restrain the defendants from registering their proposed company on the ground that the name of the *Automatic Aerator Patents, Ltd.*, so nearly resembled the plaintiff's name, *Aerators, Ltd.*, as to be calculated to deceive within the meaning of the 20th section of the Companies Act, 1862. The company proposed to be registered was intended to acquire certain patents for aeration of liquids contained in tanks and cisterns of large size, and to either work such patents themselves or form subsidiary companies for the development of such patents.

HELD—that there was no probability of deception, as the articles in which the plaintiffs dealt were very different from those to be manufactured under the defendant's patents; that the plaintiff's action was an attempt to monopolise, for the purpose of nomenclature, a word in ordinary use in the English language, and failed; and that the action must be dismissed with costs.

*North Cheshire and Manchester Brewery Co., Ltd., v. Manchester Brewery Co., Ltd.* ([1893] A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645; 15 T. L. R. 110; 16 R. P. C. 397—H. L. (E.)), explained.

*AERATORS, LD v. TOLLIT*, [1902] 2 Ch. 319; 71 [L. J. Ch. 727; 50 W. R. 584; 86 L. T. 651; 18 T. L. R. 637; 19 R. P. C. 418; 10 Manson, 95—Farwell, J.

## XXVII. SALE OF UNDERTAKING.

265. *Anticipation of Option to Buy at end of Thirty Years—Power to accept Bonds in Payment—Ultra Vires—Objects Applicable to Company as a Going Concern.*—The defendant railway company was registered in 1884 for the purpose, *inter alia*, of acquiring certain contracts with decrees of and concessions from the then Imperial Brazilian Government, and for constructing and working a railway in Brazil. The objects were expressed in paragraphs lettered from (a) to (r). The objects mentioned in paragraph (a) were “to . . . take over” specified contracts with decrees and concessions from the then Government of Brazil “and all confirmations or modifications” of the same. Among the objects defined by paragraph (l) were “to acquire, hold, dispose of, or issue to the public or otherwise, obligations of any kind

of any Government,” &c. Paragraph (p) empowered the company “to . . . sell . . . all or any part of the undertaking or business of the company.” Under the decrees an option was given to the Brazilian Government at the end of a term of thirty years to buy the undertaking at a price for the determination of which provision was made to be paid in bonds of the Government. Proposals had recently been made by the Federal Government of Brazil for the immediate purchase of the defendants' railways, and an agreement was prepared which provided for payment of the price of the railway in 4 per cent. Brazilian bonds. The plaintiff, a shareholder, brought an action to test the validity of the proposed sale.

HELD—that the period of thirty years could be anticipated, as under paragraph (a) the company was empowered to modify any existing contract with the Brazilian Government: that there was no objection to the company so modifying the contract for sale to be carried out at the end of a term, or to accelerate the time at which it was to be carried out, or so as to alter the consideration and the class of bonds in which it had to be paid, and that the proposed sale was *intra vires* if the matter stood on paragraph (a); that the proposed transaction was carried by the words “surrender or otherwise deal with and dispose of all or any part of the undertaking” in another paragraph (p); and that the objects in paragraph (l) were not only applicable to the company as a going railway company.

*LOEFFLER v. DONNA THEREZA CHRISTINA RAILWAY [Co., Ltd., (1902) 18 T. L. R. 149—Eady, J.*

266. *Compensation to Directors—Power of Company to Approve—Notice of Meeting—Sufficiency—Purpose—No Reference to Payments to Directors—Companies Clauses Act, 1845 (8 Vict. c. 16), ss. 71, 85, 86, 138.*—An agreement between two companies for the sale of the undertaking of one company to the other provided that the purchasing company should pay to the selling company the sum of £30,543 and a sum amounting to £3,250 to the directors and secretary “as compensation for loss of office.” Notice was given of an extraordinary general meeting of the shareholders of the selling company “for the purpose of considering, and, if thought advisable, of approving the terms of an agreement to be made between the A. company of the one part, and the B. company of the other part, being an agreement for the sale of the undertaking and assets of the A. company to the B. company.” A circular was afterwards sent to the shareholders stating the object of the agreement, and that, as the B. company was “desirous of having the management in their own hands, the directors and secretary have agreed to retire on being paid a lump sum as compensation for their loss of office.”

At the extraordinary general meeting a resolution confirming the agreement was passed by a large majority.

**Sale of Undertaking—Continued.**

**HELD** (reversing the decision of Kekewich, J.)—that the agreement to pay various sums to the directors and secretary was not *ultra vires*, provided the shareholders approved of it; but (affirming the decision of Kekewich, J.) that, as the notice of the extraordinary general meeting did not refer to such payments, it did not specify the "purpose" for which the meeting was called within sect. 71 of the Companies Clauses Act, 1845, and therefore the resolution was not binding on a dissentient shareholder, and he was entitled to an injunction restraining the directors from carrying it into effect until it had been duly sanctioned by a meeting of the company properly convened for that purpose.

**KAYE v. CROYDON TRAMWAYS Co., LD.,** [1898]  
[1 Ch. 358; 67 L. J. Ch. 222; 78 L. T. 237;  
14 T. L. R. 244; 46 W. R. 405—C. A.]

**267. Fraudulent Sale Set Aside—Re-transfer—Liability of Liquidator—Rents and Profits.]**—Where the sale of an undertaking of a company effected by its liquidator, nominally to another company, but really to himself, had been set aside on the ground of fraud, and the re-transfer of the undertaking to the original company had been ordered,

**HELD**—that the liquidator, being in a fiduciary capacity, should repay the rents and profits which had accrued, but that he was not to be charged with interest on the same.

**SILKSTONE AND HAIGH MOORS CANAL Co., LD. v.**  
[EDEY AND OTHERS, [1900] 1 Ch 167; 48 W. R.  
137—Stirling, J.]

**XXVIII. SECRETARY.**

**268. Lien on Books of Company.]**—The secretary of a company has no lien over the books, &c., of the company for money due to him by the company.

**BARNTON HOTEL Co. v. COOK,** (1899) 36 S. L. R.  
[938.]

**269. Same Person Secretary to Two Companies—Knowledge Obtained as Secretary of One Company—Notice to him as Secretary of the other Company—Duty to Communicate—Notice of Dishonour of Bill of Exchange—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 48, 49, 50, sub-s. 2 (b).]**—It is not true as a general proposition that a fact which comes to the knowledge of a man as secretary of one company is notice to him as secretary of another company from the mere existence of the common relationship. The true test is this: where a man holds a double capacity what the Court has to see is whether the information he gets as secretary of the one company comes to him under such circumstances as that it is his duty to communicate it to the other company.

**IN RE FENWICK, STOBART & Co., LD., DEEP SEA**  
[FISHERY Co.'s (LD.) CLAIM, [1902] 1 Ch. 507,  
71 L. J. Ch. 321; 86 L. T. 193; 9 Manson,  
205—Buckley, J.]

(*N.B.*—*In re Hampshire Land Co.* ([1896]  
2 Ch. 743; 65 L. J. Ch. 860; 45 W. R. 136; 75  
L. T. 181; 3 Manson, 269—Vaughan Williams,  
J.), to the same effect, was not cited.)

See also Sect. XXX., No. 341.

**XXIX. SHAREHOLDERS.**

See also Sect. XXX, SHARES.

**270. Petition for Arrangement—Subsequent Liquidation of Company—Liability for Calls.]**—Where a shareholder in a company presented a petition for an arrangement with his creditors, and subsequently, while the arrangement was still pending, the company went into liquidation, and a call was made on the shares,

**HELD**—that the presentation of the petition being prior to the liquidation, the call was not a debt provable in the arrangement, and was, therefore, unaffected by it, and that consequently the shareholder's name should be retained on the list of contributors; but *secus* if the liquidation had preceded the presentation of the petition.

**IN RE LIGONIEL SPINNING Co., Ex PARTE**  
[CONNOR, [1900] 1 Ir. R. 250—V. C.]

**271. Insolvent Estate—Proof—Estimated Value of Future Calls on Shares—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37, sub-sects. 3, 4, 6, 8.]**—Under the Bankruptcy Act, 1883, when a shareholder becomes bankrupt all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not.

**IN RE McMAHON, FULLER v. McMAHON,** [1900]  
[1 Ch. 173; 69 L. J. Ch. 142; 81 L. T. 715;  
16 T. L. R. 73, 7 Manson, 38—Stirling, J.]

**272. Liability—Company Incorporated under Companies Acts—Carrying on Business in Foreign State—Debts Incurred Abroad—Law of Foreign State.]**—A company was incorporated in England as a limited company under the Companies Acts, 1862 to 1898, with its registered office in England, and its share capital was fully subscribed and paid up. The objects of the company, according to its memorandum of association, were to acquire mining rights and land in the United States of America and elsewhere, to purchase or hire machinery, and to do all other things incidental or conducive thereto; and by the articles of association the company was empowered to appoint any person as its attorney for the transaction of business abroad, with such powers as it might deem necessary to enable the company's operations to be validly carried on

**Shareholders—Continued.**

abroad, and to do all such acts as might be necessary to comply with the law of any country where the company might carry on business. The company carried on business in the State of California, in the United States of America, and incurred debts there in the purchase of machinery in that State. By the law of the State of California each stockholder of a corporation was individually liable for debts contracted by the corporation during the time he was a stockholder, according to the proportion which his holding bore to the subscribed capital of the corporation, and no corporation organised outside the limits of the State was allowed to transact business within the State on more favourable conditions than were prescribed by law to similar corporations organised under the laws of the State. The company having gone into liquidation, the unpaid vendors of the machinery in California brought an action in England against the defendant, who was a shareholder in the company at the time when the debts were contracted, to recover his proportion of the amount due, as prescribed by the law of California.

**HELD**—that the defendant was not liable, as the facts did not show that he had authorised the company to enter into contracts in California, so as to make him personally liable, and the general power given to the company by its memorandum and articles to carry on business abroad was subject to the fundamental condition of limited liability on the part of the shareholders.

**Decision of Kennedy, J.** ([1905] 1 K. B. 304; 74 L. J. K. B. 243; 21 T. L. R. 179; 10 Com. Cas. 53; 12 Manson, 109), affirmed.

**RISDON IRON AND LOCOMOTIVE WORKS v. [FURNESS, [1906] 1 K. B. 49; 75 L. J. K. B. 83; 54 W. R. 324; 93 L. T. 687; 22 T. L. R. 45; 11 Com. Cas. 35—C. A.]**

**273. Share Register—Rectification—Refusal to Register Transfer—Companies Act, 1862, sect. 35.**—Where directors refuse to register a transfer an applicant for rectification under sect. 35 of the Companies Act, 1862, must show that there is no just cause for such refusal.

**Decision of Stirling, J., affirmed.**

**RE HANNAN'S KING (BROWNING) GOLD MINING [Co., Ltd., (1898) 14 T. L. R. 314—C. A.]**

**274. Share Register—Rectification—Wind-up—Money paid for Shares a Probable Debt—Costs Admitted to Proof—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 35, 158.**—An application under sect. 35 of the Companies Act, 1862, to rectify the register, and for a return of money paid for shares is not a claim for unliquidated damages.

After a successful application to rectify the register of shareholders, sums paid by applicants for shares are provable debts in the liquidation of the company; and the costs of rectifying the register, being costs

of obtaining an order, without which the debts could not be recovered or admitted to proof, may properly be added to the provable debts.

**Decision of Wright, J., affirmed.**

**IN RE BRITISH GOLDFIELDS OF WEST AFRICA, [LIMITED [1899] 2 Ch. 7; 68 L. J. Ch. 412; 47 W. R. 552; 80 L. T. 638; 15 T. L. R. 363; 6 Manson, 334—C. A.]**

**XXX. SHARES.****(a) General.**

*And see BANKRUPTCY, 224.*

**275 Acceptance of by Executor de son tort of Shareholder—Unregistered Assignee—Acts of Ownership—Shareholder by Estoppel—Liability for Calls on Shares.**—J. C., senior, being the owner of certain shares in the plaintiff company, shortly before his death assigned by deed all his property, including the shares, to his son, J. C. (the present defendant), subject, however, to payment of his debts. The company continued after the death of J. C., senior, of which they alleged they had no notice, to address the usual shareholders' notices as before, namely, to "J. C., Ballymoney," and the dividend warrants were drawn in favour of J. C. The defendant, in his evidence, admitted that he had received these dividend warrants, the first of which he indorsed as "J. C., assignee of J. C., sen.," but he alleged that he had devoted the proceeds to the payment of his father's debts. He further admitted that, since his father's death, he had attended a meeting of shareholders, and moved a resolution. He also stated that, after the meeting, he showed the deed of assignment to one of the directors, and asked to be registered as a shareholder, but that this request was refused on the ground that the deed did not comply with the articles of association. The company made calls on the shares which the defendant refused to pay. The present action having been instituted by the company to recover the amount of calls due on foot of the shares,

**HELD**—that the company were aware that the defendant was not the registered owner of the shares, and had themselves refused to register him as such; that, consequently, the defendant was not estopped by any conduct on his part from denying that he was a registered shareholder, and that therefore he could not be made personally liable for the payment of the calls; that as executor *de son tort* the defendant was also not liable for such payment *de bonis propriis*, but was only liable for the administration in due course of the assets that actually came to his hands.

**BLACKSTAFF FLAX SPINNING AND WEAVING CO. v. [CAMERON, [1899] 1 Ir. R. 252—V.-C.]**

**276. Application for—Acceptance—Withdrawal—Post Office as Agent of Parties—Delivery of Letter to Postman—Companies Act,**

*Shares—Continued.*

1862 (25 & 26 Vict. c. 89), ss. 35, 39, 62.]—J., who resided at Sheffield, on 15th October, 1893, applied for 1,000 ordinary shares in a company. On 26th October, J. wrote from Sheffield a letter withdrawing his application and asking for a return of his deposit. This letter was sent as a registered letter. It was delivered at the office of the company at about 8.30 a.m. of October 27th, before the arrival of the secretary.

An allotment letter addressed to J., dated October 26th, was delivered in Sheffield at about 7.30 p.m. of October 27th.

**HELD**—that it is settled law that an offer is to be deemed to be accepted when the letter of acceptance is posted, the reason being that the Post Office is considered the agent of both parties. The withdrawal, in order to be effectual, must be before the offer is clinched by the posting of the letter of acceptance; that the giving of the letter of acceptance to a postman was not a posting of the letter; that the company had failed to prove that the letter, which did not leave the Post Office until about eleven o'clock, was posted before 8.30 or before 9.30, at which hour the secretary arrived and opened the letter of withdrawal, and that the name of J. must be removed from the register.

*IN RE LONDON AND NORTHERN BANK, IN RE [JONES, [1900] 1 Ch. 220, 69 L. J. Ch. 24; 81 L. T. 512, 7 Manson, 60—Cozens-Hardy, J.*

**277. Alteration of Shareholders' Rights—Preference Shares issued under a Declaration of Trust—Attempt to Convert Preference into Ordinary Shares—Destruction of Preference Shareholders' Rights.**—By a declaration of trust under which preference shares were issued, it was provided that the company should not do anything to alter and affect the rights of the holders unless the trustees thought it reasonable to give their consent.

The trustees had consented to a proposal to compel all holders of £1 preference shares to accept 2s. in cash and two 10s. ordinary shares in lieu thereof.

**HELD**—(affirming Kekewich, J.) that this was a proposal to absolutely destroy the preferential rights, and was not authorised by the provision above referred to.

*DICKINSON v. HOLT, (1903) 19 T. L. R. 667—C. A.*

**278. Equitable Title—Transfer—Certificate not Produced—Assignment to Trustee for Creditors—Notice to Company—Priority.**—A debtor executed a deed of assignment of all his property to a trustee for his creditors, and the deed was duly registered. The debtor was possessed of shares in a company, and the trustee of the deed demanded the certificate of the shares; but it was not handed over, on the ground that it was not in the country. Notice was given to the company of the deed of assignment. The

debtor subsequently sold the shares through a firm of stockbrokers, and handed the certificate to the brokers, and executed a transfer of the shares. The brokers lodged the certificate with the company, and it was endorsed with a statement that it had been lodged. The transfer was then handed to the purchaser's brokers, who paid the purchase-money to the debtor's brokers, and the latter handed the money to the debtor. The transfer was taken to the company for registration, which was refused on account of the notice of the deed of assignment. The purchaser's brokers thereupon demanded and obtained other shares from the debtor's brokers, and the latter applied without success to the debtor for repayment of the amount he had received. A sale of shares in another company by the debtor took place under similar circumstances, except that in the latter case the purchaser's name was at first entered on the company's register, but the company subsequently refused to issue a certificate for them, and struck the name off the register. In an action by the trustee of the deed of assignment claiming that he was entitled to the shares as against the debtor's brokers,

**HELD**—that the trustee's equitable title being prior in point of time must prevail, there being no negligence on his part, and that the lien, if any, of the debtor's brokers, being equitable, was only upon the debtor's interest in the shares, which was subject to the prior equitable right of the trustee.

*PEAT v. CLAYTON, [1906] 1 Ch. 659; 75 L. J. Ch. 344; 54 W. R. 416; 94 L. T. 465; 22 T. L. R. 312; 13 Manson, 117—Joyce, J.*

**279 Issue of—Commission for Underwriting—Option to take Further Shares at Par—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8, sub-s. 2.]**—If the shares of a limited company stand at par and the directors have under the articles of association control of all the shares representing the capital of the company, with power to allot or otherwise to dispose of them to such persons, on such terms and conditions, either at a premium or otherwise, at such times as the directors may think fit, it is not illegal for the company, in consideration of a person taking or underwriting shares, to allot such shares to him upon the terms that for each share allotted he shall have the option during a future fixed period of taking up at par a further share in the initial capital of the company, and in the event of such last-mentioned share being taken up under such option, a further option during an additional fixed period of taking up a further share at par in the initial capital of the company, inasmuch as the contract does not constitute an application direct or indirect of any of its shares or capital money, nor is there a payment of "commission, discount, or allowance" within the prohibition contained in sect. 8, sub-sect. 2, of the Companies Act, 1900.

There is no law which obliges a company

**Shares—Continued**

to issue its shares above par because they are saleable at a premium in the market.

*Burrows v. Matabele Gold Reefs and Estate Co., Ltd.* ([1901] 2 Ch. 23; 70 L. J. Ch. 434; 49 W. R. 500; 84 L. T. 478; 17 T. L. R. 364—C. A. No. 347, *infra*) overruled, upon the ground that in that case (if rightly decided) the shares were expressly agreed to be allotted at a price below the then market premium value in order to satisfy an agreed commission.

Decision of Court of Appeal, *sub nom. Dexter v. United Gold Coast Mining Properties* ([1901] 17 T. L. R. 708) reversed.

*HILDER v. DEXTER*, [1902] A. C. 474; 71 L. J. [Ch. 781; 87 L. T. 311; 18 T. L. R. 800; 7 Com. Cas. 258; 51 W. R. 225; 9 Manson, 378—H. L. (E.)

280. *Issue of—Not Bonâ Fide—To Control Voting Power—Injunction.*—If directors issue shares, not with a view to benefit the company, but in order to secure for themselves a majority of voting power, an injunction may be granted restraining them from holding the meeting at which the new shareholders were intended to vote.

*Fraser v. Whalley* ((1864) 2 H. & M. 10) applied.

*PUNT v. SYMONS & Co., Ltd.*, [1903] 2 Ch. 506, [72 L. J. Ch. 768; 52 W. R. 41, 10 Manson, 415—Byrne, J

281. *Ownership—Trustee—Indemnity by Cestui que trust—Calls on Shares—Creation of Relation of Trustee and Cestui que trust—Personal Liability of Beneficial Owner.*—No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer.

The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal.

Where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnify by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property. It extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee.

*In re German Mining Co., Ex parte Chipendale* ((1853) 4 D. M. & G. 19; 22 L. J. Ch. 926; 2 W. R. 543; Turner and Knight Bruce, L.JJ.) applied.

When a trustee seeks indemnity from his *cestui que trust* against liabilities arising from the mere fact of ownership, there is neither principle nor authority for saying that the trustee need prove any request from his *cestui que trust* to incur such liability. In the case supposed the trust involves such liabilities, and the trustee, whilst he remains such, cannot get rid of them. He is subject

to them as legal owner; but in equity they fall on the equitable owner unless there are good reasons why they should not.

The plaintiff was the registered holder of fifty shares in a banking company formed and registered with limited liability under the Companies Act, 1862. The shares were not fully paid up when it went into liquidation. Calls were made on the contributories, of whom the plaintiff was one. The question arose whether the plaintiff was entitled to be indemnified by the defendant, who was the beneficial owner of those shares. The shares had been placed in the plaintiff's name in April, 1891, by his then employers, who were share-brokers, and the plaintiff never had any beneficial interest in them. By divers acts the defendant became the sole beneficial owner of the shares in October, 1892, the legal title to which was vested in the plaintiff with full knowledge of the fact that they were registered in his name as trustee for their original purchasers and their assigns who ever they might be.

Held—that nothing more was required to create the relation of trustee and *cestui que trust* between the plaintiff and the defendant from the moment the defendant accepted the beneficial ownership of the shares, and that the plaintiff was entitled to be indemnified by the defendant against the calls made.

*Castellan v. Hobson* ((1870) L. R. 10 Eq. 47; 39 L. J. Ch. 490; 18 W. R. 731; 22 L. T. (n.s.) 575—James, V.-C.) and *James v. May* ((1873) L. R. 6 H. L. 328; 42 L. J. Ch. 802; 29 L. T. (n.s.) 217—H. L. (E.)) applied.

*HARDOON v. BELLIOS*, [1901] A. C. 118; 70 L. J. [P. C. 9; 49 W. R. 209; 83 L. T. 573; 17 T. L. R. 126—P. C.

282. *Preference and Ordinary—Power to Issue Preference Shares having Priority as to Capital—Irrregularity in Issue—Estoppel.*—A company was incorporated with power, as stated in its memorandum of association, to divide its capital into several classes, and to attach thereto respectively any preferential rights as regarded dividends, capital, voting, or otherwise. Clause 125 of the articles of association provided that the profits should be divisible amongst the members in proportion to the amounts paid up by them respectively. The memorandum was signed for seventy shares, and in June thirty-five other shares were allotted. Later on in the same month the company passed special resolutions purporting to divide the capital into preference and ordinary shares, and giving a fixed preferential dividend, and also a preference as to capital, and purporting to alter art. 125 accordingly. In October the company issued a prospectus offering both classes of shares for subscription, and stating the rights of the preference shareholders, and large numbers of both classes of shares were applied for and allotted. Moreover, the company had received the moneys of the subscribers, and had issued certificates to them under its

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common seal in the usual form, and they had been placed on the list of contributories in the winding-up.

**HELD**—that the company was estopped from denying the validity of the issue of the preference shares, notwithstanding there had been irregularities in the management of the company.

**IN RE LONDON AND NORTHERN BANK, LD., (1902)**  
[18 T. L. R. 320—Buckley, J.]

**283. Preference Shares—Cumulative Preferential Dividend—Dividends and Arrears out of Profits of any Year.**—The holders of preference shares carrying a "cumulative preferential dividend" payable out of the profits of each year are entitled to receive out of the profits of any year, not only the preferential dividend for that year, but also arrears.

**MILN V. ARIZONA COPPER CO., (1899) 36 S. L. R.**  
[741.]

**284. Rescission of Contract to take—Misrepresentation by Promoter—Signature to Memorandum of Association obtained by Untrue Representation—Rescission—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 6, 18, 23.**—S. made to L. a representation which was assumed to be untrue, and on the faith of which L. signed the memorandum of association of a company for 250 shares. L. applied to have his name removed from the register of members.

**HELD**—that L. was not entitled to rescission of his contract to take shares on the ground of the assumed misrepresentation, as before the incorporation of the company S. was not the agent of the company, because the company did not exist; that there was no contract at all with the company until the moment of registration, when, by force of the Companies Act, 1862, the company sprang into existence, and L. became, by virtue of sect. 23 of that Act, a member of the company; that L.'s signature to the memorandum of association made him on registration a member of the company, and bound him not only in favour of the company, but in favour of every other person who became a member of the company; and that the application must be dismissed.

**Karberg's Case ([1892] 3 Ch. 1; 61 L. J. Ch. 741; 66 L. T. 700—C. A.)** distinguished.

**IN RE METAL CONSTITUENTS, LD., [1902] 1 Ch. [707; 71 L. J. Ch. 323; 50 W. R. 492; 86 L. T. 291; 9 Manson, 196—Buckley, J.]**

**285. Register—Rectification—Misrepresentation in Prospectus—Application to Remove Names of Shareholders from Register—Ex parte Application.**—An application to rectify the register of a newly-formed company by removing therefrom the names of a large number of shareholders on the ground that they had been induced to take shares by misrepresentations in a prospectus, was allowed to be made *ex parte* so as to save expense.

**IN RE LONDON ELECTROBUS CO., LD., (1906) 22 [T. L. R. 677—Buckley, J.]**

**286 Sale of by Executors of Shareholder—Executors also Directors—Agreement by Executors to Vote in the Election of Directors in a Particular Way—Ultra vires—Validity.**—The defendant executors were directors in a company, and sold to the plaintiff for a large price a considerable block of shares in that company. In consideration of the plaintiff purchasing the shares, the executors agreed with the plaintiff that, so long as they held certain shares in the company, they, in the election of directors, would vote in a particular way, and would not vote in a particular other way. The arrangement embodied in the agreement was for the benefit of the executors and their estate. Three of the executors sought to escape from performing the agreement.

**HELD**—that the agreement was not *ultra vires* the executors; that as regards shares held by any of the defendants in their individual capacity, the defendants could enter into the agreement; and that an undertaking must be given that a certain director should retire from the directorate at the next annual meeting and offer himself for re-election to avoid his being in the position of a director for three years.

**GREENWELL V. PORTER, [1902] 1 Ch. 530; 71 [L. J. Ch. 243; 86 L. T. 220; 9 Manson, 85—Eady, J.]**

**287. Surrender of Partly-paid Shares to Company—Release of Liability on Shares—Purchase and Sale—Ultra vires—Rectification of Register—Lapse of Time—Requirements of Justice—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 26, 35; Sched. I., Table A., Clauses 20, 21.**—A limited company incorporated under the Joint-Stock Companies Acts cannot purchase its own shares, unless it does so by way of reduction of capital with the sanction of the Court under the provisions of the Companies Acts, 1867 and 1877. It has power in a proper case to forfeit shares. A surrender, under circumstances which would justify a forfeiture, may be regarded as merely equivalent to a forfeiture.

**Trevor v. Whitworth ((1887) 12 App. Cas. 409; 57 L. J. Ch. 28; 36 W. R. 145; 57 L. T. 457—H. L. (E.) followed.**

The directors of a limited company, with a view to relieving the company from loss, agreed, in 1893, that each should surrender to the company eighty-three shares, which were paid up to the extent of £10 only, £1 per share remaining still payable upon the terms that he should not remain liable for the £1 still unpaid. Nothing occurred since, except that the company, which was embarrassed, turned out to be prosperous. It was suggested at general meetings to restore the eighty-three shares to the directors, and accordingly the plaintiffs brought an action for a declaration that the surrender of their shares was *ultra vires* and inoperative, and for rectification of the register. Except on



**Shares—Continued.**

this ground there was no reason for impeaching the surrender. No claim was made for past dividends. The surrendered shares had not been reissued or otherwise dealt with by the company.

**HELD**—that as the transaction was one of purchase and sale, and as it involved the release by the company to the shareholders of uncalled capital on their shares, it was a reduction of capital not sanctioned by law; and that the plaintiffs were entitled to the relief they sought, notwithstanding the time that had elapsed since the surrender.

In *Eichbaum v. City of Chicago Grain Elevators* ([1891] 3 Ch. 459; 61 L. J. Ch. 28; 40 W. R. 153; 65 L. T. 704) Stirling, J., should not have followed *Teasdale's Case* ((1873) L. R. 9 Ch. 54; 43 L. J. Ch. 578; 22 W. R. 286; 29 L. T. (N.S.) 707), per Stirling, L.J.

Decision of Kekewich, J. ([1901] 2 Ch. 265; 70 L. J. Ch. 616; 84 L. T. 651; 17 T. L. R. 510; 8 Manson, 411), on the former point affirmed, and on the latter point reversed.

*BELLERBY v. ROWLAND AND MARWOOD'S STEAM-SHIP CO., LD.*, [1902] 2 Ch. 14; 71 L. J. Ch. 541; 50 W. R. 566, 86 L. T. 671; 18 T. L. R. 582, 9 Manson, 291—C. A.

**(b) Allotment.**

**288. Conditional.**—An allotment of shares is, broadly speaking, an appropriation of shares to a particular person. Its legal meaning and effect depends on the circumstances under which it is made. It does not of itself necessarily create the status of membership. It may be subject to a condition, e.g., the performance of some act such as the payment of a sum of money by the allottee. An issue of shares takes place when the transaction is complete, when the allottee has become complete master of the shares.

*SPITZEL v. CHINESE CORPORATION*, (1899) 80 L. T. [347; 15 T. L. R. 281; 6 Manson, 355—

Stirling, J.

**289. Minimum Subscription not reached—Irregular Allotment—Voidable Contract—Rescission—Companies Acts, 1867 (30 & 31 Vict. c. 131), s. 38, and 1900 (63 & 64 Vict. c. 48), ss. 4, 5, 12.**—The defendant company though incorporated in 1897 made no public issue of shares till 1904, in which year the plaintiffs agreed to issue at their own expense, in return for shares and cash, a prospectus prepared by the company. The prospectus stated that 23,726 shares had been applied for by the directors and their friends, and that no allotment would be made unless 40,000 shares in all were applied for.

Allotment was made on application for 40,003 shares (including the 23,726) but it was then discovered that 575 of 23,726 applications were not effective. Thereupon the

directors proposed to give each allottee the option of rescinding his application, and having his subscription returned. The plaintiffs claimed an injunction to restrain them from so doing.

**HELD**—(1) that the allotment was irregular and voidable under sect. 4 of the Act of 1900 at the option of the allottees, and that the time limit in sect. 5 did not apply to this company, as it was registered before 1900;

(2) that the allottees could also rescind on the ground of the untrue statement as to 23,726 shares having been already applied for;

(3) that the agreement gave the plaintiffs no right to an injunction; and

(4) that, therefore, the directors were acting properly.

*FINANCE AND ISSUE, LD. v. CANADIAN PRODUCE [CORPORATION, LD.]*, [1905] 1 Ch. 37; 73 L. J. Ch. 751, 20 T. L. R. 807—Buckley, J.

**290. "Paid to and received by" the Company before Allotment—Cheques received, but not presented before Allotment—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (1).**—A company allotted shares on the appointed day, although some of the cheques for application money were received too late for presentation on that day.

**HELD**—that the amounts so received were "paid to and received by" the company before allotment within the meaning of sect. 4 (1) of the Companies Act, 1900.

*GLASGOW PAVILION v. MOTHERWELL*, (1904) 6 F. [116—Ct. of Sess.

**291. "Public Allotment"—Agreement to pay Arrears of Salary on First Public Allotment—Shares Allotted to another Company.**—The plaintiff was employed as secretary of the defendant railway company at a salary of £800 per annum, upon the terms that his employment should continue for three years after the railway was opened for traffic; but that no payment should be made to him until the first "public allotment" of shares, when all arrears of salary were to be paid.

Two abortive attempts were made to induce the public to subscribe, but the directors never proceeded to allotment; ultimately the company agreed with the Underground Electric Railway Co. to construct the line for £2,363,490, or (at the defendant company's option) in return for the unissued balance of its share capital and debenture stock. Under this agreement shares to the value of £500,000 had been allotted to the Underground Co.

The plaintiff, having been dismissed without reason before the opening of the line, now claimed arrears of salary and damages.

**HELD**—that he had no claim for salary, as there had been no "public allotment"; and that, as under the circumstances there was little chance of one, his damages for wrongful dismissal must be nominal—40s. and no costs.

**Shares—Continued.**

SMITH v. CHARING CROSS, EUSTON AND HAMP-  
[STEAD RY. CO., (1904) 19 T. L. R. 614—

Kekewich, J.

On appeal: settled—the plaintiff accepting  
£2,500, 20 T. L. R. 466.

292. *Sum "paid to and received by the company"—Cheque not Cleared and subsequently Dishonoured—Companies Act, 1900* (63 & 64 Vict. c. 48), s. 4.—By sect. 4, subsect. 1 of the Companies Act, 1900, no allotment of shares in a company, which are offered to the public for subscription, shall be made unless the sum payable on application has been "paid to and received by the company."

A company proceeded to allotment before a large number of the cheques sent for the moneys payable on application were credited to the company's banking account. Some of these cheques were subsequently dishonoured, but were afterwards taken up, and the amounts paid to the company by third persons.

HELD—that as some of the cheques had been dishonoured, the application moneys had not at the time of allotment "been paid to and received by the company" within the meaning of sect. 4.

*Quære*, whether payment of the application money by cheque, which is paid subsequently to the allotment, is a good payment within sect. 4.

Decision of Eady, J. (21 T. L. R. 599), affirmed.

MEARS v. THE WESTERN CANADA PULP AND  
[PAPER CO., LD., [1905] 2 Ch. 353; 74 L. J. Ch. 581; 93 L. T. 150; 21 T. L. R. 661; 12  
Manson 295; 54 W. R. 176—C. A.

(c) Calls.

293. *Calls on Forfeited Shares—Liquidation—Liability of Past Member for Calls on Forfeited Shares—Certificate of Registrar—Conclusive Effect of—Companies Act, 1862* (25 & 26 Vict. c. 89), ss. 38, 51—*Companies Act, 1867* (30 & 31 Vict. c. 131), ss. 9, 11, 15, 16.—The articles of association of a company empowered the company to forfeit the shares of members of the company who made default in paying calls, and provided that any member whose shares should have been so forfeited should nevertheless be liable to pay to the company all calls owing upon the shares at the time of the forfeiture, together with interest at a rate specified. On October 24th, 1895, the defendant's shares became forfeited for non-payment of calls. On November 25th, 1896, a resolution for winding up the company was passed, and the company went into liquidation. An action was subsequently brought to recover the unpaid calls from the defendant.

HELD—that whether or not the defendant was liable under sect. 38 of the Companies Act, 1862, to be placed on either the A. or B. list of contributories, the effect of the

articles of association was that there was a right of action for these calls vested in the company.

HELD ALSO—that sects. 15 and 16 of the Companies Act, 1867, clearly show that the certificate of the Registrar is conclusive, although an interval of fourteen days has not elapsed between the passing of the resolutions as required by sect. 51 of the Act.

Decision of Ridley, J. (68 L. J. Q. B. 871; 81 L. T. 300) affirmed.

LADIES DRESS ASSOCIATION v. PULBROOK, [1900]  
[2 Q. B. 376; 69 L. J. Q. B. 705, 49 W. R. 6—C. A.]

294. *Call on Unpaid Shares—Forfeiture of Shares—Sale—Purchasers Certified to be Deemed to be Discharged from all Calls due prior to Sale—Subsequent Call—Liability of Purchasers—Companies Act, 1862* (25 & 26 Vict. c. 89)—*Sched. I., Table A., Art. 22*—The holders of 40,000 shares of the nominal value of 5s. each in the plaintiff company, upon each of which 3s. 4d. had been paid up, failed to pay a call of 1s. 8d. a share. The directors of the plaintiff company in consequence caused the shares to be forfeited, and sold them to the defendant company, giving them a certificate of proprietorship certifying that the defendant company was "to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof." The call of 1s. 8d. still remaining unpaid, the directors of the plaintiff company subsequently made, in substitution therefor, another call of 1s. 3d. per share, which the defendant company refused to pay. The plaintiff company thereupon sued for the call.

HELD—that the plaintiff company had a right to make this call of 1s. 3d. against the defendant company, it being a call representing the money unpaid on those particular shares; and that the certificate was merely a document of title, and did not exempt the defendants from their liability to pay the call.

Decision of C. A. ([1903] 1 K. B. 461; 72 L. J. K. B. 143; 51 W. R. 391; 88 L. T. 189; 19 T. L. R. 215; 10 Manson, 289) affirmed.

RANDT GOLD MINING CO., LD. v. NEW BALKIS  
[EERSTELING, LD., [1904] A. C. 165; 73  
L. J. K. B. 384; 52 W. R. 561; 90 L. T. 494; 20 T. L. R. 396—H. L.]

295. *Compromise of Claims—Issue of Fewer Shares as Fully Paid—Ultra vires.*—In 1899 the defendant subscribed for 12,000 shares in, and became a director of, the plaintiff company upon the assurance of a co-director that no call would be made after the application money was paid. In 1900 a call was made, and, on the defendant protesting, an agreement was made by which he was released from liability on 9,750 shares, and 2,250 were issued to him as fully paid. One of the articles of association empowered the board to "accept the surrender of any shares

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by way of compromise of any question as to the holder being properly registered in respect thereof."

**HELD**—that, on the facts, the defendant had, in 1900, formulated no claim to have his name removed from the register, and that therefore there was no dispute within the meaning of the article, and the agreement was *ultra vires*; and consequently he was liable for calls on the 12,000 shares.

**MOTHER LODGE CONSOLIDATED GOLD MINES, LD.**  
[*v. HILL*, (1903) 19 T. L. R. 341—Channell, J.]

**296. Promoter Agreeing to Pay for the Shares of a Co-director—Fully-paid Certificates Issued by the Company—Estoppel.**—The defendant agreed to become a director of the plaintiff company upon condition that L., the promoter thereof, should pay for his qualifying shares. Accordingly the company issued to the defendant certificates for 1,000 fully-paid shares, which they registered in his name, while (as the Judge found) they gave credit to L. for the £1,000 due thereon. L. disappeared, owing to the company a considerable sum of money; and the company now sued the defendant for the £1,000 due on his shares.

**HELD**—that the company was estopped from saying that the shares were not in fact fully paid.

*Knights v. Wiffen* ((1870) L. R. 5 Q. B. 660; 40 L. J. Q. B. 51; 19 W. R. 244; 23 L. T. 610—Q. B.) followed.

For the defendant was not, merely as a director, affected by constructive notice of the calls being unpaid, and had, in reliance on the certificate, refrained from taking any proceedings against L., as he might otherwise have done.

**MONARCH MOTOR-CAR COMPANY v. PEASE**, (1903)  
[19 T. L. R. 148—Walton, J.]

**(d) Certificate.**

**297. Deposit of Certificate as Security for Debt—Equitable Mortgage or Pledge—Foreclosure.**—A person with whom a certificate of shares in a limited company has been deposited by way of security, without any memorandum, is entitled to a foreclosure, as such deposit amounts to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage.

**HARROLD v. PLENTY**, [1901] 2 Ch. 314; 70 L. J. [Ch. 562; 49 W. R. 646; 85 L. T. 45; 17 T. L. R. 545; 8 Manson, 304—

Cozens-Hardy, J.]

**298. Duty of Director—Estoppel—Putting to Rest—Onus of Proof—Companies Act, 1862** (25 & 26 Vict. c. 89), s. 31.—It is not the duty of a director who is present when a certificate of shares is passed round at a meeting,

but who does not sign such certificate, to inspect it and compare it with the share register. The duty is, as a rule, properly left to a subordinate official.

Section 31 of the Companies Act, 1862, makes the certificate *prima facie* evidence of the title of the member to the shares therein specified as against the company, and the *onus* lies on them to displace it.

A certificate under the seal of the company estops the company from denying the title of a person who has accepted and acted on the certificate.

Where the plaintiff did not pay her money on the faith of the certificate and the certificate was not issued until after payment, there can be no question of estoppel on that payment, nor any estoppel from the plaintiff's acceptance of the transfer. Where the plaintiff continued to hold the shares, she must prove that she suffered loss by reason of such retention.

If the broker was insolvent at the date of the writ, it lies on the defendant whose conduct put the plaintiff to rest to show that no money was ever recoverable against the broker, so that the plaintiff suffered no damage by resting on the estoppel.

*Knights v. Wiffen* ((1870) L. R. 5 Q. B. 660; 40 L. J. Q. B. 51; 19 W. R. 244; 23 L. T. (n.s.) 610) and *Balkis Consolidation Co. v. Tomkinson* ([1893] A. C. 396; 63 L. J. Q. B. 134; 42 W. R. 204; 69 L. T. 598; 1 R. 178—H. L. (E.)), followed.

*Simm v. Anglo-American Telegraph Co.* ((1879) 5 Q. B. D. 188; 49 L. J. Q. B. 392; 44 J. P. 280; 28 W. R. 290; 42 L. T. 37—C. A.) distinguished.

**DIXON v. KENNAWAY & Co.**, [1900] 1 Ch. 833; [69 L. J. Ch. 501; 82 L. T. 527; 16 T. L. R. 329—Farwell, J.]

**299. Certified Transfer—Estoppel—Duty of Company.**—A share certificate is only *prima facie* evidence of the registered holders' title: it is not a negotiable instrument, nor a warranty of title on the part of the company issuing it.

A shareholder in a company executed a transfer of his shares to a transferee, and the secretary of the company, upon the transfer being taken to the company's office by the transferee's brokers, endorsed upon it a "certification" which stated that the certificate of the shares had been lodged at the office. The transfer, which had not been executed by the transferee, was taken away by the broker. Subsequently the company's secretary, by mistake, returned the certificate to the transferor, who thereupon obtained an advance from the plaintiff upon a deposit of the certificate, together with a blank transfer. The company refused to register the plaintiff as transferee.

**HELD**—that the company owed no duty to the plaintiff or to any member of the public desirous of becoming a shareholder in the company to retain the certificate; and even

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if such duty existed, the negligence of the company was not the immediate cause of the plaintiff's loss, the loss being caused by the improper issue of the certificate by the transferor to the plaintiff.

The usual receipt given by a secretary for a transfer lodged with the company does not bind the company to necessarily recognise the transferee's title.

LONGMAN v. BATH ELECTRIC TRAMWAYS, LD., [1905] 1 Ch. 646; 74 L. J. Ch. 424; 53 W. R. 480; 92 L. T. 743; 21 T. L. R. 373; 12 Manson, 147—C. A.

**300. Issue of Certificate—Reasonable time.]**

—Plaintiff applied for and was allotted shares in a new company. Under clause 10 of its articles of association, certificates of title to shares were to be issued. The plaintiff was unable to obtain his certificate. The company set up that it appeared by the prospectus that the company was to take over a number of businesses to be paid for in shares, and that under the agreements shareholders in other companies had an option to take shares in the defendant company within a time which might be extended to six months, and be further extended by the company, and that until six months had expired no certificates of shares ought to be issued.

HELD—that the company was not bound to allot shares at once, but if allotments were in fact made it was bound to issue certificates for the shares allotted within a reasonable time, and, in considering what time was reasonable, the Court was not bound to take into account contracts under which certificates in respect of other shares could not be issued for six months. The company must therefore issue the certificate to the plaintiff in a fortnight.

BURDETT v. STANDARD EXPLORATION CO., LD., [1900] 16 T. L. R. 112—Cozens-Hardy, J.

**301. Secretary Forging Signatures of Directors—Liability of Company—Estoppel.]**

—The secretary of a limited company, having executed a deed purporting to transfer certain shares in the company to the plaintiffs, who had lent money to him, issued to them a certificate of the shares. He was the proper person to issue the certificate, which was in the proper form purporting to be signed by two directors and bearing the seal of the company. The signatures of the directors were forged, and the seal had been fraudulently affixed to it by the secretary, who issued the forged certificate fraudulently, and solely for his own private purposes and advantage, and not for or on behalf of or for the benefit of the company. The company refused to register the plaintiffs in respect of the shares. In an action to recover damages for such refusal,

HELD—that the company were not bound by the act of the secretary in forging and issuing the forged certificate, and were not estopped by the certificate issued by the secretary from disputing the plaintiffs' title to the shares.

Shaw v. Port Philip and Colonial Gold Mining Co. ((1884) 13 Q. B. D. 103, 53 L. J. Q. B. 369; 32 W. R. 771; 50 L. T. 685—Div. Ct.) doubted.

Decision of C. A. ([1904] 2 K. B. 712; 73 L. J. K. B. 872; 53 W. R. 100; 91 L. T. 619; 20 T. L. R. 720; 11 Manson, 353) affirmed.

RUBEN AND ANOTHER v. GREAT FINGALL CONSOLIDATED, LD., [1906] A. C. 439; 75 L. J. Ch. 843; 95 L. T. 214; 22 T. L. R. 712, 13 Manson, 248—H. L. (E.)

**(e) Forfeiture.**

**302 Attempt to Rescind Forfeiture Against the Will of Late Holder—No Power to Rescind.]**—An article of association giving directors power, after forfeiting shares, to annul the forfeiture, applies only to cases where the late holder of the shares desires to enter into a new contract with the company: he cannot be forced to re-accept the shares.

A.'s shares were forfeited for non-payment of a call, and he paid up (in accordance with the articles) all calls due from him at the date of forfeiture. A year later the directors purported to annul such forfeiture under a provision contained in the articles of association. Thereupon A. repudiated any further liability for the shares, but the liquidator insisted upon including him in the list of contributories.

HELD—that A. was entitled to have his name removed from the list.

IN RE EXCHANGE TRUST, LD., LARKWORTHY'S CASE, [1903] 1 Ch. 711; 72 L. J. Ch. 387; 88 L. T. 56, 10 Manson, 191—Buckley, J.

**303. Forfeiture for Non-payment of Calls—Sale of Shares—Sums Recovered by Company from Original Holder—Pro tanto Discharge of Purchaser—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38 (4).]**—Where a company forfeits shares for non-payment of calls thereon, and sells them, the purchaser is liable for the whole amount of the calls remaining unpaid, but, if the company by virtue of its articles recovers from the original holder a portion of such calls upon a special contract to pay them notwithstanding forfeiture, the purchaser is *pro tanto* discharged from his liability.

IN RE RANDT GOLD MINING CO., LD., [1904] 2 Ch. 468; 73 L. J. Ch. 598; 53 W. R. 90; 91 L. T. 174; 20 T. L. R. 619, 11 Manson, 159; 12 Manson, 93—Buckley, J.

**304. Partly Paid up—Forfeiture of—Sale of—Credit for Money Paid up—Issue at a Discount.]**—Articles of association gave the directors power to forfeit shares for non-

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payment of calls, and art. 26 provided that "any share so forfeited shall be deemed to be the property of the company, and the directors may sell, re-allot, and otherwise dispose of the same in such manner as they think fit."

Shares on which at least £3 per share had been paid up having been forfeited, the directors entered into an agreement for the sale of these shares, with £2 5s credited as paid up, for 30s. per share.

**HELD**—that what was proposed to be done did not fall within the principle of the decisions that shares cannot be issued at a discount, but was merely a sale of the shares credited with so much paid on them.

**MORRISON V. TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION**, (1899) 68 L. J. Ch. 11; 79 L. T. 605; 15 T. L. R. 84; 5 Manson, 356—C. A.

**305. Trust Deed Charging all Uncalled Capital in Favour of Trustees for Debenture Holders—Power of Directors to Forfeit Shares for Non-payment of Calls—Power not Prejudiced by the Charge.**—Where directors have power under a company's Articles of Association to forfeit shares for non-payment of calls, they do not (in the absence of *mala fides*) lose such right because the company charges all its uncalled capital in favour of trustees for debenture holders.

**IN RE THE AGENCY, LAND, AND FINANCE CO. OF AUSTRALIA, LD.; BOSANQUET V. THE CO.**, (1904) 20 T. L. R. 41—Joyce, J.

#### (f) Issued at a Discount.

**306. Bonus Shares.**—A company, called the vendor company, sold a mining property to a limited company, called the Great Central Company, in consideration of fully-paid shares in the Great Central Company. A person acting with the authority of both companies entered into an agreement with the defendant Chapman, whereby the latter agreed to take 5,000 £1 shares in the Great Central Company at the price of £5,000, and in addition he was to have a transfer from the vendor company of 15,000 fully paid shares in the Great Central Company, being part of the shares belonging to the vendor company as the purchase price of the mine.

**HELD**—that this was not an issue of shares by the Great Central Company at a discount, and the transaction was valid.

**CHAPMAN AND ANOTHER V. THE GREAT CENTRAL [FREEHOLD MINES, LD., AND OTHERS]**, (1905) 22 T. L. R. 90—P. C.

**307. Companies Clauses Act, 1845 to 1869.**—A company governed by the Companies Clauses Consolidation Act, 1845, and the Acts amending it, may issue fully paid-up original shares at a sum less than their nominal value in the same manner as new shares can, under the authority of those Acts, be issued.

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**STATHAM V. BRIGHTON MARINE PALACE AND PIER [COMPANY]**, [1899] 1 Ch. 199; 68 L. J. Ch. 172; 47 W. R. 185; 80 L. T. 73; 6 Manson, 308—Romer, J.

**308. Debentures Issued at a Discount—Option to take Fully Paid Shares for Debentures.**—A limited company proposed to issue debentures at the price of eighty per cent., the circular announcing the issue stating that debenture holders would have the option at any time prior to May 1st, 1909, to exchange their debentures for fully-paid shares in the company at the rate of one £1 fully-paid share for every £1 of the nominal amount of the debentures. The draft debenture trust deed contained a provision that the principal moneys thereby secured should immediately become payable if (*inter alia*) the registered holder should give the company a direction in writing under condition 10. That condition provided that the registered holder of any debenture might at any time prior to May 1st, 1909, direct the company in writing to allot and issue to him in exchange for and in satisfaction of the debenture fully-paid shares in the company at the rate of one share of £1 for every £1 of the nominal amount of the debenture, and the company should, after the surrender of the debenture, comply with such direction.

**HELD**—that, notwithstanding that the intention of the company was not to evade the law as to issuing shares at a discount, the scheme involved the issuing of shares at a discount, and an injunction would be granted to restrain the issue of the debentures in the proposed form.

Decision of Buckley, J. (20 T. L. R. 499), reversed.

**MOSELY V. THE KOFFYFONTEIN MINES, LD.**, [1904] 2 Ch. 108; 73 L. J. Ch. 569; 91 L. T. 266; 20 T. L. R. 557; 11 Manson, 294; 53 W. R. 140—C. A.

**309. Offer of—Commission for Subscribing—Guaranteeing Issue at a Discount—Invalidity—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8.**—A company proposed to issue 243,000 shares of 10s. each, but proposed to limit the issue at the moment to 120,000 at a price which would be equivalent to 3s. per share, by issuing the shares at par, a bonus to be returned to each applicant of 70 per cent. of the par value, leaving a net value of 3s. It was further proposed to guarantee half of this issue, so as to ensure to the company £9,000 and a net sum, after paying the commission of 10 per cent. on that issue of £8,100.

**HELD**—that this was a colourable attempt to bring the proposed issue within sect. 8 of the Companies Act, 1900, and that the Court ought not to sanction it; that the guarantee was a guarantee that the shares should be issued at a discount; and that there would be an injunction restraining the company and its directors from carrying into effect the proposed issue.

**KEATINGE V. PARINGA CONSOLIDATED MINES, LD.**, [(1902) 18 T. L. R. 266—Kekewich, J.

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(g) Issued not for Cash.

310. *Agreement—Fully Paid-up Shares—Registered Contract—Sufficient Statement of Nature of Consideration—Particulars—Recital of Prior Contracts—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 25.]—A contract registered under sect. 25 of the Companies Act, 1867, on the issue of fully paid-up shares, described (by way of recital of a prior contract entered into between the vendor and a trustee for the company) the property sold as "certain leasehold messuages, shops and premises, together with the goodwill of the several businesses carried on by the vendor upon the same, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the several businesses." The second clause of the agreement stated that the company should allot a certain number of fully paid-up ordinary shares, a certain number of fully paid-up preference shares, and a certain number of fully paid-up founders' shares; and the third clause stated that these shares should be accepted by the vendor in full satisfaction of the specified amount of the agreed purchase money.

HELD—that sufficient particulars were given of the property; that the nature of the consideration for the shares stated, and the consideration were sufficiently identified; and that the contract sufficiently determined that payment for the shares should be made in kind within the meaning of sect. 25 of the Companies Act, 1867.

*In re Maynards* ([1898] 1 Ch. 515; 67 L. J. Ch. 186; 46 W. R. 346; 78 L. T. 150, No. 321, *infra*) not followed.

Judgment of Romer, J. ([1898] 2 Ch. 556; 67 L. J. Ch. 691; 47 W. R. 27; 79 L. T. 269) affirmed.

IN RE FROST & Co., LD., [1899] 2 Ch. 207; 68 [L. J. Ch. 544; 48 W. R. 39; 80 L. T. 849; 15 T. L. R. 390—C. A.]

311. *Agreement—Partly Paid-up Shares—Registered Contract—Sufficient Statement of Nature of Consideration—Particulars—Recitals of Prior Contracts—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 25—*Companies Act, 1898* (61 & 62 Vict. c. 26), s. 1, sub-ss. 1, 4.]—A mere recital in a contract filed under sect. 25 of the Companies Act, 1867, stating that, by an unfiled contract, "the vendors agreed to sell and the company to purchase the property in the agreement now in recital mentioned for the consideration and on the terms and conditions therein expressed and contained," is not a sufficient statement of the consideration.

The filed contract must at least state generally the nature of the consideration, and not merely set forth the character of the transaction.

*In re Frost & Co., LD.* ([1899] 2 Ch. 207; 68 L. J. Ch. 544; 48 W. R. 39; 80 L. T. 849; 15 T. L. R. 390—C. A., *supra*) commented on.

IN RE ROBERT WATSON & Co., LD., [1899] 2 Ch. [509, 68 L. J. Ch. 660, 48 W. R. 40; 81 L. T. 85—Kekewich, J.]

312. *Agreement—Partly Paid-up Shares—Registration—Companies Act, 1867* (30 & 31 Vict. c. 131), s. 25.]—An agreement effecting the reconstruction of a company, by which it was provided that, in consideration of the transfer of the assets of the old company, the liquidator of the old company should be entitled to have allotted to him or his nominees 200,000 10s. shares of the new company, on which 7s. 6d. was to be deemed paid up, on applying within two months from the date of the agreement and making a small additional payment, was filed with the Registrar of Joint-Stock Companies. Application was made for 6,500 of these 200,000 shares under such option.

HELD—that, by the filing of the reconstruction agreement, sect. 25 of the Companies Act, 1867, had been sufficiently complied with.

*Elsner and McArthur's Case* ([1895] 2 Ch. 759; 65 L. J. Ch. 76; 44 W. R. 361; 73 L. T. 338; 2 Manson, 598; 13 R. 840—Romer, J.) followed.

*In re Coolgardie Consolidated Gold Mines* ((1898) 14 T. L. R. 277), and *In re Jackson & Co.* ([1899] 1 Ch. 348; 68 L. J. Ch. 190; 79 L. T. 662; 6 Manson, 125—Kekewich, J., No. 325, *infra*) distinguished.

TRANSVAAL EXPLORING COMPANY, LD. v. ALBION [(TRANSVAAL) GOLD MINES, LIMITED, [1899] 2 Ch. 370; 68 L. J. Ch. 670; 48 W. R. 108; 7 Manson, 51—Byrne, J.]

313. *Application to File Sufficient Contract—Sufficient Contract already Filed under the Companies Act, 1867* (30 & 31 Vict. c. 131), s. 25—*Relief Refused—Companies Act, 1898* (61 & 62 Vict. c. 26), s. 1, sub-ss. 1, 4.]—An arrangement was made between J. and others that a company should be formed to take over and work J.'s business of a maltster, and that J. should sell the business and premises to the company for 6,500 fully paid-up £1 shares. On the formation of the company J. signed the memorandum of association for 6,500 shares. Subsequently a contract was drawn up setting out the terms of his sale to the company, and this was duly filed in accordance with sect. 25 of the Companies Act, 1867. It was considered and intended that the 6,500 shares for which J. signed the memorandum were those issuable to him under the contract. Doubts having arisen as to this, an application was made for an order under sect. 1 of the Companies Act, 1898, that a sufficient contract might be filed, or, in the alternative, a memorandum specifying the consideration for which the shares were issued.

HELD—that, as there was a sufficient con-

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tract filed within the meaning of sect. 25 of the Companies Act, 1867, the Court had no power under the Companies Act, 1898, to grant the relief sought.

IN RE JARVIS & Co., LIMITED, [1899] 1 Ch. 193; [68 L. J. Ch. 145; 47 W. R. 186; 79 L. T. 727; 6 Manson, 116—Romer, J.]

**314. Application to File Sufficient Contract—Relief—Identification of Shares—Companies Act, 1867** (30 & 31 Vict. c. 131), s. 25—*Companies Act, 1898* (61 & 62 Vict. c. 26), s. 1.]—The issue of the certificate of incorporation of a company operates as the allotment of the shares signed for on the memorandum of association.

The nominal capital of a company was £130,000, divided into 1,300 £100 shares. R. R. W. subscribed the memorandum of association in respect of 1,068 shares. The other 232 shares were subscribed for by the other signatories on the memorandum of association. After registration of the agreement for the sale of a woollen manufacturing business and certain mills belonging to R. R. W. to the company for £130,000, of which £106,800 was to be paid in 1,068 fully paid-up shares, shares numbered 1 to 1,068 were allotted to R. R. W. as fully paid-up. All the other shares in the company were issued and paid-up.

**HELD**—that the 1,068 shares numbered 1 to 1,068 referred to in the agreement were the shares for which R. R. W. subscribed the memorandum of association, and that a sufficient contract should be filed by the company.

*In re Jarvis & Co.* ([1899] 1 Ch. 193; 68 L. J. Ch. 145; 47 W. R. 186; 79 L. T. 727; 6 Manson, 116—Romer, J. *supra*), distinguished.

IN RE WHITEHEAD & BROTHERS, LD., [1900] 1 Ch. [804; 69 L. J. Ch. 607; 48 W. R. 585; 82 L. T. 670—Cozens-Hardy, J.]

**315. Application to File Sufficient Contract—Filing Insufficient Contract—Companies Act, 1867** (30 & 31 Vict. c. 131), s. 25—*Companies Act, 1898* (61 & 62 Vict. c. 26).]—The Companies Act, 1898, is intended to deal with every kind of shlp resulting in non-compliance with sect. 25 of the Companies Act, 1867.

IN RE TOM-TIT CYCLE Co., LD., (1899) 15 [T. L. R. 132—Wright, J.]

**316. Application for Relief—Considerations for Granting Relief—Onus on Applicant—Companies Act, 1898** (61 & 62 Vict. c. 26).]—Before granting relief under the Companies Act, 1898, the Court will consider the consideration given for the shares which were issued and the nature of the contract sought to be registered. It lies on the applicant to show that, when entering into the contract which he is applying to register, he acted with due caution and conscientiousness, and that he did nothing to disentitle him to a relief at the cost of innocent persons.

IN RE ROXBURGHE PRESS, SPIERS AND BEVAN'S [Case [1899] 1 Ch. 210, 68 L. J. Ch. 111; 47 W. R. 281; 80 L. T. 280; 6 Manson, 57; 15 T. L. R. 132—Wright, J.]

**317. Application for Relief—No Contract Registered—Filing Memorandum in Lieu—Practice—Companies Act, 1898** (61 & 62 Vict. c. 26), s. 1.]—Where neither the agreement under which shares had been issued, nor the agreement of the company adopting it, had been filed, but only a short agreement reciting them,

**HELD**—that it was just and equitable to grant relief, and that the filing of the requisite contract referred to in sect. 1, sub-sect. 4, of the Companies Act, 1898, would cause inconvenience, and that in lieu thereof there should be filed with the Registrar of Joint-Stock Companies a memorandum in writing approved by the Court in the form set forth in the schedule to the order.

An application for relief under the Companies Act, 1898, should be heard in open Court, and though it may be made by motion, yet the better course is to make it by summons taken out in chambers in the first instance and adjourned into Court.

The application under the Act need not be made by all the shareholders, it may be made by any of them.

IN RE WHITEFRIARS FINANCIAL COMPANY, LIMITED, [1899] 1 Ch. 184; 68 L. J. Ch. 79; 79 L. T. 546; 6 Manson, 72—Kekewich, J.]

**318. Application for Relief—Fully Paid—Relief where no Sufficient Contract Filed—Jurisdiction—Companies Act, 1898** (61 & 62 Vict. c. 26), s. 1.]—The winding-up judge has jurisdiction to make an order that a contract filed after issue of the shares to which it relates should operate as if it had been filed before such issue in the case of a company not being wound up, but there is no reason why applications under the Act, where the company is not being wound up, should not be made to the ordinary judges of the Chancery Division. Such applications are properly made in Court, and should not as a rule be made in chambers.

IN RE CONCESSIONS ACQUISITION SYNDICATE, [(1899) 68 L. J. Ch. 49; 79 L. T. 666—Wright, J.]

**319. Application for Relief—Omission to File Sufficient Contract—Leave to File Sufficient Contract after Commencement of Winding-up—Companies Act, 1898** (61 & 62 Vict. c. 26), s. 1.]—A contract was entered into by which M. was to sell and a syndicate was to purchase certain patents, and S. agreed to pay certain costs, charges, and expenses and to indemnify M. and the syndicate and its directors against all claims in respect thereof, and in consideration thereof S. was to be entitled to fully paid-up shares in the company when incorporated. This contract was not filed, but was adopted, with modifications, by the company when incor-

**Shares—Continued.**

porated, and the adopting contract, which did not state the consideration given for the shares, was filed with the Registrar of Joint-Stock Companies before the shares were issued. The company afterwards went into liquidation.

**HELD**—that copies of both contracts duly stamped must be ordered to be filed, and to operate as if filed before the issue of the shares; that an office copy of the order must also be filed, and S. must pay the costs of the Official Receiver.

**IN RE MAY'S METAL SEPARATING SYNDICATE,**  
[1899] 68 L. J. Ch. 46; 79 L. T. 633; 5  
Manson, 342—Wright, J.

**320. Application for Relief—No Contract Filed**—“Any Person interested in such Shares or any of them”—*Companies Act, 1898* (61 & 62 Vict. c. 26), s. 1 (1) (4).—Where there has been an omission to file with the Registrar of Joint Stock Companies a memorandum in terms of sect. 25 of the Companies Act, 1867, the holder of a less number of shares than the whole of a particular class has a title to ask for an order under the Companies Act, 1898.

*Whitefriars Financial Co., Ltd.*, ([1899] 1 Ch. 184; 68 L. J. Ch. 79; 79 L. T. 546; 6 Manson, 72—Kekewich, J., No. 317, *supra*) approved.

Where such a contract has been already registered, although not timeously, the alternative procedure sanctioned by sect. 1, sub-sect. 4, of the Act, viz., that of registering a memorandum in writing, specifying the consideration for which the shares were issued, is let in.

**IN RE FERGUSON,** (1902) 4 F. 64—Ct. of Sess.

**321. Contract—Description of Property Sold—Sufficiency—Consideration—Rectification—Companies Act, 1867** (30 & 31 Vict. c. 131), s. 25.—A contract registered under sect. 25 of the Companies Act, 1867, must indicate the vendor, the purchaser, the price to be given, and the thing to be purchased; a contract reciting that by a previous agreement the vendor had agreed to sell and the company when incorporated had agreed to purchase in consideration of £40,000, to be paid partly in cash and partly in shares fully paid-up, “the business and property mentioned in the first part of the schedule thereto,” and “the leasehold hereditaments, short particulars of which are set out in the second part of the schedule thereto,” held not to be a sufficient description of the property.

**RE MAYNARDS, LD.**, [1898] 1 Ch. 515; 67 L. J. Ch. 186; 78 L. T. 150; 14 T. L. R. 250; 46 W. R. 346—Kekewich, J.

*But see* No. 310 *supra*.

**322. Consideration—Description of Property Sold—Insufficient Contract Filed—Leave to File Contract after Issue—Companies Act, 1897** (30 & 31 Vict. c. 131, s. 25—*Companies Act, 1898* (61 & 62 Vict. c. 26).—An

order may be made on motion under the Companies Act, 1898, on the application of the parties interested in the shares with notice to the company; but, *semble*, that in future cases the Court may direct notice to be given of the day for hearing the application, and that anyone desiring to oppose can attend.

*Cf.* “Palmer’s Company Law,” 2nd edit., p. 379.

**RE NORTHERN CREOSOTING v. SLEEPER CO., LD.**,  
[1898] 79 L. T. 407—Byrne, J.

**323. Contract with Promoter—Register Contract—Consideration—Companies Act, 1867** (30 & 31 Vict. c. 131), s. 25.—One of the objects for which a company was established was to adopt a contract made between a promoter and the company, whereby the company agreed to allot to the promoter 3,500 fully paid shares in consideration of an assignment of the benefit of certain options, businesses, and patent rights, and an undertaking to discharge the preliminary expenses of the company. The agreement was adopted and registered pursuant to sect. 25 of the Companies Act, 1867, and the shares allotted to the promoter and his nominees. The options, businesses, and patent rights were of no value. On the winding up of the company, the liquidator contended that there was no real consideration for the agreement, and that the allottees were liable to pay the full amount of the shares.

**HELD**—that the promoter and his nominees were entitled to hold the shares as fully paid.

*Baglan Hall Colliery Co.* ([1870] L. R. 5 Ch. 350; 39 L. J. Ch. 591; 18 W. R. 499; 23 L. T. (N.S.) 60) followed.

*In re Eddystone Marine Insurance Co.* ([1893] 3 Ch. 9; 62 L. J. Ch. 742; 41 W. R. 642; 69 L. T. 363) distinguished.

**IN RE LEINSTER CONTRACT CORPORATION, LD.**,  
[1902] 1 Ir. R. 349—M.R.

**324. Enforceable Contract Filed—Nature of Consideration Stated—Sufficiency of Identification—Estoppel by Statement in Certificate—Companies Act, 1867** (30 & 31 Vict. c. 131), s. 25.—It is sufficient to satisfy sect. 25 of the Companies Act, 1867, if an enforceable contract in writing is filed, which states with reasonable plainness the nature of the consideration which is substituted for cash, although it may not be a complete identification.

A statement in a share certificate that the shares are fully paid is not a representation that a sufficient contract has been filed under sect. 25 of the Companies Act, 1867, so as to estop the liquidator from denying it.

Decision of Wright, J. ([1899] 1 Ch. 414; 68 L. J. Ch. 215; 47 W. R. 509; 80 L. T. 282; 15 T. L. R. 143; 6 Manson, 84) affirmed.

**IN RE AFRICAN GOLD CONCESSIONS AND DEVELOPMENTS CO., MARKHAM AND DARTER’S CASE,**  
[1899] 2 Ch. 480; 68 L. J. Ch. 724; 81 L. T. 145; 15 T. R. 491—C. A.



*Shares—Continued.*

**325. Filing of Contract under Sect. 25 of the Companies Act, 1867.**—By an agreement made in 1895 the Tilgarn Exploring Co., Ltd., sold to the Coolgardie company certain mining claims. It was provided that a portion of the purchase-money might be discharged by the directors of the Coolgardie company either wholly in cash or partly in cash and partly in fully paid-up shares, or wholly in fully paid-up shares, and "for that purpose the shares from 30,008 to 60,007 shall be set aside for issue to the vendors, or as they shall appoint, in case the directors shall so decide to pay in shares, and such shares shall be issued solely as fully paid-up shares without any liability whatsoever accruing thereon." The directors having elected to discharge the purchase-money in fully paid-up shares, the contract was filed at Somerset House before the shares were issued, but nothing showing that their option had been exercised was filed till after they were issued. On an application to exclude these shareholders from the list of contributories on the ground that the shares were to be deemed to be fully paid-up, having been issued in pursuance of a filed contract under sect. 25 of the Companies Act, 1867, the Court held that it must refuse it. The case turned on the words in the section "unless the same shall have been otherwise determined" by the contract, and it was otherwise determined when the option was exercised, but not before that was done, and when the document was filed it was not a contract to issue shares. It only became such a contract when the option was exercised.

RE COOLGARDIE CONSOLIDATED GOLD MINES, LD.,  
[1898] 14 T. L. R. 277—Wright, J.

**326. Filing Impracticable—Companies Act, 1898 (61 & 62 Vict. c. 26), s. 1, sub-ss. 1, 4.**—Shares credited as partly paid up were issued pursuant to two agreements before the agreements were filed with the Registrar of Joint-Stock Companies. The directors, unaware that delay had occurred with reference to the filing by the company's solicitors, allotted such shares. The agreements were subsequently filed.

HELD—that, as the agreements were actually filed, an order could not be made under sub-sect. 1 of the Companies Act, 1898, but that the case came within sub-sect. 4 of the Act as "impracticable." It was ordered that a memorandum in writing, approved by the Court, be filed with the Registrar of Joint-Stock Companies.

THE LUCKY GUSS, LIMITED, (1899) 79 L. T. 722;  
[15 T. L. R. 82—Kekewich, J.]

**327. Fully-paid Issued bonâ fide—Consideration—Inquiry into Value of.**—Where a company in good faith issues shares as fully paid-up in consideration of property

transferred or services rendered, the Court will not inquire into the value of that which was accepted by the company as an equivalent of money.

BROWNIE, PETITIONER (SCOTTISH HERITAGE [Co.], (1899) (O. H.), 6 S. L. T. 326.

**328. Omission to file Sufficient Contract—Ignorance of Act—"Inadvertence"—Filing Supplemental Contract—Companies Act, 1898 (61 & 62 Vict. c. 26), s. 1, sub-ss. 1, 4.**—By a contract for the sale of a business by the owner to a limited company it was provided that the purchase price should be paid by the company "wholly or partly in cash, shares, or debentures as the directors of the company shall determine." As to part of the purchase price the directors allotted and issued to the vendor shares each expressed to be fully paid up, but no written contract was entered into to that effect. No contract in writing in respect of the shares was filed with the Registrar of Joint-Stock Companies owing to the ignorance on the part of the vendor and the directors of the company of sect. 25 of the Companies Act, 1867.

HELD—that the omission to file the necessary contract was due to "inadvertence" within the meaning of the Companies Act, 1898, s. 1, sub-s. 1.

HELD ALSO—that the contract was insufficient for the determination by the directors as to the mode in which payment was to be made, was supplemental to the original contract, and without the determination there was no complete contract. A supplemental contract was ordered to be entered into and filed, together with the original contract, with the Registrar of Joint-Stock Companies.

IN RE JACKSON & Co, LIMITED, [1899] 1 Ch.  
[348; 68 L. J. Ch. 190; 79 L. T. 662; 6  
Manson, 125—Kekewich, J.]

**329. Omission to file Sufficient Contract—Relief—Form of Memorandum to be filed—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Companies Act, 1898 (61 & 62 Vict. c. 26), s. 1—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 33, 36.**—In 1898 Burney's New Cross Brewery Co., Ltd., was incorporated. In 1899 Brutton and Burney, Ltd., was incorporated with the object of purchasing the business of Messrs. Brutton and Burney, a firm intimately associated with Burney's New Cross Brewery Co., Ltd., whose directors were also directors of Brutton and Burney, Ltd. It was the intention of the New Cross Brewery Co., Ltd., to acquire shares of Brutton and Burney, Ltd., and work the business in conjunction with their own. In order to carry out this intention, the subscribers to the preference shares in Brutton and Burney, Ltd., received in exchange for each preference share a second preference share in Burney's New Cross Brewery, Ltd., as fully paid. The applicants paid in cash to Brutton and Burney, Ltd., £10 per share, and they were allotted £10 second preference shares in

**Shares—Continued.**

Burney's New Cross Brewery, Ltd., fully paid, and a corresponding number of preference shares in Brutton and Burney, Ltd., were issued and allotted to Burney's New Cross Brewery, Ltd., as fully paid. The moneys payable by Brutton and Burney, Ltd., in respect of the second preference shares and by Burney's New Cross Brewery Co., Ltd., in respect of the preference shares, were not paid until February, 1900. The question arose whether the last-mentioned preference shares were paid for in cash, or whether a contract in writing ought not to have been filed under sect. 25 of the Companies Act, 1867.

**HELD**—that under the circumstances it was not unjust or inequitable that an order should be made under sect. 1 of the Companies Act, 1898, for the registration of a memorandum (in the form approved by the Court and set out in the law reports).

**Quære**—whether by virtue of sect. 38 of the Interpretation Act, 1889, the repeal of sect. 25 of the Companies Act, 1867, by sect. 33 of the Companies Act, 1900, is absolute, or has still some operation as regards transactions to which it applied before the commencement of the Act of 1900.

**IN RE BRUTTON AND BURNEY, LD.; IN RE BURNEY'S NEW CROSS BREWERY CO., LD.,** [1901] 1 Ch. 637; 70 L. J. Ch. 309; 49 W. R. 360; 84 L. T. 130; 17 T. L. R. 272—C. A.

**330. Shares Subscribed for by Signatory to Memorandum—Sale to Company for Similar Number of Shares—Relief—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Companies Act, 1898 (61 & 62 Vict. c. 26), s. 1.**—A company was formed to take over the business of D., and it was agreed that D. should sell the business to the company for 4,069 fully-paid shares. On the formation of the company D. signed the memorandum of association for 4,069 shares. Subsequently a contract setting out the terms of the sale to the company was duly filed in accordance with sect. 25 of the Companies Act, 1867. There was evidence that the shares for which D. signed the memorandum were considered by all parties to be the same as those issuable to him under the contract.

**HELD**—on a motion under the Companies Act, 1898, s. 1, for an order for filing a fresh contract, that the Court had no power to grant the relief.

**In re F. W. Jarvis & Co.** ([1899] 1 Ch. 193; 68 L. J. Ch. 145; 47 W. R. 186; 79 L. T. 727; 6 Manson, 116—Romer, J., No. 313, *supra*) followed.

**IN RE ARCHIBALD D. DAWNAY, LD.,** (1900) 48 [W. R. 600; 83 L. T. 47; 16 T. L. R. 474 —Kekewich, J.

**331. Shares Subscribed for in Memorandum of Association—Shares Allotted as Fully Paid under Contract for Sale—Relief Refused—Companies Act, 1867 (30 & 31 Vict. c.**

131), s. 25—*Companies Act, 1898 (61 & 62 Vict. c. 26), s. 1—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 33.*—A testator by his will made in 1838 left his business upon trust to transfer it to a company to be formed of his seven sons, to each of whom a specified number of fully-paid shares were to be allotted. The company was duly incorporated on 3rd March, 1893, with a capital of 1,000 shares, each of the sons signing the memorandum of association for the specified number of shares, making 750 in all. The company and the sons on 4th March, 1893, executed an agreement for the sale of the business to the company, the agreement providing for the allotment of 750 fully-paid shares to the sons in execution of the trusts of the will. The agreement was duly filed, and 750 shares were allotted to the sons. The sons subsequently applied, under sect. 1 of the Companies Act, 1898, for an order that a memorandum might be filed that 750 fully-paid shares were issued to the signatories of the memorandum in part satisfaction of the consideration for the assignment of the business. The shares mentioned in the agreement were meant to be the same as those for which the memorandum of association was signed.

**HELD**—that the application must be refused.

**In re Jarvis & Co., Ltd.** ([1899] 1 Ch. 193; 68 L. J. Ch. 145; 47 W. R. 186; 79 L. T. 727; 6 Manson, 116—Romer, J., No. 313, *supra*) followed.

**IN RE TIMMINS & SONS, LD.,** (1901 50 W. R. [134; 18 T. L. R. 134; [1902] 1 Ch. 238; 8 Manson, 47—Buckley, J.

**332. Vendor receiving Shares—Duty to file Contract—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25.**—By an agreement made between the plaintiff and the promoters of the defendant company, the plaintiff agreed to sell to the promoters for and on behalf of the intended company, his freeholds, stock in trade, goodwill, etc., for the price of £74,000, and it was agreed that he should be paid a part of this sum by 200 fully-paid up shares of the intended company and 250 shares of £100 each, 80 fully-paid.

By sect. 25 of the Companies Act, 1867, it is provided that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

**HELD**—that it was the duty of the company to pay the plaintiff in fully paid up and partly paid up shares, and consequently it became their duty to register the necessary contract, for in no other way could they carry out what they had contracted to do.

Decision of Wright, J. ((1897) 13 T. L. R. 589) affirmed.

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IBBOTSON v. IBBOTSON BROS., LD., (1898) 14 [T. L. R. 278—C. A.]

333. *Ultra Vires—Winding-up — Liability of Holders.*—A private company with only eight members was formed to work a patent belonging to two of them with a capital of 2,500 shares of £10 each. The original arrangement was that the vendors should receive £3,000 in cash and 300 fully-paid shares; the other six members (spoken of as the "shipowners") were to take and pay for 300 shares in order to provide the £3,000 cash, and were also to take as fully paid the remaining 1,900 shares. The final agreement between the vendors and the company, when incorporated, was as follows:—The vendors to sell their patents and business for £25,000, payable as to £3,000 in cash, and as to £22,000 by allotment to them or their nominees of 2,200 fully-paid shares, of which they in fact took 300 and distributed the 1,900 as arranged. In the winding-up on a summons against three of the "shipowners" who were directors,

HELD (reversing Kekewich, J.)—that there was no ground for coming to the conclusion that there were two contracts, or that the final agreement was only "colourable."

*Carling's Case* ((1876) 1 Ch. D. 115; 45 L. J. Ch. 5; 24 W. R. 165; 33 L. T. 645—C. A.) followed.

HELD, FURTHER—that, as all the shareholders were *sui juris*, there was no misfeasance; and that, therefore, the respondents had been wrongly placed on the list of contributories in respect of their shares, as though such shares were not in fact fully paid.

Decision of Kekewich, J. ([1903] 1 Ch. 674; 72 L. J. Ch. 302; 51 W. R. 378; 88 L. T. 123; 19 T. L. R. 226), reversed.

IN RE INNES & Co., LD., [1903] 2 Ch. 254; 72 [L. J. Ch. 643; 51 W. R. 514; 89 L. T. 142; 19 T. L. R. 477; 89 L. T. 525; 10 Manson, 402—C. A.]

## (h) Transfer.

334. *Certificate—Subsequent Transfer without Certificate—Representation on Certificate—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 22, 30.*—The articles of association of a company provided that before registration of any transfer of shares the instrument of transfer was to be left at the office of the company, together with any evidence the company might require to prove the title of the transferor. A certificate issued by the company to C., a shareholder, and one of their officers, had a note at the foot, "Without the production of this certificate no transfer of the shares mentioned therein can be registered." C. transferred his shares for value to the plaintiff, the date in the transfer being left blank, and handed him the certificate. Subsequently C. transferred the same shares for value to another person, and the directors of the company registered this

transfer, being satisfied by the excuse given by C. for the non-production of the certificate. Subsequently the plaintiff filled in the date on his transfer, and presented it for registration, which was refused. In an action against the company for damages for refusal to register,

HELD—that the note on the certificate was a mere warning to take care of it, and not an invitation to all the world to deal with the certificate upon the footing of a contract by the company with the holder for the time being thereof not to allow a transfer to be registered without its production; and that, therefore, the action failed.

*Per* Farwell, J., [1905] 1 Ch. 296; 74 L. J. Ch. 156; 92 L. T. 49; 21 T. L. R. 160; 12 Manson, 162.

But held on appeal (apart from any question of law) that upon the facts the company were affected with notice of the plaintiff's charge on the shares, C. having borrowed money from the company, and having then stated that "a friend" held the certificate as security for debt; and that therefore the company must repay to the plaintiff the money received by them, by arrangement with C., from the purchaser of the shares.

RAINFORD v. KEITH, [1905] 2 Ch. 147; 74 [L. J. Ch. 531; 92 L. T. 786; 21 T. L. R. 582; 12 Manson, 278—C. A.]

335. *Estoppel—Certification by Secretary—Representation by Managing Director.*—This was an action to recover damages from a company for refusing to place the respondent upon its register of shareholders. It was alleged that the company was estopped by the representations of its secretary and of its managing director. One R. had undertaken to transfer to the respondent by way of security a large number of shares in the company which were of considerable value. The secretary's certification was a representation that there had been lodged in the company's office certificates for the shares specified in the bodies of the transfers, such certificates being either in the name of R. himself, as registered owner, or in the names of registered owners who had executed in favour of R. transfers which had been lodged with the certificates. As far as R. was concerned the whole thing was a fraud.

HELD—that the company was not estopped by the certification of its secretary as the certificates had not been lodged with him; that the representation of the managing director to the effect that the company would act on the certified transfer without requiring anything more was not a representation of an existing fact, but if it was anything it was a promise *de futuro*, which could not be an estoppel.

Decision of the Court of Appeal ((1900) 16 T. L. R. 303) reversed.

GEORGE WHITECHURCH, LD. v. CAVANAGH, (1901) [85 L. T. 349; 17 T. L. R. 746 [1902] A. C. 117; 71 L. J. K. B. 400; 50 W. R. 218—H. L. (E.).]

## Shares—Continued.

**336. Forged Transfer—Registration—Innocent Parties—Implied Contract of Indemnity—Sheffield Corporation Act, 1893 (46 & 47 Vict. c. lvii.), ss. 25-30—Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), ss. 9-16.]**—Where a person acting innocently and without negligence hands to a company a forged transfer of stock, requesting the company to register him as the transferee thereof, and the company acting *bonâ fide* and without negligence registers the transfer, and subsequently the company has to make good the loss to the true owner of the stock, whose signature was forged, there is an implied contract by the transferee of the stock to indemnify the company against loss arising from the latter acting upon his request to register the transfer.

Where a person, invested with a statutory or common law duty of a ministerial character—*e.g.*, the duty of a company to register a valid transfer of stock and on the demand of the transferee to issue a fresh certificate—is called upon to exercise that duty on the request, direction or demand of another, and without any default on his part does so in a manner which is apparently legal, but is, in fact, illegal and a breach of the duty, and he thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the duty; and it makes no difference that the person making the request is not aware of the invalidity in his title to make such a request.

*Anglo-American Telegraph Co. v. Spurling* (1881) 5 Q. B. D. 188; 49 L. J. Q. B. 392; 44 J. P. 280; 42 L. T. 37; 28 W. R. 290—Lindley, J.) overruled.

Decision of the Court of Appeal ([1903] 2 K. B. 580; 72 L. J. K. B. 777; 19 T. L. R. 714) reversed.

**SHEFFIELD CORPORATION v. BARCLAY AND OTHERS,** [1905] A. C. 392; 74 L. J. K. B. 747; 69 J. P. 385; 54 W. R. 49; 93 L. T. 83; 21 T. L. R. 642; 10 Com. Cas. 287; 12 Manson, 248; 3 L. G. R. 992—H. L. (E.).

**337. Forged Transfer—Request to Bank of England to Transfer—Stockbroker—Identifying Transferor—Liability of Stockbroker—Damages, Measure of.]**—A stockbroker, acting *bonâ fide*, filled in the usual form containing particulars of the name of a person desirous (as he believed) of transferring certain India Stock standing in her name in the books of the Bank of England, and the amount of the stock, and sent the form to the bank, and attended himself with a person whom he believed to be the stockowner, and identified her to the bank officials. The stockbroker was on the bank's list of persons who were entitled to identify transferors of stock, and he was paid for the transaction by the transferor and not by the bank. The person in question thereupon signed a transfer of the stock in the books of the bank

in the name of the owner thereof, and the stock was subsequently transferred to purchasers for value in reliance upon the genuineness of the transfer. In fact, the person was not the stockowner, and the latter had not authorised the transfer, and the bank upon discovering the fraud purchased an equivalent amount of stock in the market so as to replace the stock fraudulently transferred. In an action by the bank against the stockbroker, who admittedly had acted in good faith and was misled as to the identity of the forger, to recover the sum paid in order to replace the stock,

**HELD**—that the defendant, by taking the form giving particulars of the stock and the name of the transferor to the bank, and identifying the transferor as the owner thereof, thereby requested the bank to perform a ministerial statutory duty—namely, to permit the transferor to make the transfer, and he thereby warranted to the bank that the transferor was the owner, and consequently was liable to indemnify the bank against the loss caused thereby.

*Sheffield Corporation v. Barclay* ([1905] A. C. 392, 74 L. J. K. B. 747; 69 J. P. 385; 54 W. R. 49; 93 L. T. 83; 21 T. L. R. 642—H. L.) followed.

**HELD ALSO**—that, as the bank was estopped from denying the validity of the transfers to the purchasers for value without notice, and were unable to create stock in order to replace the stock fraudulently transferred, they were bound to purchase stock upon the market for that purpose, and were entitled to recover from the defendant the amount paid for the purchase of the stock.

**BANK OF ENGLAND v. CUTLER,** [1907] 1 K. B. [889; 76 L. J. K. B. 504; 96 L. T. 636; 23 T. L. R. 374—Lawrence, J.

Affirmed C. A. April 6, 1908—24 T. L. R. 518.

**338 Non-Registration of Transfer—Accidental Delay—Voluntary Liquidation—Unregistered Shareholders Dissenting from Resolutions—Rectification of Register—Retrospective Registration—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 35, 98.]**—Although a company is in liquidation the Court has power to rectify the register under sect. 35 of the Companies Act, 1862, on any of the grounds there mentioned, and is not confined to rectifying it under sect. 98 for the purpose of settling the list of contributories. In such a case the rectification may be made retrospective, the rights of third parties being protected if necessary.

A transfer of shares in a company was, by an oversight, not registered. Subsequently the company passed resolutions for a voluntary liquidation. The shareholder, believing his transfer to have been registered, served a notice of dissent under sect. 161, which the liquidator disregarded. The shareholder then applied for rectification under sect. 35.

**HELD**—that his name should be inserted in

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the register as on some day prior to the passing of the resolutions; and that such rectification would work no injustice to other shareholders, inasmuch as it would not invalidate the notices, etc.

*Breckenridge's Case* ((1866) 2 H. & M. 642—Wood, V.-C.) and *Reese River Silver Mining Co. v. Smith* ((1869) L. R. 4 H. L. 64; 39 L. J. Ch. 849) followed.

IN RE SUSSEX BRICK CO., LD., [1904] 1 Ch. [598; 73 L. J. Ch. 308; 52 W. R. 371; 90 L. T. 426; 11 Manson, 66—C. A.

339. *Register—Sale of Shares—Custom of Stock Exchange—Refusal of Company to Register Transfer—Specific Performance—Rescission of Contract—Regulation of Company Empowering Directors to Refuse to Register a Person as Transferee.*—A contract for the sale of shares in a registered company, with unlimited liability, was made through stockbrokers, subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him by the vendor of a duly executed transfer, together with the certificate of shares. One of the regulations of the company provided that it should be lawful for the directors to decline to register the transfer of shares to any person not approved of by the directors as transferee, and that thereupon such transfer should be void. An application for registration of the transfer being subsequently made to the directors of the company by the purchaser, they refused to register him as the transferee of the shares. The vendor issued an equity civil bill, claiming specific performance of the contract, and asking that the purchaser should be ordered to procure the shares to be registered in his own name, or in that of some other person. The civil bill was subsequently amended by adding a prayer for an indemnity and for rescission of the contract; and the County Court judge made a decree declaring the plaintiff a trustee of the shares for the defendant, and that the defendant was bound to indemnify the plaintiff against calls.

HELD by Madden, J.—that the inability of the defendant to register the transfer was the non-performance of a condition subsequent binding on the defendant, by reason of which the plaintiff was entitled to treat the contract as at an end; and that the shares should be retransferred on return of the purchase-money.

HELD by the Court of Appeal (FitzGibbon, L. J., *dissentiente*)—that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transfer; and that the equity civil bill should have been dismissed.

CASEY v. BENTLEY, [1902] 1 Ir. R. 376—C. A.

340. *Refusal to Register as not in "Usual*

*Common Form"*—*Immaterial Omissions—Transferor's Address—Share Members.*—Where the articles of a company provide for the use of forms of transfer "in writing and in the usual common form," the directors cannot refuse to register a transfer merely because it omits particulars usually inserted in transfers, if under the circumstances the omission is immaterial.

A transferee sent in for registration a transfer of one share which omitted the transferor's address and the share number; both these particulars appeared in the share certificate sent with the transfer.

HELD—that the transfer must be registered.

IN RE LETHERBY AND CHRISTOPHER, LD., [1904] 1 Ch. 815; 73 L. J. Ch. 509; 52 W. R. 460; 90 L. T. 774; 11 Manson, 209—Buckley, J.

341. *Registration—Authority of Secretary to Register.*—By one of the articles of association of a company "the directors may decline to register any transfer of shares upon which the company has a lien, and in the case of shares not fully paid up, may refuse to register a transfer to a transferee of whom they do not approve." The defendant, who was the registered holder of partly-paid shares in a company, executed a transfer of them, and the transfer was lodged with the secretary, who at once entered the name of the transferee in the register. The transfer came subsequently before the directors, who, acting under the above article, refused to pass it, and the secretary struck the name of the transferee out of the register. The directors afterwards made a call upon the shares. In an action to recover the calls, the secretary in his evidence stated that he had no authority to pass transfers, and that he made the entry in the register merely in order to keep pace with the work, and that the directors had never before refused to sanction a transfer.

HELD—that the secretary had no authority to enter the transfers at once, and that, therefore, the defendant remained the registered holder of the shares, and was liable for calls.

CHIDA MINES v. ANDERSON, (1905) 22 T. L. R. [27—Walton, J.

342. *Registration—Consideration not truly Stated on Face—Insufficient Stamp for true Consideration—Right of Company to Refuse to Register—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 14 (4), 17.*—A limited company may refuse to register a transfer of shares, if the true consideration is not stated on the face thereof and the stamp is insufficient for the real consideration.

The company is entitled to have such a transfer as it can put in evidence; and, if the transfer in question was tendered, it would be liable to rejection upon extrinsic evidence of the real consideration. *Field v. Woods* ((1837) 6 L. J. K. B. 209; 7 A. & E. 114).

**Shares—Continued.**

The plaintiff bought certain shares from a defaulting shareholder, at a time when the company had a lien on them for £158 8s. 3d., the amount of unpaid calls, and also a further sum for interest thereon. He tendered a transfer showing a consideration of £158 8s. 3d., and bearing only the stamp required for such a consideration. The company refused to register it, and the market went against the plaintiff.

**HELD**—that the company acted within their rights in refusing to register the transfer, and that the plaintiff had no right of action against them.

**MAYNARD v. CONSOLIDATED KENT COLLIERIES [CORPORATION, LD., [1903] 2 K. B. 121; 72 L. J. K. B. 681; 88 L. T. 676, 19 T. L. R. 448; 52 W. R. 117; 10 Manson 386—C. A.]**

**343. Transfer in Blank—Registration—Reasonable Time for making Inquiries—Notice of Trust—Priority of Equitable Right—“Present, absolute and unconditional Right” to Registration.**—The plaintiff transferred certain shares in the defendant company to which she was entitled in her own right to her husband I. for the purpose of enabling him to attend and vote at meetings of the company in her behalf, and he was duly registered by the company as the holder of the shares. I. obtained a loan from the defendant Hart, and as part security for the money so borrowed he, without the knowledge or consent of the plaintiff, executed a blank transfer of the shares, and handed the same to the defendant Hart, together with the certificate thereof. The transfer was in the form of a deed under seal. Hart filled up and sent the transfer for registration to the company's office, and a formal receipt was given for it. The transfer was not formally submitted to the board of directors and was not registered. The plaintiff brought an action to restrain Hart from procuring the registration. Prior to the service of the writ the defendant company had no notice of the plaintiff's title.

**HELD**—that Hart had authority to fill up the transfer and do what he did; that the directors were entitled to have a reasonable time after the transfer was made in order to make inquiries for the purpose of finding out if the transfer was in order; that after what had taken place the directors were not bound to pass the transfer; that Hart had not a “present, absolute and unconditional right” to the registration of the transfer of the share; that the prior equitable right of the plaintiff must prevail, notwithstanding that the defendant Hart had no notice of the plaintiff's title and that the transfer to him was inoperative.

**Société Générale de Paris v. Walker ((1885) 11 App. Cas. 20; 55 L. J. Q. B. 169; 34 W. R. 662; 54 L. T. 389—H. L. (E.)) and Moore v. North-Western Bank ((1891) 2 Ch. 599; 60 L. J. Ch. 627; 40 W. R. 93; 64 L. T. 456—Romer, J.) followed.**

**IRELAND v. HART, [1902] 1 Ch. 522; 71 L. J. Ch. [276, 50 W. R. 315; 86 L. T. 385; 18 T. L. R. 253; 9 Manson, 209—Joyce, J.]**

**344. Registration—Transfer for Value—Obligation of Transferor not to hinder Registration—Blank Transfer—Derogation from Grant—Damages**—A transferor for value of shares is under an implied obligation not to delay or hinder the transferee's registration as owner of such shares.

W. executed a blank transfer of certain shares, and handed the transfer and certificates to H. in order that the latter might borrow money for his own (H.'s) use. The plaintiff at the request of H. borrowed from his bank upon security of the transfer and certificate, and handed the money to H., who authorised the transfer of the shares to the bank in case he failed to make repayment. Default was made, and H. absconded, whereupon the plaintiff, at the bank's request, executed the transfer and lodged it for registration. W. put a stop on the registration, and before the stop was removed, the shares fell greatly in value.

**HELD**—that the plaintiff as mortgagor of the shares had sufficient interest to maintain an action for damages against W. for breach of his implied obligation not to hinder the registration.

**HOOPER v. HERTS, [1906] 1 Ch. 549; 75 L. J. [Ch. 253; 54 W. R. 350; 94 L. T. 324; 13 Manson, 85—C. A.]**

**345. Sale of Shares—Refusal of Company to Register Transferee—Rights of Transferee—Transferor a Trustee for Him.**—A. sold to B. shares in a company whose articles of association provided (as was known to both) that the directors might, without assigning any reason, refuse to register a transfer of shares to any person not approved of by them. In an action by A., B. was ordered to pay the price of the shares in exchange for a transfer in ordinary form. B. thereupon paid the price, and having received a transfer from A. presented it to the company, who refused to register B. as proprietor of the shares or pay him the dividends accruing thereon. A., who did not propose to annul the contract of sale and return the price, declined to receive from the company the dividends.

**HELD**—that B. had the sole beneficial interest in the shares and dividends, that the shares were held by A. in trust for B. so long as A.'s name should remain on the register in respect of the shares, and B. continued to hold the beneficial interest therein; and that decree should be granted ordering A. from time to time to make payment to B. of all dividends accruing on the shares.

**STEVENSON v. WILSON, [1907] S. C. 445—Ct. of [Sess.]**

**346. Voluntary Liquidation—Interlocutory Injunction—Registration of Transfers—Lis pendens—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 35, 131, 135, sub-s. 5.]—Directors**

### Shares—Continued.

refused to register the transfer of shares because there was a resolution, confirmed by a meeting, to wind up the company and an interlocutory injunction to restrain them from carrying into effect those resolutions.

**HELD**—that the Court ought not to direct the registration of the shares, knowing that it was possible thereafter that the registration might not merely be declared to be bad, but might be bad by force of the statute. When that result was possible the registration was not refused “without sufficient cause” within sect. 35 of the Companies Act, 1862; and that, assuming the Court to have jurisdiction, it extends equally to shares, the transfers of which were executed before the commencement of the winding-up, or the possible winding-up, or to transfers executed after that date.

RE VIOLET CONSOLIDATED GOLD MINING CO.,  
[Ld., (1899) 68 L. J. Ch. 535; 80 L. T. 684;  
7 Manson, 102—Kekewich, J

### (i) Underwriting Agreements.

**347. Commission for Underwriting—Issuing New Shares to Shareholders—“Offer of Shares to the Public”—Applying Shares in Payment of Commission—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8.]**—The directors of a company issued a circular to the existing shareholders offering them an allotment of new £1 shares in the company at the price of £2 10s. in the proportion of one new share for every five shares held by them. Prior to this, certain persons had agreed with the directors to underwrite the issue of the shares, and in consideration thereof the underwriters were to have the option for six months of subscribing for certain unissued shares in the company at the price of £2 10s. The fact that this option had been given was stated in the circular. The shares, in fact, stood at a much higher price than £2 10s.

**HELD**—(1) it was admitted that this was not an offer of shares to the “public” within sect. 8, sub-s. 1 of the Companies Act, 1900; (2) that sect. 8, sub-s. 2, was a general prohibitory enactment applying to an offer of shares either to the public or otherwise; and (3) that an allotment of shares under the option in the underwriting agreement would be an application of the shares in payment of “commission, discount, or allowance” in consideration of the agreement to underwrite, and would therefore be illegal under sect. 8, sub-s. 2.

Decision of Farwell, J. (49 W. R. 428; 17 T. L. R. 303), affirmed.

BURROWS v. MATABELE GOLD REEFS AND ESTATES  
[Co., Ld., [1901] 2 Ch. 23; 70 L. J. Ch. 434;  
49 W. R. 500; 84 L. T. 478; 17 T. L. R. 364  
—C. A.

In effect overruled by H. L. in *Hilder v. Dexter*, *infra*.

**348. Commission for Underwriting—Option to take Further Shares at Par—**

*Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8, sub-s. 2.]*—If the shares of a limited company stand at par and the directors have under the articles of association control of all the shares representing the capital of the company, with power to allot or otherwise to dispose of them to such persons, on such terms and conditions, either at a premium or otherwise, at such times as the directors may think fit, it is not illegal for the company, in consideration of a person taking or underwriting shares, to allot such shares to him upon the terms that for each share allotted he shall have the option during a future fixed period of taking up at par a further share in the initial capital of the company, and in the event of such last-mentioned share being taken up under such option, a further option during an additional fixed period of taking up a further share at par in the initial capital of the company, inasmuch as the contract does not constitute an application direct or indirect of any of its shares or capital money, nor is there a payment of “commission, discount, or allowance” within the prohibition contained in sect. 8, sub-s. 2, of the Companies Act, 1900.

There is no law which obliges a company to issue its shares above par because they are saleable at a premium in the market.

*Burrows v. Matabele Gold Reefs and Estate Co., Ld.* ([1901] 2 Ch. 23; 70 L. J. Ch. 434; 49 W. R. 500; 84 L. T. 478; 17 T. L. R. 364—C. A., *supra*) overruled, upon the ground that in that case (if rightly decided) the shares were expressly agreed to be allotted at a price below the then market premium value in order to satisfy an agreed commission.

Decision of Court of Appeal, *sub nom. Dexter v. United Gold Coast Mining Properties* ([1901] 17 T. L. R. 708) reversed.

HILDER v. DEXTER, [1902] A. C. 474; 71  
[L. J. Ch. 781; 87 L. T. 311; 18 T. L. R.  
800; 7 Com. Cas. 253—H. L. (E.)

**349. Interpretation.]**—The defendant agreed to underwrite a certain number of preference shares in a company about to be brought out. One of the conditions of the underwriting agreement was that the defendant was not to be called upon to accept any allotment unless at least 8,000 preference shares were irrevocably applied for by persons residing in France, on each of which shares the application money should have been duly paid.

**HELD**—that upon the construction of the agreement an application for 8,000 shares by one of the underwriters resident in France was not a fulfilment of the condition.

Decision of Darling, J. ((1901) 17 T. L. R. 16), affirmed.

PAUL BOYER, LD. v. EDWARDES, (1902) 18  
[T. L. R. 3—C. A.

**350. Lessening Liability of Underwriter.]**

**Shares—Continued.**

—By the terms of an underwriting agreement the liability of the underwriters in respect of shares underwritten by them was to cease, or be diminished, according as the whole or part of the shares were taken up by the public. Some of the underwriters sent in applications in the ordinary way, and enclosing cheque, for shares to be taken "firm."

**HELD**—that these shares must be considered as shares taken by the public, within the meaning of the underwriting agreement, so as to diminish the extent of the underwriters' liability thereunder.

Decision of C. A. ((1897) 13 T. L. R. 564) affirmed.

SYDNEY HARBOUR COLL., LD. *v.* GREY, (1898) [14 T. L. R. 373—H. L. (E.).

**XXXI. UNREGISTERED COMPANIES**

351. *Winding-up—Company Incorporated Abroad—Office and Assets in England—Jurisdiction over—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 199.]—A foreign company, which is incorporated under the laws of a foreign country, but has its only office and all its shareholders in England, to which place its assets are all remitted, may in a proper case be wound up by the English Court under sect. 199 of the Companies Act, 1862.

*In re English, Scottish and Australian Chartered Bank* ([1893] 3 Ch. 385; 62 L. J. Ch. 825; 42 W. R. 4; 69 L. T. 268—C. A.) and *In re Union Bank of Calcutta* ((1850) 3 De G. & Sm. 253) discussed and applied.

IN RE THE SYRIA-OTTOMAN RY. CO., (1904) 20 [T. L. R. 217—Byrne, J.

352. *Illegal Association—Action by Subscribers—Creditor's Claim.*—A syndicate which consisted of more than twenty members, and was unquestionably formed for purposes of gain, was never registered under the Companies Act, and was consequently illegal. In an action by the subscribers to the syndicate against the syndicate, the supervising committee and the bankers for an injunction to restrain the defendants from dealing in or parting with the funds, inquiries were directed to be made by an order made in chambers. Advertisements were issued for creditors; and as a consequence various claims were made, and amongst others a claim from Unwin Bros., printers. The first transaction was made with a Mr. Gray, when there was no such body as the syndicate in existence. No new contract was made between the syndicate and Messrs. Unwin. Payments were made consistent with the mere obligation, legal, equitable, or moral, of the company, supposed to exist. Castle & Co. became liable in respect of the contract.

**HELD**—that the applicants had a remedy which in fact they were pursuing against Castle & Co. and other persons, and that

the applicants ought not to be admitted as creditors.

HUME *v.* THE RECORD REIGN JUBILEE SYNDICATE, (1899) 80 L. T. 404—Stirling, J.

**XXXII. VOTING.**

*See also Sect. XXI.—PROXIES.*

353. *Objection to Vote—Decision of Chairman—Fraudulent Ruling.*—An article of association provided that "No objection shall be made to the validity of any vote excepting at the meeting (if any) to which such meeting shall be adjourned in the regular course of business, and every vote, whether given in person or by proxy, not disallowed at any one of such meetings, shall be deemed valid for all purposes whatsoever."

**HELD**—that the meaning of the article was that all objections to votes at a meeting must actually be taken and dealt with at the meeting, and the decision as to their validity by the person who presides is to be final on that point. Any fraudulent ruling would be vacated by a competent Court.

WALL *v.* LONDON AND NORTHERN ASSETS CORPORATION, [1899] 1 Ch. 550; 68 L. J. Ch. 248; 80 L. T. 70; 6 Manson, 312—North, J.

354. *"Personally or by Proxy"—Voting Papers—Power of Chairman—Articles of Association.*—By the articles of association of a limited company votes might be "given either personally or by proxy," and if a poll was demanded, it should be taken "in such manner and at such time and place as the chairman of the meeting directs." A poll being demanded at a meeting, the chairman directed that the manner of taking the poll should be by voting papers signed by the members and delivered at the office of the company.

**HELD**—that voting by voting papers was not authorised by the regulations of the company, and was invalid.

McMILLAN *v.* THE LE ROI MINING CO., LD., [1906] 1 Ch. 331; 75 L. J. Ch. 174; 54 W. R. 281; 94 L. T. 160; 22 T. L. R. 186; 13 Manson, 65—Joyce, J.

355. *Proxies Signing Voting Papers "for Self and Proxies"—Form.*—The articles of the defendant company stipulated that the instrument appointing a proxy should be deposited at the office of the company not less than forty-eight hours before the time for holding the meeting, otherwise the persons so named should not be entitled to vote in respect thereof. There was no express provision empowering him to vote if this condition was complied with, but that followed by necessary implication. Instruments of proxy had been proved to be properly executed and to have been duly deposited in the company's office within the prescribed time. The plaintiff, who was entitled to vote in respect of them, signed



**Voting—Continued.**

the voting papers "George Foerster, for self and proxies."

**HELD**—that this was a good vote for the plaintiff and also a good vote for the persons who appointed him their proxy.

**FOERSTER v. NEWLANDS (WEST GRIQUALAND)**  
[DIAMOND MINES, LD., (1902) 18 T. L. R. 497  
—Kekewich, J.]

**356. Shares—Forfeiture of Shares on which Calls are Payable—Sale of such Shares—Purchaser's Right of Voting.**—The articles of association of a company provided for the forfeiture of shares and their sale when forfeited and that calls were still to be payable, and that no member should be entitled to vote whilst any call or other sum should be due and payable.

**HELD**—that the purchaser and transferee of forfeited shares on which calls were payable could not vote.

**RANDT GOLD MINING CO., LD. v. WAINWRIGHT,**  
[1901] 1 Ch. 184; 70 L. J. Ch. 90; 84 L. T. 348; 17 T. L. R. 29; 8 Manson, 61—  
Kekewich, J.]

**XXXIII. WINDING-UP.****(a) General.**

**357. Action against Company—Voluntary Liquidation—Grounds for staying Proceedings—Companies Acts, 1862 (25 & 26 Vict. c. 89), ss. 85, 87, 138, and 1900 (63 & 64 Vict. c. 48), s. 25**—A plaintiff sued a company in voluntary liquidation for money in respect of services rendered. The liquidator denied liability, but asked for a stay of proceedings.

**HELD**—that, as no special grounds had been shown, the question of liability should be determined in the ordinary way and the action allowed to proceed.

**CURRIE v. CONSOLIDATED KENT COLLIERIES CORPORATION, LD.,** [1906] 1 K. B. 134; 75 L. J. K. B. 199; 94 L. T. 148; 13 Manson, 60  
—C. A.]

**358. Action for Calls before Winding-up—Set-off Pleaded in Defence—Liquidation of Plaintiff Company before Judgment in Action—Summons in Winding-up for Balance Order.**—Where an action for calls had been commenced prior to a voluntary winding-up and set-off pleaded as a defence, but no judgment had been given,

**HELD**—On a summons being taken out in the winding-up for a balance order in respect of those calls, that no allowance could be made by way of set-off against the sums payable under that order.

**IN RE HIRAM MAXIM LAMP CO.,** (1902) 51 W. R. 74; 19 T. L. R. 26; [1903] 1 Ch. 70; 72 L. J. Ch. 18; 87 L. T. 729; 10 Manson, 329—  
Byrne, J.]

**359. Application to Substitute Another Petitioner—Companies Winding-up Rules, 1903, r. 36.**—An application to substitute another petitioner under the Companies

Winding-up Rules, 1903, r. 36, will only be entertained where the original petition is founded on a valid subsisting debt, and where the petitioner for some good reason is not able to proceed with his petition. It was refused, therefore, where the petitioner's debt was founded on a judgment which the Court of Appeal had set aside.

**CHARLES, LD., RE,** (1907) 51 Sol. Jo. 101—  
[Warrington, J.]

**360. Ceasing to Carry on Business—Struck off Register—Right of Creditors.**—Under sect. 7 of the Companies Act, 1880, the Registrar of Joint Stock Companies has power to strike the name of a registered company off the register when it is not carrying on business or is not in operation; and the company whose name is so struck off becomes dissolved. It is, however, provided that the liability (if any) of every director, managing officer and member of the company shall continue and may be enforced, as if the company had not been dissolved.

**HELD**—that a creditor who seeks to enforce this liability should do so by a petition to wind up the company; and that the provisions respecting service of the petition contained in the rules of 1890 and in the Act of 1880 have no application to such a case, but that special directions as to service should be obtained.

**IN RE ANGLO-AMERICAN EXPLORATION AND DEVELOPMENT CO.,** [1898] 1 Ch. 100; 4 Manson, 389—Williams, J.]

**361. Committee of Inspection—Removal of Members of—Filling Vacancies—Jurisdiction—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 91—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), ss. 6, 9, 23, 24, Sched. I., r. 6.**—The meeting of creditors of a company duly summoned under the Companies (Winding-up) Act, 1890, resolved upon and nominated a committee of inspection, and the committee of contributories recommended that application should be made to the Court to appoint the persons so nominated. A foreign company, not in a position to be, and not in fact present or represented at the meeting, complained that, although its debt was larger than the total amount of the debts of the other creditors, it was not represented upon the committee of inspection as constituted, and it sought to have an opportunity to be represented on the committee.

**HELD**—that under both sections, sect. 23 of the Companies (Winding-up) Act, 1890, and sect. 91 of the Companies Act, 1862, there is power in the Court to direct the summoning of a general meeting of the creditors to consider whether the creditors should or should not exercise the power which they have under sect. 9 of the Act of 1890, of removing one or more members of the committee of inspection, and whether any other person or persons should be appointed in the room of any of those who are removed, and

**Winding-up—Continued.**

that a general meeting of the creditors should be summoned to consider those questions.

HELD ALSO—that the Court probably has jurisdiction, instead of ordering such a meeting of creditors, to order fresh meetings or further meetings to be summoned for the purposes of sect. 6 of the Act of 1890.

IN RE RADFORD AND BRIGHT, LD. (No. 1), [1901]

[1 Ch. 272; 70 L. J. Ch. 78; 49 W. R. 270;

84 L. T. 150, 17 T. L. R. 81—Wright, J.

**362. Committee of Inspection—Unrepresented Foreign Creditors—Resummons of First Meetings—Appointment of Additional Members on Committee—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 91—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), ss. 6, 9.]—Under sect. 91 of the Companies Act, 1862, the Court has an almost unlimited power as to ordering meetings of creditors or contributories to be summoned.**

A meeting of creditors had expressed its opinion that a foreign company, creditors for a large amount, ought to be represented on the committee, but that it was undesirable for any member of the committee to retire. The Official Receiver made his report and the matter was again brought before the Court.

HELD—that the Court had power, under sect. 91 of the Act of 1862, to order that the first meetings of the creditors and contributories should be resummoned in order to see whether effect should be given to the above resolution; and, if so, whether by appointing an additional member of the committee or by removing one of the existing committee, and appointing another person in his place.

IN RE RADFORD AND BRIGHT, LD. (No. 2), [1901]

[1 Ch. 735; 70 L. J. Ch. 352, 84 L. T. 150;

17 T. L. R. 200; 8 Manson, 98, 189—

Wright, J.

**363 Company Limited by Guarantee—Contributions—Debts—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38.]—A member of a mutual marine insurance company, limited by a guarantee under the Companies Act, 1862, is not liable to be placed on the list of contributories, in the event of the company being wound up, for a larger amount than is prescribed by the company's memorandum of association. He may be a debtor to the company or to the other members of it for losses, but though he may be sued in respect of such losses, he cannot be made a contributory in the winding-up in respect of them.**

*The Lion Mutual Marine Insurance Association v. Tucker* ((1883), 12 Q. B. D. 176; 53 L. J. Q. B. 185; 32 W. R. 546; 49 L. T. 764—C. A.) applied.

IN RE BANGOR AND NORTH WALES MUTUAL

[MARINE PROTECTION ASSOCIATION, [1899] 2

Ch. 593; 68 L. J. Ch. 521; 47 W. R. 695; 80

L. T. 870—Wright, J.

**364. Company Limited by Guarantee—Debentures Charging Present and Future Assets.]—A petition to wind up a company limited by guarantee, not having a capital divided by shares, was opposed on the ground that there were debentures for an amount greater than the assets, and that in the event of an order for a winding-up there would be nothing for the unsecured creditors. The debentures purported to create a charge on all the assets present and future. The memorandum of association bound each member in the event of a winding-up to contribute a sum not exceeding £5 towards debts and liabilities.**

HELD—that as the debentures could not create a valid charge on the amounts guaranteed by the members, there must be a winding-up order.

IN RE IRISH CLUB CO., [1906] W. N. 127—

[Buckley, J.

**365. Compensation—Society for Providing Entertainments—Fellows and Life Members with Privilege of Free Admission—No Obligation to Continue the Entertainments—Claim for Compensation for Loss of Privilege.]—A company formed for the purpose of providing entertainments had a number of life members and fellows, who had the right of free admission to the entertainments, and some of whom (at any rate) had paid donations, or compositions, in order to acquire such status. The company sold its property and went into voluntary liquidation; and thereupon the various classes of life members and fellows claimed to be compensated for the loss of their privileges.**

HELD—that there was no implied agreement on the part of the company that its undertaking should be continued, and that no compensation was payable.

*Ex parte Maclure* ((1870) L. R. 5 Ch. 737; 39 L. J. Ch. 685; 18 W. R. 1122; 23 L. T. 685) and *Hamlyn v. Wood* ([1891] 2 Q. B. 488; 60 L. J. Q. B. 734; 40 W. R. 24; 65 L. T. 286—C. A.) applied.

IN RE ROYAL AQUARIUM AND SUMMER AND WINTER

[GARDEN SOCIETY, LD., (1904) 20 T. L. R.

35—Buckley, J.

**366. Contract to Take Shares—Fraudulent Prospectus—Rescission.]—To enable a person, who has been induced to take shares in a company by fraudulent misrepresentation in the prospectus, to escape liability as a contributory, he must have actually commenced proceedings to have his name removed before a petition to wind up is presented. The only exception to this rule is where one shareholder has commenced litigation to have his name removed, and there is an agreement between the company and other repudiating shareholders that all cases shall stand or fall by the result of his litigation; then, if that case is decided in favour of the litigant shareholder, the others also will be entitled to relief.**

CENTRAL KLONDYKE GOLD MINING AND TRADING

[Co., LD., THOMSON'S CASE, (1898) 5 Manson,

282—Wright, J.

**Winding-up—Continued.**

**367. Costs of Pending Action—Adoption of Proceedings by Liquidator—Liability to Pay Full Costs.**—An action against a limited company to recover unliquidated damages for breach of contract was pending when the company passed an extraordinary resolution for voluntary winding-up. The plaintiff in the action thereupon wrote to the liquidator's solicitor, and a copy of the letter was sent to the liquidator, asking whether the liquidator was prepared to admit the claim in full or in part, or to dispute it. The liquidator's solicitor replied that the liquidator could not admit the claim. The action proceeded, and the plaintiff recovered judgment for damages and costs.

**HELD**—that, as the liquidator had adopted the defence in the action and elected to go on with it, the plaintiff was entitled to have the costs paid in full out of the company's assets.

In such a case the liquidator should apply to the Court to stay the action, or to allow it to go on only on terms as to adding costs to damages.

*Bailey and Leetham's Case* ((1869) L. R. 8 Eq 94; 38 L. J. Ch. 485—James, V.-C.) followed; *In re Thurso New Gas Co.* ((1889) 42 Ch. D. 486; 38 W. R. 156; 61 L. T. 351—Kay, J.) distinguished.

*IN RE WENBORN & Co., LD.*, (1905) 74 L. J. [Ch. 283; 53 W. R. 332; 92 L. T. 228; 21 T. L. R. 229; 12 Manson, 45—Buckley, J.

**368. Cross Claims—Set-off—Damages due to Company for misfeasance by Promoters—Debt due to Promoters.**—T. Co. & F. Co., which promoted it, were both in liquidation. T. Co. owed F. Co. £5,100 on a debenture; F. Co. had been held liable to pay to T. Co. £12,000 for misfeasance; and towards this debt had (in pursuance of an order) handed over all its assets valued at £7,677, leaving £4,323 still due.

Other creditors had now established debts amounting to £5,490 against F. Co.

**HELD**—that the proper way of administering the assets of T. Co. was to add notionally the £4,323 to its assets available to pay creditors, and, calculating dividends on such sum, to pay to the F. Co. so much of the dividend (on its £5,100) as might exceed the £4,323 due from it.

*IN RE LEEDS AND HANLEY THEATRES OF VARIETIES, LD., EX PARTE CONSOLIDATED EXPLORATION AND FINANCE CO., LD.*, [1904] 2 Ch 45; 73 L. J. Ch. 553; 52 W. R. 506; 12 Manson, 191—Buckley, J.

**369. Debenture-holder's Petition—Security not Presently Redeemable—No Interest in Arrear—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 79, 80, 82.]**—A debenture-holder whose security is not presently redeemable, and the interest of which is not in arrear, cannot petition for the winding-up of the company, as he is not yet a creditor.

*In re Australian Joint Stock Bank* (W. N. (1897) 48) distinguished.

A clause made the security of a debenture-holder enforceable if the company committed a breach of any covenant therein contained.

**HELD**—that the security did not become enforceable upon a breach of a trifling obligation, but only on a breach of a covenant of importance. A mere allegation that the company was not in fact carrying on its business to the best advantage is not enough to make the clause attach.

*IN RE MELBOURNE BREWERY AND DISTILLERY*, [1901] 1 Ch. 453; 70 L. J. Ch. 198; 49 W. R. 250; 84 L. T. 228; 17 T. L. R. 173, 8 Manson, 403—Wright, J.

**370. Effect of Winding-up in Colony—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104)**—The Joint Stock Companies Arrangement Act, 1870, does not extend to or bind the Courts of the Colonies, and, therefore, proceedings under that Act cannot be pleaded as a defence to an action by a creditor of a company in a colony.

Judgment of the Court below affirmed.

*Ellis v. McHenry* (L. R. 6 C. P. 228) distinguished.

*Gibbs v. Société des Métaux* (25 Q. B. D. 399) approved and followed.

*NEW ZEALAND LOAN AND MERCANTILE AGENCY* [Co. v. MORRISON, [1898] A. C. 349; 67 L. J. P. C. 10; 77 L. T. 603; 5 Manson, 171; 14 T. L. R. 141; 46 W. R. 239—P. C.

**371. Grounds for—"Just and equitable"—Receiver and Manager carrying on for Debenture-holders—No Surplus Assets—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79 (5)—Companies Winding-up Rules, 1903, r. 186.]**—It is no longer a rule of practice that a petitioner for the winding-up of a company must allege the existence of available assets from which there is a reasonable probability of his getting something. If the Court deems it desirable that a company should be wound up, an order may be made, although there is no chance of the petitioner getting anything.

A company's business was being carried on by a receiver and manager appointed by the debenture-holders; the assets were all covered by the debentures and were insufficient to pay one-fiftieth of the amount: upon a creditor's petition,

**HELD**—that the company was a mere *nomini umbra*, and that it was desirable that it should be wound up; order made accordingly.

*IN RE CHIC, LD.*, [1905] 2 Ch. 345; 74 L. J. Ch. [597; 53 W. R. 659; 93 L. T. 301; 12 Manson, 342—Warrington, J.

**372. Grounds for—"Just and Equitable Cause"—One Branch of Business at an End—Dissentient Minority—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79.]**—A company was formed (a) to purchase, charter, hire, or

**Winding-up—Continued.**

otherwise acquire ships, and to work, hire, or employ them; and (b) to carry on the business of shipowners. It had lost its only vessel, and its only asset was a bank balance of £363. A majority in number and value of the shareholders petitioned for a winding-up order, which was opposed by a minority who wished to continue the business of charterers and were numerous enough to prevent a winding-up resolution being carried by the necessary three-fourths majority.

**HELD**—that it was “just and equitable” that the company should be wound up.

*PIRIE v. STEWART*, (1905) 6 F. 847—Ct. of Sess.

**373. Grounds for—Two Directors—Deadlock—Companies Act, 1862** (25 & 26 Vict. c. 89), s. 79.]—The only two directors of a company failed to agree in carrying on the business of the company. There was power under the articles to appoint a third director. A petition was presented to wind up the company on the ground that there was an absolute deadlock, owing to the disagreement of the two directors.

**HELD**—that the deadlock was only temporary and could be removed by appointing a third director, and therefore no winding-up order ought to be made.

*RE FARRIERS' ALLIANCE, LD.*, (1907) 51 Sol Jo. [172—Warrington, J.]

**374. Jurisdiction—Company Incorporated under Special Act.]**—The Court has jurisdiction to make a winding-up order on a judgment creditor's petition against a company incorporated under a special Act.

*In re Barton-on-Humber and District Water Co.* (1889) 42 Ch. D. 585; 58 L. J. Ch. 613; 38 W. R. 8—North, J.) followed.

*IN RE ST. NEOT'S WATER CO.*, (1906) 22 T. L. R. [478—Buckley, J.]

**375. Memorandum of Association—Construction—Primary and Incidental Objects—Substratum Gone—“Just and Equitable”—Companies Act, 1862** (25 & 26 Vict. c. 89), s. 79, sub-s. 5.]—The A. Syndicates, Limited, was incorporated on the 29th May, 1897, and its objects as defined by its memorandum of association were (a), (b), and (c) to acquire and take over as going concerns the undertakings, assets, and liabilities of three existing “Diamond Jubilee” Companies; (d) to carry on all kinds of promotion business; (e) to act as house agents, surveyors, and builders; (f) to acquire, sell, and deal in rooms, &c., for viewing processions, and in supply of refreshments, lodgings, &c., to persons attending the same.

The Jubilee being over, and an admitted loss having been incurred, a shareholder presented a petition for winding-up the company, on the ground that it was just and equitable so to do, because the principal business which it was formed to carry on

had come to an end, and the directors, instead of setting about to divide and adjust the balance of assets, were contemplating the carrying on further business as being within the later objects of its memorandum.

**HELD**—that notwithstanding the general terms of the later object clauses, they must be read as only referring to matters incidental to the primary business of the company, and that as the directors were thus contemplating business not within the scope of the memorandum, the distribution of the assets of the company ought not to be left to the company, its directors and officers, but a compulsory winding-up order should be made under sub-s. 5 of sect. 79 of the Companies Act, 1862.

*Re Irrigation Company of France; Ex parte Fox* (L. R. 6 Ch. 176) distinguished.

*RE AMALGAMATED SYNDICATES, LD.*, [1897] 2 Ch. [600; 66 L. J. Ch. 783; 77 L. T. 431; 4 Manson, 308; 46 W. R. 75—Williams, J.]

**376. Mortgage Debentures—Charge on Uncalled Capital—Reserve Capital—Companies Act, 1879** (42 & 43 Vict. c. 76), s. 5.]—A limited company was registered in August, 1892, with a capital of £50,000 in 5,000 shares of £10 each. Both the memorandum of association and the articles authorised the creation of a charge on the uncalled capital of the company.

By a special resolution passed on the 21st September, 1892, and confirmed on the 12th October, 1892, it was declared, “That such portion of the company's capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purposes of the company being wound up in accordance with the provisions of the Companies Act, 1879.”

In June, 1894, the company issued 160 first mortgage debentures of £100 each, purporting to be a charge on all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

On the 8th August, 1896, an action was commenced on behalf of all the debentureholders, and a receiver was appointed on the 12th August. On the same date a compulsory winding-up order was made against the company. At that time only £5 per share remained uncalled.

An application was made by a debentureholder to have it declared that the debentures were a first charge on £5 per share which had been called up by the official receiver and liquidator in the winding-up.

**HELD**—that sect. 5 of the Companies Act, 1879, was framed with a double object, viz., first, to preserve for the general creditors of a company the funds which the members were liable to pay, but which the directors could not call up; and secondly, to enable the members to limit the amount of their liability on a winding-up to pay the creditors more than the amount preserved for them.

**Winding-up—Continued.**

**HELD**—therefore, that the uncalled capital mentioned in the special resolution passed under that section was to be preserved intact for the purposes of the winding-up.

*Re The Pyle Works, Ltd.* (44 Ch. D. 534) considered and explained.

*Newton v. The Debenture-holders, &c., of The Anglo-Australian Investment Company* (1895) A. C. 244 distinguished.

Decision of Wright, J., affirmed.

*RE MAYFAIR PROPERTY CO, LD. · BARTLETT v. [MAYFAIR PROPERTY CO., LD., [1898] 2 Ch. 28, 67 L. J. Ch. 337; 78 L. T. 302, 5 Manson, 127; 14 T. L. R. 336, 46 W. R. 465—C. A.*

**377. Mortgages — Mortgage of Uncalled Capital—Winding-up Order—Sub-mortgage of Mortgage fraudulent against Contributors—Notice of Winding-up, but no Notice of Fraud—Assignee of Chose in Action taking Subject to Equities.**—A mortgage of the uncalled capital of a company was given by the directors to the promoter's wife (whose name was used in the deed at his request and for his convenience), to secure £3,400, alleged to have been advanced for the company. The circumstances under which this mortgage was executed were such that the Court decided that it was as to £1,350 (portion of the principal thereby secured) fraudulent as against the shareholders. The promoter's wife obtained an advance of £2,750 by executing a sub-mortgage to W., who had no notice of the fraud affecting the transaction, though he was aware that the company had been ordered to be wound up in hostile proceedings.

**HELD**—(reversing the decision of the Master of the Rolls)—that once the winding-up order was made all the then uncalled capital, so far as not validly or otherwise appropriated, became devoted to the payment of the general creditors, and that W., claiming under the sub-mortgage with notice of the statutory appropriation of all the uncalled capital, could not get against the company a title higher than that of the mortgagee under whom he derived.

*IN RE GWELO (MATABELELAND) EXPLORATION [AND DEVELOPMENT CO., LD.; WILLIAMSON'S CLAIM, (1901) 1 Ir. R. 38—C. A.*

**378. New Company—Scheme of Arrangement—Promissory Notes issued Under—Postponement of Payment—Interest subsequent to Winding-up.**—The defendant company was formed in 1892 to take over the business, assets, and liabilities of the English Bank of the River Plate, which was then in liquidation, in accordance with a scheme which had been sanctioned by the High Court. By this scheme it was provided that the defendant company should issue, for the benefit of the creditors of the old company, promissory notes for the amounts of their claims, payable, some at six months, some at fifteen months, and some at ten years after date, the notes to

carry interest at 4 per cent. It was further provided that, "if upon the winding-up of the company the assets and uncalled capital thereof shall be insufficient for payment of all creditors in full, then all claims for principal or interest upon the promissory notes issued under the said scheme, or any renewal thereof, shall be postponed to all other claims proved in the winding-up of the said company." The defendant company was now being wound up, and it had not sufficient assets to pay all its creditors in full, and the question arose whether, under the terms of the above proviso, the preferred creditors were entitled not only to be paid their debts in full with interest down to the commencement of the winding-up, but whether they could also demand subsequent interest, in preference to the claims of the holders of the promissory notes. The Court held that the postponement of the promissory notes did not extend to interest subsequent to the commencement of the winding-up.

*NEW ENGLISH BANK OF RIVER PLATE, (1898) 14 [T. L. R. 526—C. A.*

**379. Notice of Meeting—Requisition of Shareholders—Unauthorized Notice convening Meeting to pass Resolution for Winding-up Voluntarily—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 51, 129, 145; Sched. I., Table A., cl. 32—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 13.**—A requisition of shareholders in a company was sent to the directors asking them to convene an extraordinary general meeting of the company to pass resolutions for voluntary winding-up. Before the twenty-one days limited by sect. 13 of the Companies Act, 1900, as the time within which the directors may proceed to call a meeting, had expired, the secretary of the company, acting on his own authority, convened a meeting at which two directors, the requisitionists, and many shareholders were present, and at which resolutions for voluntary winding-up were passed. Upon a petition for a compulsory winding-up,

**HELD**—that before the period of twenty-one days had expired only the directors could call the meeting, and the secretary could not, without their authority, summon a meeting; that the meeting was improperly convened, and no valid resolution for the voluntary winding-up was passed; and that the usual compulsory order for winding-up should be made.

*In re Haycraft Gold Reduction and Mining Co.* ([1900] 2 Ch. 230; 69 L. J. Ch. 497; 83 L. T. 166, 16 T. L. R. 350—Cozens-Hardy, J., No. 486, *infra*), followed.

*IN RE STATE OF WYOMING SYNDICATE, [1901] 2 [Ch. 431; 70 L. J. Ch. 727; 49 W. R. 650; 84 L. T. 868; 17 T. L. R. 631—Wright, J.*

**380. Official Receiver Obtaining Information—Duty as to Passing on to Outside Liquidator—Companies (Winding-up) Rules, 1903, rr. 53, 144.**—The Official Receiver interviewed the officers of a company in

**Winding-up—Continued.**

liquidation under Rule 53, and thus acquired information partly embodied in notes and memoranda. An outside liquidator superseded him, and claimed to have such information and documents passed on to him.

**HELD**—that neither under Rule 144 (1) nor Rule 144 (3) was it the duty of the Official Receiver to accede to his request.

*Semble*, upon evidence of special circumstances the Court might direct the Official Receiver to disclose to the liquidator information so acquired.

IN RE LAKE GEORGE MINES, LD., [1904] 1 Ch. 803, 73 L. J. Ch. 333; 11 Manson, 214—Byrne, J.

**381. Official Receiver's Report—Further Report—Allegations of Fraud—Setting Out Facts—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 8, sub-s. 2.]**—In the winding-up of a company the further report of the Official Receiver, made under sect 8, sub-sect 2, of the Companies (Winding-up) Act, 1890, must allege that fraud has been committed by some specified person or persons who took part in the promotion or formation of the company, and must set out such facts as the basis of his opinion as will warrant the judge in calling upon such person or persons to undergo public examination.

*Ex parte Barnes* ([1896] A. C. 146; 65 L. J. Ch. 394; 44 W. R. 433, 74 L. T. 153; 3 Manson, 63) considered and explained.

IN RE CIVIL, NAVAL, AND MILITARY OUTFITTERS, [LTD., [1899] 1 Ch. 215; 68 L. J. Ch. 164; 47 W. R. 233; 80 L. T. 241, 15 T. L. R. 114; 6 Manson, 100—C. A.

**382. Order to Prosecute Director—Grounds for Giving Such Direction—Previous Refusal of Public Prosecutor to take Proceedings—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 167.]**—The fact that the public prosecutor, on the advice of the law officers, has refused to institute proceedings may, or may not, be material, when the Court is considering whether it should direct the Official Receiver to prosecute some director of a liquidating company; its relevancy must depend upon the materials then before the law officers, and the nature of the considerations influencing them.

If a *prima facie* case for conviction is made out, the Court will, in deciding the question, consider mainly whether, if the creditors were a single person, such person would regard it as his duty as a good citizen to prosecute; no motives of revenge, or possible pecuniary gain to the prosecutor ought to be considered; but two other subsidiary points may be looked at, viz., the proportion of creditors for and against the prosecution, and the expense of the prosecution.

IN RE LONDON AND GLOBE FINANCE CORPORATION, [LD., [1903] 1 Ch. 728; 72 L. J. Ch. 368, 51 W. R. 651; 88 L. T. 194; 19 T. L. R. 314, 375; 10 Manson, 198—Buckley, J.

**383. Order to Wind up Obtained by Mistake—Jurisdiction to Rescind.]**—A winding-up order was obtained by the mistake of a solicitor's clerk, who, after arrangements had been made to satisfy the petitioners and have the petition withdrawn, which were duly carried out, in ignorance instructed counsel and obtained the order. On an application to rescind the order,

**HELD**—that the Court had no jurisdiction to rescind the order after it had been passed and entered.

IN RE LYRIC SYNDICATE, LD., (1901) 17 T. L. R. [162—Cozens-Hardy, J.

**384. Pending Action—Appeal—"Proceeding" Against the Company—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87.]**—The respondents were a joint stock company registered in Ireland, and on 6th March, 1899, an order was made by the Chancery Division of the High Court in Ireland for the winding-up of that company by the Court. At that time an appeal by the present respondents from the judgment in this action was pending in the Court of Appeal. By the judgment of the Court of Appeal the judgment of Phillimore, J., was reversed, and the respondents objected that the present appellants could not proceed with their appeal without the leave of the Court in Ireland.

**HELD**—that as it was the respondents who themselves "proceeded" with the action after the winding-up order by prosecuting their appeal in the Court of Appeal, there was no necessity for the defendants in the action to obtain leave for any defensive proceeding on their part.

HUMBER & Co. v. JOHN GRIFFITHS CYCLE CORPORATION, LD., (1901) 85 L. T. 141—H. L. (E.)

**385. Petition Dismissed—Costs of Directors and Contributories Opposing—Common Order for One Set of Costs—What Costs Included—Not Copies of Evidence Filed by Petitioner and Company—Charges of Fraud Against Directors.]**—Proceedings by petition for winding up a company, in which charges of fraud are made against the directors are not analogous, as regards persons appearing on the petition to an ordinary action charging the defendants with fraud. The duty of defending the petition, and of adducing evidence for that purpose, is upon the company; and, therefore, although the Court may hear directors or contributories in opposition to the petition and to the charges therein contained, and may (and generally does) allow them one set of costs, such costs will not, apart from special order to that effect made at the time, include the cost of copying and perusing evidence filed by the petitioner or by the company.

*Semble*, if the directors appear by the company's solicitors, they will not be allowed to share in the set of costs allowed to contributories.

**Winding-up—Continued.**

IN RE IBO INVESTMENT TRUST, LD., [1904] 1 Ch [26, 73 L. J. Ch 71; 90 L. T. 373; 11 Manson, 105—Byrne, J.

**386. Preferential Payments — Debenture-holders' Action—Receiver in Possession—Poor and District Rates—Water Rate—Apportionment — Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (a)—Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), ss. 2, 3.]—Where a receiver, appointed in a debenture-holders' action against a company in possession, had paid poor and district rates due at the date of the commencement of the winding-up of the company, and a rate for water supplied by meter partly before and partly after the commencement of the winding-up:—**

**HELD**—that the poor rate was a preferential debt under the Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1 (a), and ought to be repaid as a preferential payment as against the debenture-holders, and there should be no apportionment and the liquidators must pay the whole of the poor rate; that the district rate was in the same position; and that the water rate for water supplied after the commencement of the winding-up could not be claimed as a preferential payment, and only an apportioned part of the water rate was payable by the liquidators, viz., what was due at the date of the commencement of the winding-up.

IN RE MANNESMANN TUBE CO., LD., VON SIEMENS [v. MANNESMANN TUBE CO., LD., [1901] 2 Ch. 93; 70 L. J. Ch. 565; 65 J. P. 377; 84 L. T. 579; 8 Manson, 300—Kekewich, J.

**387. Preferential Payments — Managing Director of a Company—"Clerk or Servant"—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (b)—Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), s. 3.]—The managing director of a company is not entitled by virtue of the Preferential Payments in Bankruptcy Act, 1888, and the Preferential Payments in Bankruptcy Amendment Act, 1897, to receive a sum of £50 in priority to debenture-holders. He is not a "clerk" or "servant" of the company within the meaning of the first-named Act, sect. 1, sub-sect. 1 (b).**

IN RE NEWSPAPER PROPRIETARY SYNDICATE, LD.; [HOPKINSON v. NEWSPAPER PROPRIETARY SYNDICATE, LD., [1900] 2 Ch. 349; 69 L. J. Ch. 578; 83 L. T. 341; 16 T. L. R. 452—Cozens-Hardy, J

**388. Preferential Payment Wages—Wages Varying in Amount—Commission—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1) (b).]—Wages varying in amount, and paid by way of commission on the tonnage of ships turned out from a shipbuilding act are "wages" within the meaning of the Preferential Pay-**

ments in Bankruptcy Act, 1888, s. 1 (1) (b), and are entitled to preferential treatment.

IN RE EARLE'S SHIPBUILDING AND ENGINEERING [Co., [1901] W. N. 78—Joyce, J.

**389. Preferential Payments — Workmen's Wages—Retrospective Effect of Act of Parliament—Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19).]**—The W Typewriter, Limited, had gone into liquidation, and the debenture holders had commenced an action against it, before the date of the passing of the Preferential Payments in Bankruptcy Amendment Act, 1897. This Act gives priority in respect of workmen's wages and certain other debts over the claims of debenture and debenture stock holders under any floating charge created by a company.

The question now arose whether it was retrospective.

**HELD**—that the Act being silent as to the date of its coming into force, the general rule applied and the Act was not retrospective.

WAVERLEY TYPEWRITER, LD., RE; D'ESTERRE v [WAVERLEY TYPEWRITER, [1898] 1 Ch. 699; 67 L. J. Ch. 360; 78 L. T. 593; 5 Manson, 269, 14 T. L. R. 354; 46 W. R. 685—Wright, J.

**390. Priorities—Secured and Unsecured Creditors—Judgment Creditors—Bankruptcy Rule—Judicature Act, 1877 (40 & 41 Vict. c. 57), s. 28 (1).]**—In the compulsory winding-up of an insolvent company in the Court of Chancery under the Companies Acts, 1862 and 1867, the effect of sect. 28 of the Judicature Act, 1877, is that the rules of bankruptcy as to secured and unsecured creditors prevail, therefore judgment creditors, who have taken no active steps to enforce their securities, have no priority over ordinary creditors.

*Re Whitaker* ([1901] 1 Ch. 9; 70 L. J. Ch. 6; 49 W. R. 106, 83 L. T. 449—C. A. (See EXECUTORS, 136)) followed.

IN RE LEINSTER CONTRACT CORPORATION, LD., [1903] 1 Ir. R. 517—M. R

**391. Restraining Proceedings—Proceedings in Foreign Court—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 85, 87.]—The Court has power when a company is being wound up to restrain creditors from taking proceedings against the company's vessels in a foreign court.**

RE JENKINS & CO., LD., (1907) 51 Sol. Jo. 715—[Pickford, J.

**392. Scheme of Arrangement with Creditors and Contributories—One Class of Contributories having no Interest in Assets—Power of Court to Sanction Scheme notwithstanding Dissent of such Class—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 24.]—The joint effect of sect. 24 of the Companies Act, 1900, and sect. 2 of the Joint Stock Companies Arrangement Act, 1870, is that, if the Court sees that some**

**Winding-up—Continued.**

class of contributories has no interest in the company's assets, it can sanction a scheme of arrangement approved by the creditors and the other class (or classes) of contributories, notwithstanding the dissent of the first-named class. As a matter of grace, such class may be given some benefit under the scheme; but, nevertheless, the scheme must be treated as one made between the company and the creditors, and between the company and the assenting classes of contributories.

IN RE TEA CORPORATION, LD.; SORSBIE v. THE [CORPORATION, [1904] 1 Ch. 12; 73 L. J. Ch. 57; 52 W. R. 177, 89 L. T. 516, 20 T. L. R. 57; 11 Manson, 34—C. A.

**393. Servants—Gratuities to—Ultra vires—Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 47, Sch. IV.]—**A scheme prepared by a London Water Company under Sched. 4 of the Metropolis Water Act, 1902, for the application and distribution of the purchase-moneys payable upon the acquisition of the undertaking by the Metropolitan Water Board, contained a proposal to pay out of such moneys certain gratuities to servants who had been for a long period in the company's service. In an action by a stockholder,

HELD—that the company had no power to pay such gratuities out of the purchase-money.

HUTTON v. WEST CORK RY. CO. ((1883) 23 Ch. 654; 52 L. J. Ch. 689; 31 W. R. 827; 49 L. T. 420—C. A.) followed.

WARREN v. LAMBETH WATERWORKS CO., (1905) 21 T. L. R. 685—Warrington, J.

**394. Servants—Resolution for Voluntary Liquidation—Whether Operating as Dismissal of Servants of Company—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131.]—**The defendant agreed to serve a banking company, which was registered under the Companies Act, 1862, as manager of a branch, and he agreed that he would not within a year of the termination of the agreement, "either by notice or as thereafter provided," enter into the service of or in any way act for any bank carrying on business within a radius of five miles of any branch of the bank to which he might be appointed manager. The banking company were empowered to put an end to the agreement in the event of the defendant being guilty of misconduct. The banking company afterwards passed resolutions for voluntary winding-up, and liquidators were appointed for the purpose of selling their business and goodwill to another banking company. The defendant left the company's branch bank and entered the service of another bank at the same place. The company thereupon gave him a month's notice to terminate the agreement, and brought an action to restrain him from entering the service of the other bank in breach of the agreement.

HELD—that the voluntary winding-up did not operate as a dismissal of the company's servants, and that, therefore, the company were entitled to the injunction claimed.

SHIRREFF'S CASE ((1873) L. R. 14 Eq. 417; 42 L. J. Ch. 5; 20 W. R. 966) distinguished.

MIDLAND COUNTIES DISTRICT BANK, LD. v. ATT- [WOOD, [1905] 1 Ch. 357; 74 L. J. K. B. 286; 92 L. T. 360, 21 T. L. R. 175, 12 Manson, 20—Warrington, J.

**395. Special Resolution—Voting—Declaration of Chairman—"Conclusive Evidence"—Erroneous Declaration—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51.]—**At a meeting of shareholders called to pass a resolution for voluntary winding-up the chairman on a show of hands said, "Those in favour, six, those against, twenty-three; but there are two hundred voting by proxy, and I declare the resolution carried as required by Act of Parliament." The proxies could not be regarded, as no poll was taken or demanded.

HELD—that it was shown on the face of the declaration of the chairman that the resolution had not been passed by the majority of not less than three-fourths required by sect. 51 of the Companies Act, 1862, and that being so, there was no voluntary winding-up in existence.

IN RE HADLEIGH CASTLE GOLD MINES, LD. ([1900] 2 Ch. 419; 69 L. J. Ch. 631; 83 L. T. 400; 16 T. L. R. 468—Cozens-Hardy, J., No. 176, *supra*); and ARNOT v. UNITED AFRICAN LANDS, LD. ([1901] 1 Ch. 518; 70 L. J. Ch. 306; 49 W. R. 322; 84 L. T. 309; 17 T. L. R. 248; 8 Manson, 179—C. A., No. 177, *supra*) distinguished.

IN RE CARATAL (NEW) MINES, LD., [1902] 2 Ch. [498; 71 L. J. Ch. 883; 50 W. R. 572; 87 L. T. 437; 18 T. L. R. 640, 9 Manson, 414—Buckley, J.

**396. Trust Fund—Balance Unclaimed by Bondholders.]—**The balance of a fund set apart for the payment of bondholders in a company in liquidation, the bonds not becoming payable until 1950, not having been claimed for over ten years in answer to advertisements, the Court refused to make an order that the unclaimed balance should be handed over to the liquidator on behalf of the shareholders.

ELKINS v. CAPITAL GUARANTEE SOCIETY, (1900) 16 [T. L. R. 423—C. A.

**(b) Assets.**

**397. Sale of Assets—Accidental Omission to Transfer a Mortgage Security to Purchaser—Company Finally Dissolved—Order Vesting Mortgage in Purchaser—Power to Court to Make—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 143—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26 (ii.) (c), 35 (1), 36.]—**A company went into voluntary liquidation in order to sell all its property, and was automatically dissolved by the operation of sect. 143 of the Companies Act, 1862. By inadvertence a certain mortgage of leaseholds was never legally conveyed to the purchaser. Upon an



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application by the purchaser, supported by the mortgagor,

**HELD**—that the Court could, and would, make an order vesting in the purchaser the right to sue for and recover the mortgage debt, and the premises comprised in the mortgage for such estate and interest as was vested in the company at the date of its dissolution.

**IN RE GENERAL ACCIDENT ASSURANCE CORPORATION, LD.**, [1904] 1 Ch. 147; 73 L. J. Ch. 84; 52 W. R. 332; 89 L. T. 699—Farwell, J

**398. Sale of Assets—Agreement for Sale by Liquidator of Letters-patent—No Assignment—Dissolution of Company—Bona vacantia—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25, 35, 36.**—A company was inadvertently dissolved without executing any formal assignment of letters-patent which the liquidator had sold to a purchaser.

**HELD**—that the Court had no jurisdiction to make a vesting order under the Trustee Act, 1893, the patent having passed to the Crown as *bona vacantia*.

*In re General Accident Assurance Corporation Ltd. (supra)* not followed

Upon the advice of the Board of Trade the Comptroller consented to enter in the Register the name of the purchaser as owner of the patent.

**IN RE TAYLOR'S AGREEMENT TRUSTS**, [1904] 2 Ch. [737; 73 L. J. Ch. 557; 52 W. R. 602; 21 R. P. C. 722—Buckley, J

**399. Sale of Assets—Omission to Assign Leaseholds—Dissolution of Company—Appointment of Trustee—Vesting Order—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25, 26.**—A company in voluntary liquidation transferred its assets to a new company. By an omission no transfer of certain leaseholds was executed before the old company became automatically dissolved. The new company had paid the purchase-money and was in possession.

**HELD**—that the Court would appoint a person to be trustee of the leaseholds on behalf of the new company, and make a vesting order.

*In re Farnborough ((1880) Malins, V.-C., reported at [1906] 1 Ch. 361, n.)* followed.

*In re Taylor's Trusts ([1904] 2 Ch. 737; 73 L. J. Ch. 557; 52 W. R. 602, 21 R. P. C. 722—Buckley, J., supra)*, distinguished.

**IN RE No. 9, BOMORE ROAD**, [1906] 1 Ch. 359; [75 L. J. Ch. 157; 54 W. R. 312; 94 L. T. 403; 13 Manson, 67—Warrington, J.

**400. "Surplus Assets"—Calling Up Unpaid Capital—Distribution—Rights of Shareholders inter se—Contract.**—The A.-C. Corporation of W. A., Limited, was registered with a capital of 500,000 shares of £1 each. 100,000 shares were issued with 5s. per share paid up, and 25,000 further shares were issued and fully paid up.

The company having gone into liquidation, there was not enough surplus (after providing for debts and expenses) in the hands of the liquidator to return in full the capital paid up.

The articles of association of the company provided that, if upon the winding-up of the company the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed, so that as nearly as might be the losses should be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up, other than amounts paid in advance of calls.

Upon an application by the liquidator for the direction of the Court as to the distribution of the surplus assets of the company:

**HELD**—that, in the circumstances of this case, there was no room for the application of the rule in *Ex parte Maude* (23 L. T. Rep. 749, L. Rep. 6 Ch. App. 51) and *Birch v. Cropper* (61 L. T. Rep. 621, 14 App. Cas. 525); and that the liquidator must make a call (either actual or in account) of the unpaid capital, in order to equalise the capital account; and, after doing so, divide the assets in hand equally between the 125,000 shares; the ultimate loss of each shareholder being the difference between the equalised amount paid up on each share and the dividend so paid.

**RE ANGLO-CONTINENTAL CORPORATION OF WESTERN AUSTRALIA, LD.**, [1898] 1 Ch. 327; 67 L. J. Ch. 179; 78 L. T. 157; 5 Manson, 184; 14 T. L. R. 218; 46 W. R. 413—Wright, J.

**401. Surplus Assets—Distribution—Agreement to Distribute Inconsistent with Articles of Association**—In the winding-up of a company the Court may order a distribution of the assets to be made in a manner not authorised by its articles of association, where there has been an agreement to that effect, approved by resolution at a meeting of which notice had been duly given.

**RE BEESTON PNEUMATIC TYRE CO., LD.**, (1898) 14 T. L. R. 338—Wright, J.

**402. "Surplus Assets"—Fully-paid and Partly-paid Shareholders—Equalisation—Company with Unlimited Liability.**—The D. Gas Light Company was originally formed by a deed of settlement in 1835, was subsequently registered under 7 & 8 Vict. c. 110, and was incorporated under the Companies Act, 1862, as an unlimited company.

By clause 1 of the deed of settlement it was provided that the sums set opposite to the names of the parties thereto should form the capital or joint stock of the company, and that the aggregate amount thereof should be £1,800, subject to increase; by clause 19, that if the gains and profits of the undertaking should at any time be insufficient to discharge any losses, these should be made good by the proprietors in proportion to their respective shares;

**Winding-up—Continued.**

by clause 20, that profits should be divided among the proprietors according to the amount of their respective shares, and by clause 32, that upon a winding-up the clear residue, after payment of debts and expenses, should be divided among the several proprietors in proportion to their respective shares.

In January, 1893, the capital of the company consisted of £6,000 in 600 fully-paid £10 shares. Later on in 1893, 600 additional £10 shares were created on which only £6 10s. had been paid up.

One of the deeds of covenant creating a portion of the fully-paid shares, and the deed of covenant creating the partly-paid shares, recited resolutions of the company to the effect that these shares were to be entitled to the same dividends and subject to the same liabilities as the original shares, but witnessed that they were to be subject to the provisions and stipulations of the original deed of settlement.

In 1897 the undertaking of the company was sold, and it was now being wound up voluntarily. Upon a summons by the liquidator to ascertain on what principle a surplus of some £21,000 should be distributed as between the holders of the fully and partly paid shares,

**HELD**—distinguishing the decision in *Somes v. Currie* (1 K & J. 603) and *Sheppard v. The Scinde, Punjab, and Delhi Ry. Co.* (57 L. T. Rep. 585), that, after equalisation of the capital account by a return of all the capital paid up, the surplus remaining must be divided according to the terms of clause 32 of the deed of settlement between the several proprietors for the time being in proportion to the nominal amounts of their shares.

**RE** *DRIFFIELD GAS LIGHT Co.*, [1898] 1 Ch. 451, [67 L. J. Ch. 247; 78 L. T. 162, 5 Manson, 253, 14 T. L. R. 259, 46 W. R. 411—Wright, J.

**403 Surplus Assets — Fully-paid and Partly-paid Shares—Distribution.**—One of the articles of association of a company contained the following clause: "If upon the winding-up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares."

The capital of the company consisted of 60,000 shares of £1 each, of which 26,000 were vendors' shares issued as fully paid, besides which 30,357 other shares had been issued on which 10s. only had been paid up. On the voluntary winding-up of the company there remained a large sum for distribution among the shareholders after paying all debts and the expenses of liquidation.

**HELD**—that the distribution must be in accordance with the agreement shown in the articles, viz., the balance, after repaying the

paid-up capital, must be distributed in proportion to the paid-up capital.

**IN RE** *MUTOSCOPE AND BIOGRAPH SYNDICATE, LD.*, [1899] 1 Ch. 896; 68 L. J. Ch. 417; 47 W. R. 520; 81 L. T. 22; 6 Manson, 298—Wright, J.

**404. Surplus Assets — Preferred and Deferred Shareholders—Sale to Another Company—Legal Rights—Power of Majority.**—Company A., whose capital was divided into preference shares and ordinary shares, with articles of association which were silent as to how the surplus assets were to be divided between the two classes of shareholders in the event of winding-up, purported to sell its undertaking and assets to company B., for £310,000 stock of company B. The resolution for adopting the agreement for sale would not have been passed but for the positive representation contained in company A.'s circular that the £310,000 stock of company B was to be distributed as follows: £210,000 to the preferred shareholders, and £100,000 to the deferred shareholders. A resolution was passed by company A. that it should be wound up, and liquidators were appointed. The liquidators took out an originating summons asking for directions how, and in what proportions, the £310,000 stock was to be distributed as between the preferred and deferred shareholders of company A.

**HELD**—that it was, on the present application, impossible to make an order or declaration affecting the shareholders collectively, as there was no room for an inference that all the parties concerned had agreed upon a principle of distribution not in accordance with their legal rights, and that the majority had no power to bind the minority in that respect. The liquidators would have to give the resolution, as far as it stood, its legal effect, unless the resolution itself was set aside.

The Court sanctioned some delay in the distribution of the stock, so as to give an opportunity to the preferred shareholders to ask for consents from individual deferred shareholders to the distribution of the assets so far as their individual interests were concerned, according to the suggested scheme.

**IN RE** *NORTH WEST ARGENTINE RAILWAY*, [1900] 2 Ch. 883; 49 W. R. 134, 17 T. L. R. 20; 70 L. J. Ch. 9; 83 L. T. 675—Wright, J.

**405. Surplus Assets—Partly-paid Shares—Bankrupt Contributory—Proof for Amount uncalled—Right to Share of Surplus Assets.**—A shareholder in a limited company was adjudicated bankrupt. The shares were partly-paid, and the company proved in the bankruptcy for the amount uncalled upon the shares, and received a dividend in respect thereof.

The company subsequently went into voluntary liquidation, and after satisfying all its liabilities it had surplus assets available for distribution among its shareholders. The trustee in bankruptcy of the bankrupt shareholder asked for a declaration that his

**Winding-up—Continued.**

share should be treated as fully-paid for the purpose of any distribution of assets.

**HELD**—that the bankrupt's shares could not be regarded as paid beyond the amount of calls and dividends actually received by the company in respect of them.

*Ex parte Hornby* ((1819) Buck. 351) explained.

Decision of Buckley, J. ([1905] 1 Ch. 597, 74 L. J. Ch. 347; 53 W. R. 455, 92 L. T. 596, 21 T. L. R. 375; 12 Manson, 185) affirmed.

**IN RE WEST COAST GOLD FIELDS, LD, ROWE'S [TRUSTEE'S CLAIM, [1906] 1 Ch. 1; 75 L. J. Ch. 23; 54 W. R. 116, 93 L. T. 609, 22 T. L. R. 39—C. A.**

**(c) Compulsory Order.**

**406. Creditor's Petition—Voluntary Winding-up—"Prejudice" to Creditor—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 145.]**—The Court made a compulsory winding-up order, there being already a voluntary winding-up order, the petitioning creditor not showing that he would be prejudiced by a voluntary winding-up, but showing a case for inquiry.

*In re Bishop & Sons, Ltd.* ([1900] 2 Ch. 254; 69 L. J. Ch. 513, 82 L. T. 756; 7 Manson, 342—Farwell, J., No. 473, *infra*), followed.

**IN RE HERMANN LICHTENSTEIN & Co., LD., (1907) [23 T. L. R. 424—Parker, J.**

**407. Fully Paid Shareholder's Petition for Compulsory Order—Abortive Scheme of Reconstruction.]**—A holder of fully paid shares in a company presented a petition asking that it might be wound up by the Court. It was not disputed that the vendor to the company had not fulfilled his obligations, but that nevertheless the directors at a very early stage actually proceeded to pay him a very large sum of money.

**HELD**—that this and other matters required a searching public investigation which could only be obtained by means of a compulsory winding-up order.

A resolution for voluntary winding-up which had been passed in furtherance of a reconstruction scheme had fallen to the ground.

**HELD**—that the very foundation of the voluntary winding-up had gone, and that the usual compulsory winding-up order should be made.

**IN RE GUTTA PERCHA CORPORATION, [1900] 2 Ch. [665; 69 L. J. Ch. 769; 83 L. T. 401—Cozens-Hardy, J.**

**408. Petitioning Creditor's Debt Under £50—Costs.]**—Where a compulsory winding-up order is made on the petition of a creditor whose debt is under £50, he may, if supported by creditors for a larger amount, be allowed his costs.

**IN RE LEYTON AND WALTHAMSTOW CYCLE Co., LD., [(1901) 50 W. R. 93—Wright J.**

**409. Principles Guiding the Court—Circumstances Requiring Investigation—Advantage to Creditors—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 8.]**—*Prima facie* a creditor, whose debt is unpaid, and who satisfies certain conditions precedent, is entitled to have a compulsory winding-up order; there are exceptions, *e.g.*, where it is proved that no possible benefit can accrue to the creditors from such an order, or where a large body of creditors are opposed to it. If the circumstances are such as to suggest that an investigation under a compulsory order will be likely to benefit the unsecured creditors, that alone is sufficient ground for making a compulsory order.

*In re Chapel House Colliery Co.* ((1883) 24 Ch. D. 259; 52 L. J. Ch. 934, 31 W. R. 933; 49 L. T. 575—C. A.) approved.

In the case before the Court there were suspicious circumstances connected with the company, one person being vendor, manager and debenture-holder; and, as it also appeared possible that certain persons, said to have guaranteed the share issue, might prove to be liable under their guarantee, a compulsory order was made on the application of three shareholders, one of whom was also a creditor.

**RE THE MANCHESTER AND LIVERPOOL TRANSPORT [Co., LD., (1903) 19 T. L. R. 227—Byrne, J.**

**410. Stay of Proceedings—Consent of Creditors—Discretion—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 89.]**—The principles guiding the Court in applications to rescind a receiving order, or to annul the bankruptcy of an individual, are equally applicable to a motion to stay proceedings in the winding-up of a company. The Court has a discretion, and will not necessarily stay proceedings because all the creditors consent or their claims are satisfied, but will in the public interest require full investigation of all the circumstances.

The Court will have regard to such matters as *e.g.*—

(1) Arrangements whereby the promotor, or directors, share in the fully-paid shares allotted to the vendor as purchase-money;

(2) That the directors have been backward in giving information, or furnishing a statement of the company's affairs, to the Official Receiver; or

(3) That there are other matters calling for investigation in connection with the company's formation or operations.

**RE TELESCRIPTOR, LD., [1903] 2 Ch. 174; 72 [L. J. Ch. 480; 51 W. R. 409; 88 L. T. 389; 19 T. L. R. 271; 10 Manson, 213—Buckley, J.**

**411. Voluntary Liquidation in Progress—Grounds for making Compulsory Order—Wish of Creditors—Circumstances requiring Investigation—Voluntary Winding-up Resolution a Breach of Good Faith—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 145, 149.]** Where the creditors of a "one-man" com-

**Winding-up—Continued.**

pany had come to an agreement with the controlling shareholder as to the terms of a composition, and were in ignorance that a valid notice for considering a winding-up proposal was in fact running, it was held to be a breach of faith to repudiate the agreement and at once pass a resolution for a voluntary winding-up; for, if the creditors had contemplated such action, they would have themselves petitioned for a compulsory order.

On this ground, and also on the ground that there were circumstances connected with the carrying on of the company which called for investigation, the Court made a compulsory winding-up order.

IN RE THE A. B. CYCLE CO., LD., (1903) 19 [T. L. R. 84—Byrne, J.]

**(d) Contributories.**

**412. Action for Calls—Leave to Defend and Counter-claim for Rescission—Petition for Winding-up before Delivery of Defence and Counter-claim.**—A shareholder who, in an action for calls brought against him by a company, obtains leave to defend on application to enter final judgment under Ord. 14 on an affidavit which sets up misrepresentation as a ground of defence, and states that he intends to counter-claim for rescission, has done all that can reasonably be expected in the way of commencing legal proceedings to establish his right to repudiate his shares.

He is not made, therefore, too late for relief owing to a petition for the winding-up of the company being presented before delivery of his defence and counter-claim.

IN RE CLEVELAND IRON CO., *Ex parte Stevenson* ((1867), 16 W. R. 95) distinguished.

Decision of Wright, J. ([1899] 1 Ch. 770; 68 L. J. Ch. 365; 80 L. T. 868) reversed.

IN RE GENERAL RAILWAY SYNDICATE, WHITELEY'S [CASE, [1900] 1 Ch. 365; 69 L. J. Ch. 250; 48 W. R. 440, 82 L. T. 134; 16 T. L. R. 176—C. A.]

**413 Action for Calls before Winding-up—Proceedings by Originating Summons for same Calls after Winding-up—Application to stay Proceedings till Costs of Previous Action paid—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101**—A company commenced an action for money due from the defendant as the holder of shares in the company. Before trial the company went into voluntary liquidation and appointed a liquidator who applied to the defendant for payment of the sum sued for, and after notice settled him on the list of contributories in the winding-up. The liquidator then gave notice of discontinuance of the action, and issued an originating summons in the winding-up under sects. 101 and 138 of the Companies Act, 1862, for an order on the defendant to pay the said sum. The defendant applied that the proceedings by originating summons might be stayed until his taxed costs of the discontinued action were paid.

Held—that the liquidator was not bound to go on with the action commenced by the company, and that he was doing his duty when he discontinued that action, that the liquidator's proceedings by way of originating summons ought not to be stayed unless he paid the taxed costs of the action brought by the company; but that those costs ought to be allowed to the applicant out of moneys which the liquidator might recover against him.

*Cook v. Hathway* ((1869) L. R. 8 Eq 612; 39 L. J. Ch. 89; 17 W. R. 1057—Malins, V.-C.) and *M'Cabe v. Bank of Ireland* ((1889) 14 App. Cas. 413; 59 L. J. P. C. 13; 38 W. R. 257; 61 L. T. 416—H. L. (Ir.)) distinguished.

IN RE UNITED SERVICE ASSOCIATION, [1901] 1 Ch. [97, 70 L. J. Ch. 15; 49 W. R. 216; 84 L. T. 145; 8 Manson, 97—Wright J.]

**414. Directors—Qualification Shares—Company not going to Allotment.**—Each of two directors applied for more shares than he required for his qualification, and the company refused to make any allotment because the company was not coming to anything.

Held—that there was no default, because each director had put himself in a position to qualify; that after the expiration of the time in which he was to qualify, nothing existed which required the director to hold shares at all; and that the directors were entitled to have their names removed from the list of contributories.

Decision of Buckley, J. ((1902) 18 T. L. R. 656), affirmed.

IN RE YOUNG'S BILL POSTING, LD., (1902) 18 [T. L. R. 731—C. A.]

**415. Discharge of Contributory on Payment of Composition—Lapse of Twenty Years—Alleged Concealment of Assets—Reduction of Discharge Refused.**—Where twenty years have elapsed since a contributory in the winding-up of a company was discharged from further liability, every intendment must be made in favour of the discharge.

The appellants were representatives of two persons who were contributories in the winding-up of the City of Glasgow Bank in 1878.

In 1879 these contributories were discharged of their liabilities under compromises with the liquidator.

In 1882 the respondent company, under a private Act of Parliament, took over the assets and rights of the bank.

In 1901 and 1902 the respondent company commenced these actions, asking for a reduction of the compromises on the ground that the contributories, when negotiating with the liquidator, had concealed or failed to disclose their assets.

Held—that no concealment or untrue statement had been proved or could be assumed after so long a time.

Decision of Ct. of Sess. ((1904) 6 F. 754) reversed.

WATT AND OTHERS v. ASSETS CO., LD.; BAIN AND [OTHERS v. ASSETS CO., LD., [1905] A. C. 317; 74 L. J. P. C. 82—H. L. (S.).]

**Winding-up—Continued.**

416 *Fraud—Void Contract* ]—B, who had previously applied for admission as a Fellow of an old-established society called the Auctioneers' Institute of the United Kingdom, with its address in Chancery-lane, agreed to join a society then called the Institute of Auctioneers and Valuers, whose address was also in Chancery-lane, believing this to be the old Auctioneers' Institute, and being, in the opinion of the Court, intentionally deceived as to this by those who were acting for the new company.

The company was being compulsorily wound-up, and B's name having been placed on the list of contributories, he now applied to have it removed on the ground that his contract to become a member was void *ab initio*.

**HELD**—that the principles of the decision in *Cundy v. Lindsay* (L. R. 3 App. Cas. 459) applied, and that, there being in fact no contract at all, B. was entitled to the relief claimed.

**RE INTERNATIONAL SOCIETY OF AUCTIONEERS AND [VALUERS, BAILLIE'S CASE [1898] 1 Ch. 110; 67 L. J. Ch. 81; 77 L. T. 523; 4 Manson, 393; 46 W. R. 187—Wright, J.**

417. *List of Contributories—Unincorporated Building Society—Person Ceasing to be a Member by not Paying Instalments* ]—The rules of an unincorporated building society provided that when the fines due from a member equalled the sum standing to his credit, the amount thereof should be forfeited to the society and he should cease to have any interest in the society. The rule required notice to be sent to every member six months in arrears.

In the liquidation of the society the liquidator placed on the list of contributories the name of a member whose fines had exceeded the sum standing to his credit twenty years ago, but who had received no notice as to arrears.

**HELD**—that the member had ceased to be a member before the liquidation, and that his name was wrongly included in the list.

**IRVINE AND FULLARTON BUILDING SOCIETY v. [CUTHEBERTSON, (1906) 8 F. 1—Ct. of Sess.**

418. *Transfer of Shares to Escape Liability—Equities as between Transferor and Transferee—Colourable Transfer.* ]—Where shortly before a company goes into liquidation a shareholder transfers his shares to another person so as to avoid liability and under such circumstances that the transferee has a right to be relieved in equity against the transfer, the transfer is not *bona fide*, but colourable, and the Court will place the transferor on the list of contributories.

*Costello's Case* ((1860), 2 De G. F. & J. 302) and *Budd's Case* ((1861), 3 De G. F. & J. 297) applied.

**IN RE DISCOVERERS FINANCE CORPORATION, LD., [(1907) 24 T. L. R. 12—Parker, J.**

419 *Transfer of Shares to Infant—Laches of Liquidation—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131* ]—In 1893 a company went into voluntary liquidation. At that time S. was the registered holder of fifty partly-paid shares. In 1894 a firm of brokers bought them, and took a transfer in name of their clerk L., who was an infant. The liquidator, under sect. 131 of the Companies Act, 1862, assented to the transfer, and L.'s name was entered in the register. A month later the liquidator registered a transfer from L. to D., who was also an infant.

In 1906, calls being in arrears, the liquidator sought to substitute the brokers for D. in the lists of members and contributories.

**HELD**—that he could not do so, there being no contractual relationship between the brokers and the company.

*King's Case* ((1871), L. R. 6 Ch. 196; 40 L. J. Ch. 361; 24 L. T. 599; 19 W. R. 549) applied.

*Pugh and Sharman's Case* ((1872), L. R. 13 Eq. 566; 41 L. J. Ch. 580; 26 L. T. 274), and *Richardson's Case* ((1875), L. R. 19 Eq. 588; 44 L. J. Ch. 252; 32 L. T. 18; 23 W. R. 467) distinguished.

*Semble*—since the liquidator knew in 1896, at latest, that L's transferee was an infant, he had by his laches lost any equity against L.

**IN RE NATIONAL BANK OF WALES, LD.; MASSEY [AND GIFFIN'S CASE, [1907] 1 Ch. 582; 76 L. J. Ch. 290; 96 L. T. 493; 14 Manson, 66—Parker, J.**

**(e) Creditors.**

*And see BANKERS AND BANKING, 8, 9.*

420. *Creditor-Contributory—Right to Set-off Debt against Calls—Right to Dividend on Debt when Calls in Arrear—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.* ]—The A. G. P., Limited, owed the A. P., Limited, for calls made and in arrears, and the A. P., Limited, owed the A. G. P., Limited, for money lent. Both the companies subsequently went into liquidation.

The question now arose whether the claim for money lent could be set off against the claim for the amount of calls, upon a summons taken out by the liquidator of the A. G. P., Limited, in the winding-up of the A. P., Limited.

**HELD** (following the decision in *Gill's case*, 12 Ch. Div. 755)—that sect. 10 of the Judicature Act, 1875, had not introduced into the law of the winding-up of companies the bankruptcy rules as to set-off, so as to allow a set-off against liability for the amount of unpaid calls in the case of the winding-up of a company constituted with limited liability; and that the applicant had no right of set-off, but only of proof in the winding-up of the A. P., Limited, for the money lent.

*Re Duckworth* (L. R. 2 Ch. 578) distinguished.

A further question then arose as to

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whether the A. G. P., Limited, could take any dividend upon the debt owing to them by the A. P., Limited, until they had paid up all calls in arrear on shares held by them in the A. P., Limited.

**HELD**—that the case fell within the express terms of the judgment of Chelmsford, L.C., in *Grissell's Case* (L. R. 1 Ch. 528), and that the A. G. P., Limited, could not take any dividend upon the debt due to them until the calls in arrear on the shares were paid up.

RE AURIFEROUS PROPERTIES, LD (No. 1), [1898]

[1 Ch. 691; 67 L. J. Ch. 367; 79 L. T. 71; 5 Manson, 260, 14 T. L. R. 390—Wright, J.]

**421 Failure of Consideration—Unpaid Shares Issued as Fully Paid-up—Proof for Balance.**—Where a company contracts to issue to a creditor a certain number of fully-paid shares in satisfaction of a debt due by it to him, and some of the shares are in fact issued as unpaid, there is *pro tanto* a failure of consideration, and the creditor can, notwithstanding that he has become a member of the company, prove in its winding-up for such part of his debt as is represented by the unpaid shares. Interest cannot be claimed upon such a debt, except either by contract or by way of damages under sect. 29 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42).

IN RE RAILWAY TIME TABLES PUBLISHING COMPANY, LD., EX PARTE WELTON, [1899] 1 Ch. 108, 68 L. J. Ch. 50, 47 W. R. 133, 79 L. T. 679, 15 T. L. R. 46; 5 Manson, 367—C. A.

**422. Proof of Debt—Amount—Dividends—Period of Ascertainment.**—Where a creditor proves for a debt against a company which is being wound up under the Companies Act, 1862, the amount of the proof, on which dividends are to be paid, is to be ascertained when the claim is filed, and without regard to payments made by third parties after the sending in of the claim and before adjudication thereon.

IN RE LIGONIEL SPINNING CO., EX PARTE BANK OF IRELAND, [1900] 1 Ir. R. 324—V.-C.

**423. Rights of General Creditors—Life Insurance Company—Company Carrying on Other Business—Fund Set Apart for Life Policies—Life Assurance Companies Acts, 1870 (33 & 34 Vict. c. 61), s. 4; and 1872 (35 & 36 Vict. c. 41), s. 1.**—A company was formed to acquire the business and goodwill of a tea dealer and to effect insurances for life and to issue pensions. By the articles of association the directors were to set aside three-fourths of the profits earned by the company in each week as a fund to meet the liability of the company in respect of customers' pension cards, and the sum so set aside was to be applied in discharge of the company's liability thereunder, and so far as in any week the whole amount should

not be distributed, the balance was to be carried forward and might be applied at the discretion of the directors in making good any deficiency in any future weeks in respect of such pensions; but the company were not to be liable in respect of the pensions beyond the amount of the three-fourths of the profits, and if the three-fourths should be insufficient to pay the weekly pensions in full, the pensions should abate. The company issued cards to their customers, upon which the purchases of tea were entered, and each customer who became a widow was to be entitled to a weekly pension provided that she had purchased a certain quantity of tea for 52 weeks before widowhood. The company deposited £20,000 in Court under sect. 4 of the Life Assurance Companies Act, 1870. The company having been ordered to be wound up,

**HELD**—that the £20,000 and the sum specially appropriated out of the profits to meet the pensions were available to satisfy the obligations of the company to their pensioners and customers, and, further, that as between the pensioners and the customers the claims of the pensioners had priority.

IN RE NELSON & CO., LD., (1907) 24 T. L. R. [74—C. A.]

**424. Secured Creditor—Judgment Creditor—Garnishee Order nisi—Application of Bankruptcy Law—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45**—A judgment creditor served a garnishee order *nisi* on a company attaching a debt due from the company to the judgment debtor, and before the garnishee order was made absolute the company was ordered to be wound up.

**HELD**—that the principle of *In re Stanhope Silkstone Collieries Co.* ((1879) 11 Ch. D 160; 48 L. J. Ch. 409; 27 W. R. 561, 40 L. T. 204—C. A.) survived, notwithstanding sect. 45 of the Bankruptcy Act, 1883, and that the contention of the liquidator that the garnisher was not as against him a secured creditor could not prevail.

IN RE NATIONAL UNITED INVESTMENT CORPORATION, [1901] 1 Ch. 950, 70 L. J. Ch. 461; 84 L. T. 766; 17 T. L. R. 396; 8 Manson, 399—Wright, J.

**(f) Examination.**

**425. Examination of Ex-officer of Company—Questions as to Documents belonging to Company—Evidence required for purposes of Action for Libel by Company—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115.**—An ex-officer of a company in liquidation is bound, on an examination under sect. 115 of the Companies Act, 1862, to answer questions relating to documents which were alleged to be the company's property, and which it was alleged he had handed over to the defendant in an action for libel brought by the company, even although the information sought was required merely for the purpose of such libel action.

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Decision of Wright, J. (1902) 50 W. R. 167; 18 T. L. R. 130) affirmed.

IN RE LONDON AND NORTHERN BANK, ARCHER'S [CASE, 50 W. R. 262, 85 L. T. 698, 18 T. L. R. 206—C. A.]

426. *Order for Public Examination—Summons to Discharge Order—Time—Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 8.]—A summons to discharge an order for public examination under sect. 8 of the Companies (Winding-up) Act, 1890, must be made with promptness to be in time. Thus, an application made two months after the order was served is too late.

Evidence that the applicant did not take part in the formation or promotion of the company cannot be admitted in support of a summons to discharge the order, as that is the very question which it is the object of the examination to ascertain.

Decision of Wright, J. ([1899] 2 Ch. 773, 69 L. J. Ch. 16, 48 W. R. 185, 81 L. T. 529, 16 T. L. R. 8; 7 Manson, 56) affirmed.

IN RE NATIONAL STORES, LD., [1900] 1 Ch. 27, [69 L. J. Ch. 16, 81 L. T. 529, 16 T. L. R. 59—C. A.]

427. *Private Examination—Costs of Persons Examined—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 115—*Judicature Act, 1890* (53 & 54 Vict. c. 44), s. 5.]—A creditor of a liquidating company, B. a contributory, and also other contributories obtained an order giving leave to examine W and X, two officers of the company, under sect. 115 of the Companies Act, 1862, and to apply subsequently for permission to issue a misfeasance summons.

After the examination A and B. issued a misfeasance summons against W. and X., but it was dismissed with costs, which were taxed and paid.

W. and X. then applied for an order that A. and B. should pay them their costs of the examination, at which they employed counsel.

HELD—that an examination under sect. 115 is “a proceeding in the Supreme Court” within the meaning of sect. 5 of the Judicature Act, 1890; and that, as W. and X. were examined not as ordinary witnesses, but as persons against whom it was intended to launch proceedings, the Court would, in the exercise of its discretion, order A. and B. to pay the costs incurred by them in connection with their examination.

IN RE APPLETON, FRENCH AND SRAFTON, LD., [1905] 1 Ch. 749; 74 L. J. Ch. 471; 53 W. R. 601; 93 L. T. 8, 12 Manson, 335—

Warrington, J.

428. *Private Examination—Inspection of Witness's Depositions—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 115.]—A witness is not now entitled as of right to inspect and take copies of the depositions of his examination under sect. 115 of the Companies Act, 1862, but must obtain the leave of the Court to

do so, and even if the Court considers that the witness ought to be allowed to see his depositions, it does not follow that such leave will be granted to him at any moment which he may choose, but the Court will consider the circumstances of each case.

IN RE MERCHANTS' FIRE OFFICE, [1899] 1 Ch. 432; [68 L. J. Ch. 211; 47 W. R. 480; 80 L. T. 285; 15 T. L. R. 160; 6 Manson, 93—Wright, J.]

429. *Private Examination of Witness—Right of Presiding Officer to require Undertaking from the Solicitors of Witness not to Communicate Evidence or Information obtained during the Examination—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 115.]—An examination of a witness under sect. 115 of the Companies Act, 1862, is a private examination which the Court sanctions in order that the liquidator may obtain the necessary information to enable him to proceed in the winding-up, and it is most undesirable that the opposing party in the litigation contemplated by the liquidator should be allowed to be present at a proceeding which is essentially a proceeding for the purpose of informing the officer of the Court, and the Court, what course ought to be pursued. It is not as though it were absolutely and finally a sealed book to which the opposing litigant could never get access, because the Companies Winding-up Rule of November, 1895, provides machinery whereby the Court can allow the result of this examination, if in its discretion it thinks proper, to be disclosed so far as necessary.

The registrar, or other the person conducting the examination under sect. 115, has the right to require an undertaking from the solicitor, or the managing clerk of the solicitor, of an opposing litigant and of the witness, as the condition of his being present, not to communicate any part of the evidence, or any information obtained during the examination, to any other person, or use it for any purpose except for the examination of the particular witness without the leave of the Court.

Decision of Byrne, J. ((1902) 50 W. R. 886; 18 T. L. R. 403), affirmed.

IN RE LONDON AND NORTHERN BANK, LD., HADDOCK'S CASE, HOYLE'S CASE, [1902] 2 Ch. 73, 71 L. J. Ch. 511, 50 W. R. 536; 86 L. T. 430, 18 T. L. R. 536; 9 Manson, 325—C. A.]

430. *Public Examination of Promoter—Discretion of Court to Allow Questions to be put to Promoter—Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 8, sub-s. 7.]—The discretionary power of allowing a question to be put at a public examination given to the Court by sect. 8, sub-sect. 7, of the Companies (Winding-up) Act, 1890, is in no way limited by the other provisions of that section, but is a discretion that must be judicially and carefully exercised under all the circumstances of each particular case.

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IN RE LONDON AND GLOBE FINANCE CO., LD.,  
[1902] 50 W. R. 253—Byrne, J.

**(g) Fraudulent Preference.**

431. *Debentures Issued as Collateral Security to Creditor to Relieve Surety—Court Looks at the Motive and Not the Result—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 28, 48*—Section 48 of the Bankruptcy Act, 1883, is made applicable to companies by sect. 164 of the Companies Act, 1862, and though sect. 164 uses the words “undue or fraudulent preference,” it does not extend the operation of sect. 48. A transaction is not void under sect. 48 if it is entered into to protect the debtor himself, or for the benefit of some third person, such as a surety.

The plaintiff company became creditors of the defendant company for a sum of money, part of which was secured by an acceptance of the defendant company upon which their chairman was liable. At this date the balance at the defendant company's bank was practically nothing. The defendant company was known by the directors to be, if not absolutely insolvent, at least unable to pay its debts as they became due from its own money. Debentures were issued to the plaintiff company as collateral security for its debt, with the object of relieving the chairman from his liability. Within three months afterwards the defendant company began its winding-up.

HELD—that although the plaintiff company would get the benefit of the charge, the charge was not a fraudulent preference, as it was not given with a view to give them a preference, and that the Court was bound to look at the motive and not at the result.

*In re Mills* ((1888) 58 L. T. 871; 5 Morr. 55—C. A.) followed.

IN RE THE STENOGRAPHER, LD., HASTINGS BROTHERS  
[v. THE STENOGRAPHER, LD., [1901] 1 Ch. 250;  
70 L. J. Ch. 94; 84 L. T. 149; 17 T. L. R.  
151; 8 Manson, 203—Cozens-Hardy, J.

432. *Payment from a Sense of Moral Duty—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48.*—Directors of a company fully aware that the company was hopelessly insolvent paid a creditor of the company in advance of others, not from a sense of legal obligation, but from a sense of moral obligation or duty.

HELD—that such payment was a fraudulent preference.

*In re Fletcher* ((1891) 9 Morrell, 8) and *In re Vingo and Davies* ((1894) 1 Manson, 416) followed.

IN RE BLACKBURN & CO., BUCKLEY'S CASE, [1899]  
[2 Ch. 725; 68 L. J. Ch. 764; 48 W. R. 186,  
81 L. T. 520—Wright, J.

433. *Surety—“Creditor”—Contingent Liability—Proof—Companies Act, 1862 (25 & 26*

*Vict. c. 89), s. 164—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; s. 48, sub-s. 1.*—The plaintiffs, four of the directors of the Blackpool Motor Car Co., LD., signed a guarantee to a bank for the repayment of all moneys not exceeding a certain sum due or to become due from the company to the bank. The company afterwards executed a deed purporting to indemnify the plaintiffs against all liability in respect of the guarantee, and to give them as floating security for the payment of everything that might become due thereunder a charge on all the property and undertaking of the company. At this date the account of the company was overdrawn, but the plaintiffs had not been called upon to pay anything under the guarantee, though they subsequently had to pay about £300 to the bank.

HELD—that the deed was executed with a view of giving the plaintiffs a preference, and that at that time the company was unable to pay its debts as they became due from its own money.

HELD ALSO—that the plaintiffs were persons who were under a contingent liability which could be subject of a proof, and that they were creditors within the definition of sect. 48 of the Bankruptcy Act, 1883; and that the deed was void as a fraudulent preference.

*In re Paine, Ex parte Read* ([1897] 1 Q. B. 122, 66 L. J. Q. B. 71; 45 W. R. 190; 75 L. T. 316, 3 Manson, 309—Vaughan Williams, J.) followed.

IN RE BLACKPOOL MOTOR CAR CO., LD., HAMILTON v. BLACKPOOL MOTOR CAR CO., LD., [1901] 1 Ch. 77; 70 L. J. Ch. 61; 49 W. R. 124; 8 Manson, 193—Buckley, J.

434. *Unregistered Agreement by Company to Give Security to Director when Called for—Security Given Two Weeks before Winding-up—Companies Acts, 1862 (25 & 26 Vict. c. 89), s. 164, and 1900 (63 & 64 Vict. c. 48), s. 14.*—A company was registered in 1904, W. being chief shareholder and “permanent director,” and his son one of the other two directors.

In 1904 W. guaranteed its bank overdraft, the company then being prosperous, up to £2,500, and the company agreed to give him security when called on to do so.

In February, 1905, the guarantee was extended on the same terms up to £4,000.

In 1905 the company had a heavy loss, and W. (who was also a large trade creditor of the company), for the first time asked for security on December 8th. On the 15th he was given a debenture, and this was duly registered, but the agreements were not registered. On January 1st, 1906, the company went into liquidation.

HELD—that, having regard to all the facts, although there was good consideration for the agreements, the issue of the debenture was a fraudulent preference and invalid: W. could have had the debenture whenever he wished, and had not discharged himself



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of the onus of proving the postponement to have been *bonâ fide*.

*Ex parte Kilner, In re Barker* ((1879) 13 Ch. D. 245; 44 L. J. P. 264, 28 W. R. 269; 41 L. T. 520—C. A.) applied.

*IN RE JACKSON AND BASSFORD, LD.*, [1906] 2 Ch. [467, 75 L. J. Ch. 697; 95 L. T. 292, 22 T. L. R. 708; 13 Manson, 306—Buckley, J

**(h) Liquidator.**

435. *Appointment—Official Liquidator—Provisional Liquidator—Permanent Liquidator—Jurisdiction of Court—Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), ss. 4, 6—*Companies Act, 1862* (25 & 26 Vict. c. 89), s. 92.]—The Court, on making an order upon a creditor's petition for the compulsory winding-up of a company, has no jurisdiction to appoint a permanent liquidator other than the official receiver for the district.

By sect. 4 of the Companies (Winding-up) Act, 1890, the official receiver becomes, by virtue of his office, provisional liquidator, and, under sect. 6, he has to summon a meeting of the creditors of the company, and, until they have been thus consulted as to the appointment of the liquidator, the Court has no power to appoint a permanent liquidator.

*IN RE JOHN REID & SONS, LD.*, [1900] 2 Q. B. [634, 69 L. J. Q. B. 736; 49 W. R. 15; 83 L. T. 196, 16 T. L. R. 444—Div. Ct.

436. *Liquidator appointed by Invalid Resolution—Right to Remuneration—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 67.]—A company resolved upon voluntary liquidation by a resolution which was subsequently set aside as invalid, and appointed the plaintiff its liquidator. The company was then ordered to be wound up compulsorily.

**HELD**—that the liquidator invalidly appointed was not entitled to be paid anything in respect of services rendered by him as such, either under sect. 67 of the Companies Act, 1862, or upon a *quantum meruit*, but that he was entitled to reasonable remuneration, so far as any work done by him had been useful to the company for ordinary business purposes, or had been used by the official receiver and liquidator with full knowledge of the facts.

*IN RE ALLISON, JOHNSON AND FOSTER, LD.*, *Ex parte Birkenshaw*, [1904] 2 K. B. 327; 73 L. J. K. B. 763; 91 L. T. 66; 20 T. L. R. 493, 53 W. R. 285—Div. Ct.

437. *Liquidator Compromising Claim—Necessary Sanction to Compromise not Obtained—Compromise held Binding—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 160.]—A voluntary liquidator, without obtaining the sanction of an extraordinary resolution, compromised for £14 a claim for £50 by the company against one of the direc-

tors. Two years later, the official liquidator (the company having been ordered to be wound up compulsorily), sued and recovered judgment for £36, the balance of the alleged debt.

**HELD** (on appeal)—that the compromise was binding on the company, and that the defendant was entitled to judgment.

*In re English and Scottish Marine Insurance Co.* ((1870) 23 L. T. (N.S.) 685—judgment of James, L.J.) followed.

*CYCLE MAKERS' CO-OPERATIVE SUPPLY CO. v. SIMS*, [1903] 1 K. B. 477; 72 L. J. K. B. 160; 88 L. T. 360; 19 T. L. R. 153—Div. Ct.

438. *Liquidator Selling to Himself—Sale Set Aside—Interest on Rents and Profits.*—Where the sale of an undertaking of a company effected by its liquidator, nominally to another company, but really to himself, had been set aside on the ground of fraud, and the re-transfer of the undertaking to the original company had been ordered,

**HELD**—that the liquidator, being in a fiduciary capacity, should repay the rents and profits which had accrued, but that he was not to be charged with interest on the same.

*SILKSTONE AND HAIGH MOOR COAL CO. v. EDEY* [1900] 1 Ch. 167; 69 L. J. Ch. 73; 48 W. R. 137—Stirling, J.

439. *Misfeasance — Distributing Assets without Providing for Income Tax—Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 10.]—The liquidator of a company, which was being wound up for the purpose of the sale of its undertaking to a new company, distributed the assets of the old company without providing for income tax due to the Crown.

**HELD**—that he had been guilty of misfeasance within sect. 10 of the Companies (Winding-up) Act, 1890, and must pay the amount due to the Crown.

*IN RE NEW ZEALAND JOINT STOCK AND GENERAL CORPORATION, LD.*, (1907) 23 T. L. R. 238—Parker, J.

440. *Misfeasance Summons by Liquidator—Security for Costs—Practice—Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63) s. 10.]—The Court will not order a liquidator to give security for the costs of a misfeasance summons on the ground of his poverty.

*IN RE STRAND WOOD CO., LD.*, [1904] 2 Ch. 1; [73 L. J. Ch. 550; 53 W. R. 69; 90 L. T. 800; 11 Manson, 291—C. A.

441. *Official Liquidator Ordered to pay Costs Personally—Right of Appeal.*—An appeal will lie against an order on an official receiver or liquidator to pay costs personally, for such an order is equivalent to a declaration that such official has been guilty of misconduct.

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IN RE RAYNES PARK GOLF CLUB, LIMITED, EX  
[PARTE THE OFFICIAL RECEIVER, [1899] 1 Q. B.  
961, 68 L. J. Q. B. 529, 47 W. R. 496; 80 L. T.  
388, 6 Manson, 316—Div. Ct.]

**(i) Petition.**

**442. Affidavit in Support—Companies Winding-up Rules, 1890, rr. 36, 177 (1).—**The statutory affidavit in support of a petition to wind up a company must be made by the petitioner, or one of the petitioners, and the power to make it cannot be delegated to a subordinate.

IN RE CHARTERLAND STORES AND TRADING CO  
[1900] 2 Ch. 870, 69 L. J. Ch. 861; 49 W. R.  
75, 83 L. T. 674—Wright, J.]

**443. Affidavit in Support—Charge of Fraud—Sufficiency of Statutory Affidavit—Companies (Winding-up) Rules, (1903) r. 29.]—**Where fraud is charged on a winding-up petition, the statutory affidavit under r. 29 of the Winding-up Rules, 1903, is not sufficient. The facts alleged to constitute fraud must be set out in an affidavit.

RE LONDON AND HULL SOAP WORKS, [1907] W. N.  
[254—Parker, J.]

**444. Affidavit in Support—Who may Make—Solicitor to Petitioner—Company (Winding-up) Rules, 1903, rr. 29, 200.]—**The affidavit in support of a winding-up petition may in a proper case be made by the petitioner's solicitor or agent, especially when the facts are better known to such person than to the petitioner.

Rule 29 on the point is merely directory.

In re Charterland Stores and Trading Co.  
[1900] 2 Ch. 870; 69 L. J. Ch. 861, 49 W. R.  
75—Wright, J.) not followed.

IN RE AFRICAN FARMS, LD., [1906] 1 Ch. 640; 75  
[L. J. Ch. 378, 54 W. R. 490, 95 L. T. 403;  
13 Manson, 123—Warrington, J.]

**445. Affidavit in Support—Petition by Crown—Affidavit by Solicitor to Inland Revenue.]—**Where the Attorney-General, on behalf of the Crown, presents a petition to wind up a company, the statutory affidavit in support of the petition need not be made by the Attorney-General, but may be made by some fit and proper person; for instance, in a petition to wind up on the ground that the Crown has been unable to recover income-tax due by the company, the solicitor of the Inland Revenue may make the affidavit.

IN RE BRANDY DISTILLERS' COMPANY, (1901) 17  
[T. L. R. 272—C. A.]

**446. Affidavit in Support—Supplemental Affidavits—Notice of Filing—Companies (Winding-up) Rules, 1890, r. 36—Rules of March, 1893.]—**It is not necessary to give notice of the filing of the statutory affidavit in support of a winding-up petition, but

such notice should be given in respect of the filing of additional or supplemental affidavits to avoid unnecessary adjournments being made in order to answer such affidavits.

RE BRITISH CYCLE MANUFACTURING CO., LD.,  
[(1898) 77 L. T. 683, 4 Manson, 383—  
Wright, J.]

**447. Allegation of Assets.]—**A creditor's petition for the winding-up of a company must contain an allegation that the company has assets available for distribution in the winding-up.

PRACTICE NOTE, (1902) 18 T. L. R. 503—  
[Buckley, J.]

**448. Allegation that the Whole Substratum of the Business had Gone.]—**By its memorandum of association the object of the company was stated to be, *inter alia*, to take over the business, property, undertaking, and assets of the Bathurst Gold Co., then in liquidation, and its incorporation was a part of a scheme of reconstruction of the latter company. The Bathurst Co. had agreed with the company for the acquisition by the company of mines belonging to the Bathurst Co. in New South Wales. The petitioner, to whom 200 shares in the company had been allotted, on which he had paid 4s. 6d. per share, alleged that the Bathurst Co. had no mines in New South Wales, nor any mines which it could transfer to the company, who were negotiating for the acquisition of other mining property. He submitted that under these circumstances the whole substratum of the company had gone, and that it should be wound up. The petition was only supported by one creditor and contributory, and was opposed by a very large number of shareholders. Wright, J., dismissed the petition on the ground that if the directors found that it was desirable to abandon the Bathurst Company's mine for another mine, and they had money to acquire that mine, it could not be said that the substratum had gone, and, on appeal, his decision was confirmed.

In re Coolgardie Gold Mines, Ltd., 13  
T. L. R. 301, distinguished.

IN RE DONALD GOLD CO., EX PARTE DUNCAN,  
[(1898) 14 T. L. R. 204—C. A.]

**449. Costs—Instructions for Brief—Trial of Issue of Fact before Judge—Rules of Supreme Court, 1883, Ord. 71, r. 1a, Appendix N., items 81, 82, 82a.]—**A petition was presented for the compulsory winding-up of a company which was already being voluntarily wound up. The application was heard by way of summons, under sect. 138 of the Companies Act, 1862, as being a matter arising in the liquidation which could be decided by the Judge, and the issue of fact for trial was whether or not the applicant was entitled to prove for certain dividends which had been guaranteed by the company in liquidation. The issue involved the hearing and examination of witnesses in open Court and the investigation of documents, and in

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every respect was conducted precisely upon the lines of a trial of an issue of fact before a Judge.

**HELD**—that in substance the trial was of an issue of fact before a Judge, and that the costs of the instructions for brief of the applicant must be allowed. Appendix N. to the Rules of Supreme Court, 1883, item 81, must be construed strictly.

**IN RE CONSOLIDATED EXPLORATION AND FINANCE**  
[Co., [1899] 2 Ch. 599; 68 L. J. Ch. 752;  
81 L. T. 522; 7 Manson, 45—Wright, J.]

450. "*Creditor*"—*Equitable Assignee of a Debt—Companies Act, 1862* (25 & 26 Vict. c. 59), ss. 80—82.]—Although it is doubtful whether an assignment of part of an entire debt is within sect. 25 (6) of the Judicature Act, 1873, a person who has a good equitable assignment in the shape of an order to pay a specific sum out of a particular fund, can petition to wind up the company from which such fund is due.

*Dictum* of Chitty, L.J., in *Durham Bros. v. Robertson* ([1898] 1 Q. B. 765, 67 L. J. Q. B. 484; 78 L. T. 438—C. A.) referred to.

*Dictum* of Cotton, L.J., in *In re Combined Weighing Machine Co.* ((1890) 43 Ch. D. 99, 53 L. J. Ch. 26, 27; 38 W. R. 67; 61 L. T. 582; 1 Meg. 398) followed.

**IN RE MONTGOMERY-MOORE SHIP COLLISION—[DOORS SYNDICATE, LD., (1903) 72 L. J. Ch. 624, 89 L. T. 126; 19 T. L. R. 554; 10 Manson, 327—Byrne, J.]**

451. "*Just and Equitable*"—*Absence of Assets—Debenture-holders carrying on Business—Companies Act, 1862* (25 & 26 Vict. c. 59), ss. 79 (5), 91.]—Where the debenture-holders of a company are in possession of the assets of the company, and are in substance carrying on the business for themselves, although the name of the company is used, and are in a position, in ordering goods in the name of the company and incurring debts for which the company is liable to intervene by the appointment of a receiver, and sweep away all assets from the unsecured creditors, the Court has a discretion to make a winding-up order upon the petition of a judgment creditor of the company, even though the order will not produce anything for the unsecured creditors.

In such a case it is "just and equitable" within the meaning of sect 79, sub-sect. 5, of the Companies Act, 1862, that a company, conducted under the above circumstances, should be wound up.

**IN RE ALFRED MELSON & CO., LD., [1906] 1 Ch. [841; 75 L. J. Ch. 509; 54 W. R. 468; 94 L. T. 641; 22 T. L. R. 500; 13 Manson, 190—Buckley, J.]**

452. "*Just and Equitable*"—*Deadlock in Carrying on Business—Companies Act, 1862* (25 & 26 Vict. c. 59), s. 79 (5).]—Two brothers, H. and D., the partners in a quarry business, agreed to make the business over to a limited

company; the shares were to be issued to H. and D. or their nominees, except a few which were to be given to a third brother, J.

The company was formed in 1899, H., D., and J. being directors, and H. being the managing director. The memorandum set out that the company's object was to carry on the business of quarry-masters, but made no reference to taking over the particular business. The company, in fact, worked the quarries, but obtained no conveyance of the partnership assets, and no shares were ever issued with the exception of one a-piece to the signatories. Disputes having arisen as to the appointment of directors, H. and four signatories as against D. and J. resolved that H. be appointed sole director. On a petition by D. and J.,

**HELD**—that it was "just and equitable" that the company should be wound up.

**SYMINGTON v. SYMINGTON'S QUARRIES, LD., (1906) [8 F. 121—Ct. of Sess.]**

453. *Notice of Intention to Appear in Opposition—Mistake in Date before which Notice to be Served.*—The advertised notice of a petition to wind up a company contained a statement that notices of intention to appear on the hearing must be served not later than 6 p.m. on June 18th (instead of the 25th). The petition was to be heard on June 20th. Several persons gave notice of intention to appear after June 18th.

**HELD**—at the hearing, that the mistake should not invalidate the proceedings, and that an order might be made.

**IN RE SAUL MOSS & SONS, [1906] W. N. 142—[Buckley, J.]**

454. *Petitioner Withdrawing Petition—Liability for Costs—Costs of Persons Appearing to Support or Oppose his Petition—Winding-up Rules, April, 1892, r. 20*—Where a petition to wind up a company is withdrawn at the hearing, the petitioner will have to pay the costs of persons who, within the time prescribed by Rule 20 of the Companies Winding-up Rules, April, 1892, have given notice of their intention to appear on the hearing of the petition—one set of costs to supporters and one set of costs to opposers.

*In re Patent Cocoa Fibre Co.* ((1876) 1 Ch. D. 617, 45 L. J. Ch. 207; 24 W. R. 483—Jessel, M.R.) followed.

**IN RE BRITISH ELECTRIC STREET TRAMWAYS, LD., [1903] 1 Ch. 725; 72 L. J. Ch. 386; 10 Manson, 195—Buckley, J.]**

455. *Rights of Unsecured Creditor—Debentures Covering all Assets—Right to Winding-up Order—Companies Act, 1862* (25 & 26 Vict. c. 59), s. 79.]—A creditor's petition to wind up a company was opposed by debenture-holders, who had a floating charge on all assets and had obtained the appointment of a receiver, and by the company, which was under the control of the debenture-holders, on the ground that there were no assets available for the unsecured creditors.

**Winding-up—Continued.**

**HELD**—that the *onus* was on the respondents to show that there was no reasonable possibility of unsecured creditors obtaining any benefit from a winding-up; unless such *onus* was discharged, the petitioner was entitled to an order.

**Per Buckley, J.**—The tendency of the Court is in favour of winding-up in such cases, if the order will be useful (not necessarily fruitful) to unsecured creditors.

**IN RE CRIGGLESTONE COAL CO.,** [1906] 2 Ch. [327; 75 L. J. Ch. 662; 95 L. T. 81, 510; 22 T. L. R. 585; 13 Manson, 233—Buckley, J., and C. A.

**(k) Practice.**

**456. Appeal from Compulsory Order—Whether Final or Interlocutory.**—On an appeal from a compulsory winding-up order the Court intimated that it would be placed in the interlocutory list. **Per Vaughan Williams, L.J.**: “It would be convenient that these appeals should be treated as interlocutory and not final.”

And see *In re Samuel Allsopp & Sons, Ltd.*, [1903] W. N. 132, No. 245, *supra*.

**RE NAVAL CO-OPERATIVE SOCIETY OF SOUTH AFRICA,** [1903] W. N. 120; 115 L. T. Jo. 200; 47 Sol. J. 618; 38 L. J. N. C. 327—C. A.

**457. Change of Solicitor—Discretion of Liquidator.**—During the course of the winding-up of a company, a summons was taken out by one of the contributories asking for an order to remove the liquidator and to restrain him from employing any other solicitor in the winding-up of the company than the one then acting. Upon the hearing of this summons the Judge ordered the liquidator to convene a meeting of the company, under sect. 139 of the Companies Act, 1862, in order that this question of a change of solicitor might be considered, and adjourned the hearing of the summons. This meeting was duly convened, and the shareholders expressed the opinion that their then solicitor should continue to act, and that the liquidator ought not to have employed any other solicitor. On appeal the Court dismissed the summons.

**RE COOPERS, LD.,** (1898) 14 T. L. R. 144—C. A.

**458. Appeal—Costs—More than One Set of Contributories Supporting Respondent in Court Below—One Set of Costs.**—An appellant from an order on a winding-up petition, when the respondent has been supported in the Court below by more than one set of contributories, if he does not wish to disturb that part of the order which gives one set of costs among those persons, should give notice by letters to the creditors or shareholders in question that an appeal is pending which, however, does not affect the order made in the Court below, so far as their costs are concerned. If creditors or shareholders, after receiving such a letter, appear on, and successfully oppose, the appeal, they

will only be entitled to one set of costs among them, the rule in the Court below applying in such a case in the Court of Appeal.

**RE IBO INVESTMENT TRUST, LD.,** (1903) 72 [L. J. Ch. 661; 51 W. R. 593, 88 L. T. 752; 10 Manson, 399—C. A.

**459. Appeal from Registrar in Chambers**—From an order made in Chambers by the Registrar in the wind-up of a company an appeal lies, not direct to the Court of Appeal, but to the Judge taking winding-up business.

**IN RE PRETORIA-PIETERSBURG RY. CO.,** (No. 1) [1904] 2 Ch. 170; 73 L. J. Ch. 551; 53 W. R. 41; 91 L. T. 274; 20 T. L. R. 591; 11 Manson, 318—C. A.

**460. Order Made by Registrar in Chambers—Motion to Set Aside Companies (Winding-up) Rules, 1903, r. 7.**—Rule 7 of the Companies (Winding-up) Rules, 1903, provides that the Registrar may, under the general or special direction of the Judge, hear any application which may be heard and determined in chambers. On an application made by motion to discharge an order made by the Registrar in Chambers,

**HELD**—under the power of the Court to give a general direction, that a person desiring to discharge the order of the Registrar must move before the Judge in Court

**IN RE BRYNDY AND PORT TALBOT COLLIERIES, LD.,** [1904] W. N. 136; 48 Sol. J. 589; 39 L. J. N. C. 346—Buckley, J.

**461. Order in Restricted Form.**—In future compulsory orders will be made in the usual form and not in the restricted form sanctioned in *In re New Imperial Electric Lamp Co., Ltd.*

**PRACTICE NOTE,** (1904) 20 T. L. R. 73—

[Buckley, J.]

**462. Petition Standing Over—Undertaking “Not to Wind up Voluntarily.”**—Where a petition to wind up a company is ordered by consent to stand over on the terms known as the “St. Thomas Dock Order,” the proper form of undertaking to be given by the company is that it will not consent to a winding-up order on the petition of another person or to a voluntary winding-up.

**IN RE ST. NEOT’S WATER CO.,** (1906) 93 L. T. [788—Buckley, J.]

**(l) Proof.**

**463. Creditor Out of Jurisdiction Claiming to Prove—Security for Costs—Companies (Winding-up) Rules, 1903, r. 201.**—Where a company is being wound up voluntarily, and a person resident out of the jurisdiction applies for a declaration that he is entitled to prove as a creditor in the winding-up, the Court has jurisdiction to require him to give security for costs.

**Winding-up—Continued.**

IN RE PRETORIA-PIETERSBURG RY. CO. (No. 2),  
[1904] 2 Ch. 359; 73 L. J. Ch. 706; 53 W. R.  
74; 91 L. T. 285—Buckley, J.

**464. Debentures—Security to Bank for Overdraft—Interest—Right to Prove for.**—A company issued to a bank as security for advances debentures accompanied by a letter of charge and bearing interest at 5 per cent. The bank charged interest on the overdraft, but interest on the debentures was never paid. After four or five years the company went into liquidation.

**HELD**—that the bank was entitled to interest on the debentures.

IN RE VINT AND SONS, LD., (1905) 1 Ir. R. 112.—  
[M. R.]

**465. Debts Paid in Full—Proof for Interest—Gaming Transactions—Interest on Deposits.**—Certain transactions of a company carrying on business as outside brokers were held to be gaming transactions; but in the winding-up, customers were held entitled to prove in respect of their unappropriated deposits held by the company as “cover.”

Upon such deposits the company had been in the habit of allowing to customers interest at 4 per cent.

Customers and other creditors received two dividends amounting together to 20s. in the pound, and there remained an overplus. Out of this overplus the customers claimed to receive interest on their deposits.

**HELD**—(1) that there was an implied contract on the part of the company to pay 4 per cent. interest on deposits; (2) that the customers were not prejudiced by having signed a receipt for “the amount payable to me in respect of the second and final dividend of 10s in the £ on and in full discharge of my claim”; and that, therefore, out of the surplus the customers were entitled to receive interest on their deposits from the date of the winding-up to that of the final dividend.

IN RE DUNCAN & CO., [1905] 1 Ch. 307; 74  
[L. J. Ch. 188; 53 W. R. 299; 92 L. T. 108; 12  
Manson, 38—Buckley, J.

**466. Priority of Debts—Claim for Directors’ Fees—Money Due to Members of Company in Character of Members—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38, sub-s. 7.]**—The articles of association of a company provided that “the remuneration of the board shall be an annual sum of £1,000, to be paid out of the funds of the company, which sum shall be divided in such manner as the board from time to time determine.”

On a claim by directors of the company, which was being wound-up, to rank as ordinary creditors of the company in respect of their fees due at the commencement of the liquidation,

**HELD**, following the principle of the decision in *Re Dale and Plant, Ltd.* (62 L. T. R. B.D.—VOL. I,

215, 43 Ch. Div. 255), and distinguishing the decision in *Re Leicester Club and County Race Course Co., Ltd., Ex parte Cannon* (53 L. T. R. 340; 30 Ch. Div. 629)—that the directors, having been employed and accepted office upon the terms of the articles, and having thus obtained a contractual right to an annual sum of £1,000 as remuneration, were entitled to rank as ordinary creditors in respect of their fees, and that these were not debts due to them in their character of members within the meaning of sect. 28, sub-sect. 7, of the Companies Act, 1862.

RE NEW BRITISH IRON CO. LD., EX PARTE  
[BECKWITH [1898] 1 Ch. 324; 67 L. J. Ch. 164,  
78 L. T. 155, 5 Manson, 168; 14 T. L. R. 196,  
46 W. R. 376—Wright, J.

**467. Secured Creditor Proving for Debt as Unsecured—In fact Holding and Having Lien on Title Deeds—Parting with Title Deeds—Application for Leave to Amend or Withdraw Proof—Inadvertence—Companies Act, 1890 (53 & 54 Vict. c. 63), Sched. I., cl. 8.]**—A company went into liquidation, and its solicitors, who held the title deeds of its property and had a lien on them for costs, proved for the whole amount of the debt due to them, stating in the proof that they held no security; subsequently they voted in respect of the whole debt.

The liquidator employed them in realising the assets, and having received the purchase-money from the purchaser, they handed over to him the title deeds without in any way protecting their lien. Upon the liquidator objecting to their retaining part of the purchase-money to meet their debt, they applied for leave to amend their proof by estimating their security, or to withdraw their proof and rely on their security.

It was contended that their incorrect proof had been filed through “inadvertence,” and the facts were stated to be as follows: A clerk who was ignorant of the existence of the lien filled up the proof, and the partner who swore it did not notice the mistake.

**HELD**—that the application must be refused, *per* Vaughan Williams, L.J., because the applicants had not brought themselves within the definition of “inadvertence” given in *Ex parte Clarke*, (1892) 67 L. T. 232, 40 W. R. 608, and also because they had lost their lien by handing over the title deeds.

*Per* Stirling, L.J.—because the Court would not in the exercise of their discretion grant such an application where the liquidator had altered his position since the filing of the proof.

IN RE SAFETY EXPLOSIVES, LD., [1904] 1 Ch. 226;  
[73 L. J. Ch. 184; 52 W. R. 470; 90 L. T.  
331; 11 Manson, 76—C. A.

**(m) Reconstruction**

**468. Dissident Shareholder—Partly-paid Shares in New Company—Power to Sell**

**Winding-up—Continued.**

*Shares in New Company if Not Accepted by Members—Proceeds to be Applied in Payment of Liabilities—Memorandum of Association—Article Depriving Shareholders of Rights under Sect. 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89).—*A company's objects were defined by its memorandum as being (*inter alia*) "to sell and dispose of any of the property of the company or the whole undertaking, and to accept in payment of the same money, or wholly or partly shares . . . of any other company, whether wholly or partly paid-up . . . with power to distribute the same in specie, either by way of dividend or otherwise."

**HELD**—that, upon a reconstruction, this did not authorise the company to compel its shareholders to forego their rights under sect. 161 of the Companies Act, 1862, and to accept partly-paid shares in the new company, upon pain of having such shares forfeited, and the proceeds of the sale thereof applied in payment of the company's liabilities. Such terms were an invalid device to compel members, upon whom no further calls could be made, to provide additional capital.

**HELD ALSO**—that an article of association purporting to sanction such terms and to deprive shareholders of the rights given to them by sect. 161 was invalid.

*Payne v. Cork Co.* ([1900] 1 Ch. 308, 69 L. J. Ch. 156; 48 W. R. 325, 82 L. T. 44; 7 Manson, 225—Stirling, J.; see No. 495, *infra*) followed.

**MANNERS v. ST. DAVID'S GOLD AND COPPER [MINES, LD., AND OTHERS, [1904] 2 Ch. 593, 73 L. J. Ch. 764; 91 L. T. 277; 20 T. L. R. 661, 729; 11 Manson, 425—Joyce, J., and C. A.**

**469 "Amalgamation" — Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.**—By the memorandum of association of S. Co., its preference shareholders were in the event of a winding-up for the purpose of reconstruction or amalgamation to have a bonus of 15 per cent. The company also issued debentures upon terms that in the event of such a winding-up the debentures should be redeemed at a price above par.

A. Co. had shares and debentures entitled to similar advantages.

S. Co. sold its business and most of its assets to A. Co. for shares; A. Co. resold to I. Co. for a sum in excess of its share capital and debenture issue.

Subsequently S. Co. sold the rest of its assets, including its shares in A. Co., to another company.

S. Co. and A. Co. then went into voluntary liquidation for the purpose of carrying out these agreements, and not for the purpose of realising and dividing their assets.

**HELD**—that the companies were being wound up for the purpose of reconstruction or amalgamation; and that the holders of

preference shares and debentures had become entitled to their bonuses.

Meaning of "reconstruction" and "amalgamation" discussed.

**IN RE SOUTH AFRICAN SUPPLY AND COLD STORAGE [Co., LD., [1904] 2 Ch. 268; 73 L. J. Ch. 637, 52 W. R. 649, 91 L. T. 447; 12 Manson, 76—Buckley, J.**

**470. Right of Shareholders in Old Company to receive Share in New Company—Application—Withdrawal of Application before Allotment—Contributory.]—**The C. Company was wound up voluntarily, and all its assets were transferred to the M. Company, upon the terms of an agreement (*inter alia*) that every member of the C. Company should, in respect of each share therein held by him, be entitled to claim on certain conditions an allotment of a debenture or shares in the M. Company partly paid up. The liquidators of the C. Company pursuant to the agreement gave notice to W., a shareholder in the C. Company, who duly claimed from the directors of the M. Company an allotment of shares. Subsequently W. wrote to the M. Company withdrawing his application. The liquidators sought to have W. retained on the list of contributories in respect of the shares applied for.

**HELD**—that the application could be withdrawn before acceptance, as there was no direct relation between the M. Company and W. prior to his claim from the directors of the M. Company of an allotment; that it was not an acceptance of a prior offer made to him by the M. Company, and that the applicant's name must be removed from the list of contributories.

**IN RE METROPOLITAN FIRE INSURANCE Co., [WALLACE'S CASE, [1900] 2 Ch. 671; 69 L. J. Ch. 777, 83 L. T. 403; 16 T. L. R. 513—Cozens-Hardy, J.**

**471. Sale of Assets to New Company—Misfeasance Proceedings—Damages for Benefit of Shareholders of Old Company.]—**Upon a reconstruction scheme under which the assets of the old company were transferred to a new company, and the shareholders of the old company were entitled to take shares, partly paid up, in the new company, the order sanctioning the scheme reserved the right of the liquidator of the old company to take misfeasance proceedings under sect. 10 of the Companies (Winding-up) Act, 1890, against the officers of the old company and others, and the proceeds of any such proceedings were to be held by the liquidator for the benefit of the shareholders of the old company. Misfeasance proceedings were taken, and a large sum was recovered.

**HELD**—that this sum belonged to the shareholders of the old company, whether they came in under the scheme or not.

**IN RE OLYMPIA, LD., (1900) 16 T. L. R. 564—[Wright, J.**

**472. Transfer of Shares not Registered—**

**Winding-up—Continued.**

*Allotment of Shares in New Company—Right of Transferee against Transferor—Trustee and Cestui que trust.*—The plaintiff, who was a shareholder in a company, purchased further shares in the company from the defendant, and the transfers were duly executed and handed to the plaintiff. Shortly afterwards, and before the transfers were lodged with the company for registration, resolutions were passed to voluntarily wind up and reconstruct the company. A new company was accordingly formed, the shares in which were to be offered rateably to the shareholders in the old company, each share being credited with 18s. paid up and 2s. unpaid. The 2s. was to be paid by instalments. The plaintiff then sent the transfers for registration to the liquidator of the old company, but he refused to register them except upon payment of 1s. a share, being the amount payable at that time on the shares in the new company. The plaintiff delayed making the payment, and the transfers were not registered. The defendant applied for the shares in the new company, and paid to the liquidator the sum due on the shares, and received an allotment.

**HELD**—that the defendant was a trustee of the shares in the new company for the plaintiff, and that on the facts there was no equity to deprive the plaintiff of his rights as *cestui que trust*.

ROONEY v. STANTON, (1901) 17 T. L. R. 28—  
[—C. A.]

**XXXIV. VOLUNTARY WINDING-UP.****(a) General.**

**473 Compulsory Order—Wishes of Shareholders and Creditors—Companies Act, 1862** (25 & 26 Vict. c. 89), ss. 91, 145, 149.]—A resolution for voluntary liquidation is only an expression of the wishes of the shareholders as to the mode in which liquidation shall be carried out. Such a resolution does not override the wishes of the creditors.

Section 145 of the Companies Act, 1862, is a security to the creditor that he shall not be unduly deprived of his right to a winding-up order, and as a protection to the shareholders that they shall not be necessarily driven into compulsory liquidation by one creditor, or a few creditors, by reason of the mere expression of his or their wish without showing any prejudice to themselves by reason of the voluntary liquidation.

Any unpaid creditor is as between himself and the company *prima facie* entitled to a compulsory order *ex debito justitiæ*. This right is restricted by sect. 145; but the right of the general body of creditors to have effect given to their wishes under sects. 91 and 149 is untouched by sect. 145.

*In re West Hartlepool Ironworks Co.* (1875), L. R. 10 Ch. 618; 44 L. J. Ch. 668; 23 W. R. 938; 33 L. T. (N.S.) 149; *In re Gold Co.* ((1879), 11 Ch. D. 701; 48 L. J. Ch. 281; 27 W. R. 757; 40 L. T. 5—C. A.), and *In re*

*Varieties, Ltd* ([1893] 2 Ch. 235; 62 L. J. Ch. 526; 41 W. R. 296; 68 L. T. 214, 3 R. 324—V. Williams, J.) followed.

*In re New York Exchange, Ltd.* ((1888), 39 Ch. D. 415; 58 L. J. Ch. 111; 60 L. T. 66; 1 Meg. 78—C. A.), and *In re Russell, Cordner & Co* ([1891] 3 Ch. 171; 60 L. J. Ch. 805; 39 W. R. 635; 65 L. T. 740—North, J.) distinguished.

**IN RE E BISHOP & SONS, LD.**, [1900] 2 Ch. 254; [69 L. J. Ch. 513; 82 L. T. 756; 7 Manson, 342—Farwell, J.]

**474. Costs — Taxation — Drawing Bills of Costs — Liquidator appearing by Solicitor whose Bill is being Taxed—Companies Winding-up Rules, April, 1892, r. 17.**—The costs of drawing a bill of costs are allowed where there is litigation, or where there is quasi litigation, e.g., an application for payment out of a fund or an application to determine the construction of a will, or the like; but costs of drawing the bill of costs are never allowed when the order is to tax a bill already delivered, or the order is one as between the solicitor and his own client for delivery of a bill and its taxation.

The N. Bank, Ltd., sold to the M. Bank, Ltd., certain assets, including claims which the former company had against third parties, and the latter company agreed to pay all the charges, costs, disbursements, and expenses of the N. Bank and its liquidators of and incidental to its winding-up and dissolution and the sale. To recover the amount of these claims the liquidator of the N. Bank took proceedings, and in so doing he incurred costs to the extent of £3,754. He claimed these costs from the M. Bank, who required particulars, the drawing of which cost £301. The N. Bank paid the £3,754. The liquidator obtained an order for taxation of the several bills of his solicitor as between solicitor and client. The cost charged for drawing these bills amounted to £73. The taxing master disallowed both the £301 and £73 on the ground that if the liquidator, before applying to the M. Bank for the £3,754 had asked his solicitor for his bill of costs, the solicitor must have prepared them at his own expense.

**HELD**—that the summons to review the taxation failed; and that as the applicant was really not the liquidator, but the solicitor, costs would not be allowed out of the estate.

**IN RE NATIONAL BANK OF WALES**, [1902] 2 Ch. [412 71 L. J. Ch. 679; 50 W. R. 541, 87 L. T. 436—Buckley, J.]

**475. Creditor's Right to Compulsory Winding-up Order—For Creditor's Sole Benefit.**—Where a company is in voluntary liquidation a creditor may come to the Court and ask to have the voluntary liquidation turned into a compulsory liquidation, or else to have it continued under the supervision of the Court. But it is in the discretion of the Court whether it will grant the order, and, unless it would be in the interest

**Voluntary Winding-up—Continued.**

of the general body of creditors to grant it, the order ought not to be granted.

Where the petitioning creditor asked for a compulsory winding-up order for his own benefit only, and not for that of the creditors at large,

**HELD**—that there was no justification for employing the expensive machinery of statutory liquidation at the instance of a particular creditor to enable him to recover a sum of money which would not have been distributable among the creditors generally.

IN RE GREENWOOD & Co., [1900] 2 Q. B. 306; 69 [L. J. Q. B. 751, 48 W. R. 607, 82 L. T. 843—Div. Ct

**476. Dissolution—Voluntary Liquidation—Time for Dissolution—Extension of—Stay of Proceedings—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 89, 138, 142, 143.]**—Where it is desired for good reason to keep alive a company in voluntary liquidation beyond the period of three months prescribed by sect. 143 of the Companies Act, 1862, for its dissolution, the Court may, under sects. 89 and 138, make an order in the winding-up to stay all proceedings in reference thereto, and so indirectly extend the period.

There is no power to make an order directly extending the period.

IN RE EASTERN INVESTMENT Co., Ltd., [1905] 1 [Ch. 352; 74 L. J. Ch. 281; 53 W. R. 186, 92 L. T. 359; 12 Manson, 27—Warrington, J

**477. Gratuities to Servants—Ultra Vires Act—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133.]**—At an extraordinary general meeting of a company incorporated under the Companies Act, 1862, resolutions were passed that the company should be wound up voluntarily, and that a sum of money should be distributed among the officers and servants of the company. The sum was in the nature of a gratuity, and not remuneration for past or future services. These resolutions were confirmed at a subsequent meeting.

**HELD**—(upon the application of a dissenting shareholder)—that the resolution as to the payment of the sum to the officers and servants of the company was *ultra vires*.

STROUD v. ROYAL AQUARIUM, &C. AND OTHERS, [1903] 89 L. T. 243; 19 T. L. R. 656—

Joyce, J.

**478. Lease—Landlord—Bills of Exchange for Rent Overdue—Distress—Debentures—Receiver—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 87, 138, 163.]**—A lease was purchased by a company, but no assignment of it was taken. The company gave the landlord for rent overdue bills of exchange which were dishonoured. No evidence was given that the bills were given as collateral security. The company went into voluntary liquidation. The landlord distrained for the rent on the company's chattels, which were subject to a floating security contained in de-

bentures for more than their value, but no receiver had been appointed by the debenture-holders

**HELD**—that as between the landlord and the liquidators, the landlord had no right to distrain, as he had a right to prove.

**HELD ALSO**—that the company had no interest in the chattels, and that the liquidators had no right to intervene.

*Ex parte Clemence* ((1883), 23 Ch. D. 154; 52 L. J. Ch. 472, 31 W. R. 397; 48 L. T. 308—Fry, J.) not followed.

*Ex parte Pursell* ((1887), 34 Ch. D. 646; 56 L. J. Ch. 332; 35 W. R. 421; 56 L. T. 792) followed.

IN RE HARPUR'S CYCLE FITTINGS COMPANY, [1900] [2 Ch 731; 69 L. J. Ch. 841; 83 L. T. 407—Wright, J.

**479. Notice of Meeting—Resolutions for Voluntary Winding-up—Resolutions Passed Different from Proposed Resolutions in the Notice Given—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.]**—The directors of a company gave notice to the shareholders of an extraordinary general meeting of the company to consider and, if thought fit, to pass resolutions for a voluntary winding-up of the company, for the appointment of a liquidator at a fixed remuneration, and for the reconstruction of the company. At the meeting a resolution was carried by the requisite majority by means of the votes of shareholders who were present and by proxies, simply to wind up the company voluntarily, and that a liquidator should be appointed, and this resolution was confirmed. Upon a petition by a creditor for a compulsory winding-up order—

**HELD**—that the resolution for voluntary winding-up was invalid, as when the meeting was held the resolutions of which notice was given were not put at all, and the only resolution put and passed was different in its results and objects from which was proposed in the notice; and that a compulsory winding-up order should be made.

IN RE TEEDS AND BISHOP, LD., (1901) 70 L. J. Ch. [409, 84 L. T. 561, 17 T. L. R. 282; 8 Manson, 217—Cozens-Hardy, J.

**480. Petition for Compulsory Order by a Contributor who is a Fully-paid Shareholder—Surplus for Distribution—Jurisdiction—Fraud—Benefit to Shareholders—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 145.]**—*Primâ facie* there is a right in a contributor who is a fully-paid shareholder where a voluntary winding-up is in existence, and there is a surplus or a probable surplus for distribution, to petition for a compulsory order. This jurisdiction is not limited to cases where it has been shown that a resolution for voluntary liquidation was a sham or a fraud—that is, a resolution not *bonâ fide* passed for the purpose of winding up the business of the company, but for some oblique motive—or where the case is one in which the petition is supported by creditors.



**Voluntary Winding-up—Continued.**

If the Court is satisfied on ample proof that the voluntary liquidation is existing under such circumstances as are likely to prejudice the shareholders in the company, the Court has jurisdiction to make an order on the petition of a contributory. The Court ought to be very careful how it exercises that jurisdiction, and ought not to make an order for compulsory winding-up unless it is satisfied that some benefit will thereby result to the shareholders.

*In re Haycraft Gold Reduction and Mining Co.*, ([1900] 2 Ch. 231; 69 L. J. Ch. 496; 83 L. T. 166, 16 T. L. R. 350; 7 Manson, 243—Cozens-Hardy, J., No. 486, *infra*); and *In re Gutta Percha Corporation* ([1900] 2 Ch. 665; 69 L. J. Ch. 769; 83 L. T. 401, 8 Manson, 67—Cozens-Hardy, J., No. 407, *supra*) approved.

*In re Gold* ((1879) 11 Ch. D. 701; 48 L. J. Ch. 281; 27 W. R. 341; 40 L. T. 5—C. A.) considered.

*IN RE NATIONAL DISTRIBUTION OF ELECTRICITY*  
[Co., Ltd., [1902] 2 Ch. 34; 71 L. J. Ch. 702, 87 L. T. 1, 9 Manson, 314—C. A.]

481. *Production of Documents—Income Tax Returns—Misfeasance Summons—Officer of Public Department—Discretion of Judge—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 115.]—Section 115 of the Companies Act, 1862, gives a discretion to the Judge with which the Court of Appeal will not *prima facie* interfere.

Accordingly the Judge of first instance having in his discretion refused an application by the liquidator of a company for production of certain balance-sheets of the company, which had been deposited with the district surveyor of taxes for the purpose of income tax returns, on an affidavit by the secretary of the Board of Inland Revenue that in the opinion of the board such production was prejudicial and injurious to the public interest:

Held—that this decision would not be reviewed by the Court of Appeal

Decision of Wright, J. (16 T. L. R. 93), affirmed.

*IN RE JOSEPH HARGREAVES, LD.*, [1900] 1 Ch. 347; 69 L. J. Ch. 183; 48 W. R. 241; 82 L. T. 132; 16 T. L. R. 155, 7 Manson, 354—C. A.]

482. *Purchase of Undertaking—Interest of Dissident Shareholder—Arbitration—Award of Umpire—Validity of Award—Arbitration Act, 1889* (52 & 53 Vict. c. 49), *First Schedule* (c) (d)—*Companies Act, 1862* (25 & 26 Vict. c. 89), s. 162.]—The articles of association of a company do not constitute an “agreement” within sect. 162 of the Companies Act, 1862.

The appointment of an umpire by arbitrators constitutes an act in the arbitration within the meaning of clause (c) in the First Schedule to the Arbitration Act, 1889.

Decision of Stirling, J. ([1898] 2 Ch. 633, 67 L. J. Ch. 622; 47 W. R. 23; 79 L. T. 185), reversed

*IN RE AN ARBITRATION BETWEEN F BARING—[GOULD AND THE SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE, [1899] 2 Ch. 80; 68 L. J. Ch. 429, 47 W. R. 564; 80 L. T. 739, 15 T. L. R. 366; 6 Manson, 430—C. A.]*

483. *Scheme—Sale of Undertaking for Debenture Stock, Shares, and Cash to a New Company—Sanction of Court to Scheme—Dissentient Shareholders—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 161—*Joint Stock Companies Arrangement Act, 1870* (33 & 34 Vict. c. 104), s. 2—*Companies Act, 1900* (63 & 64 Vict. c. 48), s. 24.]—A company under its memorandum of association had power to sell the undertaking for shares in another company and to distribute any property of the company among its members in specie. The company sold its undertaking to a new company, the consideration being preference and ordinary shares and debenture stock of the new company and cash. The old company went into voluntary liquidation, and resolutions at meetings of the ordinary and preference shareholders of the old company had approved the mode of distribution, proposed by the liquidator, of the shares and other proceeds of the sale. The sanction of the Court to this scheme was sought. The scheme was opposed by some preference shareholders.

Held—that in this case there was no one, in the position of a liquidator acting under sect. 161 of the Companies Act, 1862, who could abandon the scheme, because here what would have to be abandoned would be the actual sale of the assets, and that could not be done; that as there were two classes of shareholders, some of whom held both classes of shares, it would be impossible to work the Act of 1870 if the Court had to analyse the motives of each shareholder and to consider whether his mode of voting at a meeting of one class of shareholders was dictated by his being the holder of another class; and that the scheme which was a fair one must be sanctioned.

*IN RE PATERSON, LAING, AND BRUCE, LD.*, (1902) [18 T. L. R. 515—Buckley, J.]

484. *Scheme—Petition to Sanction Scheme Involving Reduction of Capital—Compliance with Statutes Relating to Reduction—Joint Stock Companies Arrangement Act, 1870* (33 & 34 Vict. c. 104).]—Where an extraordinary resolution for voluntary winding-up had been passed by a company, a scheme of arrangement was prepared which involved a reduction of capital under the Companies Acts, 1867 and 1877, and a resumption of business with the reduced capital. A petition was then presented for the sanction of the scheme under the Joint Stock Companies Arrangement Act, 1870. The petition was not intitled in the matter of the Acts of 1867 and 1877, nor had the requirements of those two Acts as to reducing capital been observed.

Held—that where a scheme involved the reduction of capital, the reduction must be

### Voluntary Winding-up—Continued.

carried out in accordance with the statutes dealing therewith; and that the petition should stand over with liberty to amend it by intituling it also in the matter of the Acts of 1867 and 1877.

IN RE COOPER, COOPER AND JOHNSON, LD.,  
[1902] W. N. 199—Byrne, J.

485. *Shares Issued not for Cash—No Contract Filed—Application for Relief—Liquidator's Costs—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Companies Act, 1898 (61 & 62 Vict. c. 26).*—In the case of an application made under the Companies Act, 1898, for relief in respect of liability on shares issued as full paid-up, but without the proper filing of the contract under the Companies Act, 1867, the applicants ought to give the liquidator, in good time, the most plenary and candid assistance to enable him to judge whether he should go to the expense of opposing the application for relief.

When the applicant does not give such assistance the liquidator, as protector of the creditors as well as of the shareholders, ought to be fully indemnified against costs reasonably incurred according to the discretion of the Court.

When the applicant does not give such assistance and it is established that the liquidator was wrong in resisting the application, the liquidator ought not to have costs beyond any costs necessarily incurred in testing the statements made in watching the hearing of the application.

IN RE FARMER'S UNITED, STEPHENSON'S CASE,  
[1900] 2 Ch. 442; 69 L. J. Ch. 684; 83 L. T.  
406—Wright, J.

486. *Unauthorised Notice Convening Meeting for Winding-up Voluntarily—Paid-up Shareholders' Petition for Compulsory Winding-up—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 79, sub-ss. 5, 129, sub-ss. 3, 145.*—A company was insolvent. A committee of investigation was appointed who made a report charging the directors with misfeasance and recommending that steps should be taken to recover from them what they were alleged to be liable for. Notice was given convening a meeting to pass an extraordinary resolution for winding-up voluntarily and appointing the secretary liquidator. The secretary was appointed liquidator at the meeting, and proceeded with the most unusual rapidity to arrange for the dissolution of the company and the destruction of all its books. Three holders of paid-up shares petitioned for the compulsory winding-up of the company.

HELD—that there was no voluntary winding-up in existence, as the notice convening the meeting was sent out without the authority of a resolution of the board of directors.

HELD ALSO—that, assuming that there was a valid voluntary winding-up, such winding-up was not a legal bar to the jurisdiction of the Court to make a compulsory order on

the application of a shareholder, for the resolutions could not be regarded as an honest exercise of the wishes of the shareholders with regard to the winding-up of the company, and it was just and equitable that the company should be wound up by the Court.

IN RE HAYCRAFT GOLD REDUCTION AND MINING  
[Co., [1900] 2 Ch. 231; 69 L. J. Ch. 496,  
83 L. T. 166; 16 T. L. R. 350—

Cozens-Hardy, J.

And see Nos. 117 and 480, *supra*.

### (b) Liquidators.

487. *Appointment of Liquidator—Notice—Abrogation.*—It is competent for a company, after passing a resolution for voluntary winding-up, to proceed forthwith, without previous notice of intention, to the election of a liquidator, and this general power will not be abrogated in cases in which notice has been given of intention to elect a particular person as liquidator, and such person is not elected.

Decision of Kekewich, J. (69 L. J. Ch. 97; 48 W. R. 200, 81 L. T. 723), reversed.

IN RE TRENCH TUBELESS TYRE CO., LD.; BETHELL  
[v. TRENCH TUBELESS TYRE CO., LD., [1900]  
1 Ch. 408; 69 L. J. Ch. 213, 48 W. R. 310,  
82 L. T. 247; 16 T. L. R. 207—C. A.

488. *Board of Trade—Scheme—Surplus of Calls—"Undistributed Assets"—Payment into Companies Liquidation Account—Joint-Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2—Companies Winding-up Act, 1890 (53 & 54 Vict. c. 63), s. 15, sub-s. 3.]*—The L. M. Bank of F., LD., went into voluntary liquidation in December, 1895, and appointed voluntary liquidators, the bank being in temporary difficulties, and unable to pay the interest on its terminable debentures.

In 1896 a scheme of arrangement under the Joint-Stock Companies Arrangement Act, 1870, was sanctioned by the Court, and under this scheme, if there was a surplus from called-up capital after paying a dividend on the debentures, it might be applied, before paying any further dividends, in the payment of wages, &c., or in "any expenditure which the company may think necessary or expedient for protecting and keeping up the company's property and assets, or of developing the same with a view to the realisation thereof." A trust deed had been executed in pursuance of the scheme, by which the liquidators covenanted to apply the proceeds of the calls in accordance with the scheme.

The liquidators having delivered to the Registrar of Joint-Stock Companies the statement of accounts required by sect. 15 of the Companies (Winding-up) Act, 1890, showing them still to have a surplus of calls in their hands, the Board of Trade directed them to pay this money into the Companies Liquidation Account, at the Bank of England, under sub-sect. 3 of the same section.

**Voluntary Winding-up—Continued**

This the liquidators refused to do, and the Board of Trade now moved for an order on the liquidators to obey the provisions of the Act.

**HELD**—that the sum in respect of which the present application was made not being “undistributed assets” within the meaning of sect. 15 of the Act, but being, under the provisions of the scheme and trust deed approved by the Court, a matter within the discretion of the liquidators, and not of the Board of Trade, the motion must be dismissed with costs.

RE LAND MORTGAGE BANK OF FLORIDA, LD., [1898] 1 Ch. 444; 67 L. J. Ch. 183, 78 L. T. 156; 5 Manson, 178; 14 T. L. R. 203; 46 W. R. 333—Wright, J.

**489. Duties of Voluntary Liquidator—Officer of Company—Duty to Stamp and File Contract Relating to Shares Issued Otherwise than for Cash—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7.**—Where a company is being wound up voluntarily, the liquidator is an officer of the company within the meaning of sect. 7 of the Companies Act, 1900. Therefore it is his duty to pay out of the company's assets the stamp duty in respect of any unfilled contract for the allotment of shares for some consideration other than cash, and to file such contract.

IN RE X. & Co., LD., [1907] 2 Ch. 92; 76 [L. J. Ch. 529; 97 L. T. 50, 14 Manson, 227—Parker, J.

**490. Failure to Pay Creditor—Dissolution of Company—Liability of Liquidator—Companies Acts, 1862 (25 & 26 Vict. c. 89), ss. 133, 138, 142, 143; and 1900 (63 & 64 Vict. c. 48), s. 25.]**—The liquidator of a company, which was being voluntarily wound up, knowing of a debt due from the company to the plaintiff, omitted to pay it, though there were sufficient assets in his hands to do so. The company was subsequently dissolved, and the assets distributed. The plaintiff had no knowledge of the liquidation until after the company had been dissolved. In an action against the liquidator to recover damages for his negligence and breach of statutory duty in not paying the plaintiff,

**HELD**—that the defendant was liable.

PULSFORD v. DEVENISH, [1903] 2 Ch. 625; 52 [W. R. 73; 19 T. L. R. 688; 73 L. J. Ch. 35; 11 Manson, 393—Farwell, J.

**491. Power of Court to Appoint an Additional Liquidator—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 138, 141.]**—Section 141 of the Companies Act, 1862, enables the Court to appoint a liquidator in a voluntary winding-up, not only in the cases specified in the section, but in any other case, “on due cause shewn”—e.g., to appoint an additional liquidator.

IN RE SUNLIGHT INCANDESCENT GAS LAMP CO., [1900] 2 Ch. 728; 69 L. J. Ch. 873, 83 L. T. 406—Wright, J.

**492. Removal of—“On Due Cause Shown”—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 141.]**—The removal of a liquidator in a voluntary winding-up is a matter of judicial discretion; and if the judge has exercised his discretion according to law, the Court of Appeal has no power to interfere.

IN RE URMSTON GRANGE STEAMSHIP CO., (1901) [17 T. L. R. 553—C. A.

**493. Remuneration—Charges for Writing Letters.]**—A voluntary liquidator charged in respect of writing letters as if they had taken half-an-hour each to write, in accordance with the usual practice of accountants. The official receiver contended that this method of computation was incorrect.

**HELD**—that it was not established that there was any such general practice as to the charges allowed to be made by accountants, that the Court should not adopt a practice which makes no discrimination between the class of letter which from its importance requires real attention on the part of the principal, and letters which do not call for that attention; that the scale adopted by the Master of the Rolls and the Vice-Chancellors and sanctioned by the Lord Chancellor in 1868 was applicable only to official liquidators; and that in the case of a voluntary liquidator each case must be considered with regard to its own particular circumstances.

IN RE AMALGAMATED SYNDICATES, LD., [1901] 2 [Ch. 181; 70 L. J. Ch. 726; 84 L. T. 864; 17 T. L. R. 486—Wright, J.

**(c) Reconstruction.**

**494. Commission to Underwriters—Dissentient Shareholders—Sanction of Court—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104).]**—The Court was asked for its sanction to a scheme of arrangement for reconstructing a company which provided for the formation of a new company and the substitution for the existing debenture liability of a different debenture liability of the new company and for the transference of the assets and liabilities to the new company, and it was proposed by the scheme that the liquidator should give effect to arrangements which he had made in regard to underwriting which involved the payment of a commission out of the assets of the company.

**HELD**—that the Court ought to be very careful about giving its sanction to such underwriting agreements. It would be like turning the Court into a company promoter. The objection, however, was removed by the undertaking of the liquidator not to act upon and to procure the cancellation of the underwriting agreements.

**HELD ALSO**—that the scheme deprived the dissentient shareholders of their statutory right under sect. 161 of the Companies Act, 1862, but that objection was also removed by the undertaking of the liquidator that those

**Voluntary Winding-up—Continued.**

shareholders should be treated as if they had given the proper notices, and should retain the rights given to them by that section, and as he had also undertaken to pay the unsecured creditors in full, the scheme should be sanctioned with such modifications.

IN RE CANNING JARRAH TIMBER CO. (WESTERN [AUSTRALIA] LD., [1900] 1 Ch. 708; 69 L. J. Ch. 416; 82 L. T. 409—C. A.

495. *Sale of Assets—Dissentient Members—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 161.]—Where a company is being wound up voluntarily, and a shareholder has dissented from a sale to a new company, he cannot be deprived by the articles of association from having the benefit of the provisions of sect. 161 of the Companies Act, 1862, relating to the purchase of his interest.

PAYNE v. THE CORK COMPANY, LD., [1900] 1 Ch. [308; 69 L. J. Ch. 156; 48 W. R. 325; 82 L. T. 44; 16 T. L. R. 135—Stirling, J  
And see No. 468, *supra*.

496. *Sale to New Company—Application, after the Limited Time, for Shares in New Company—Surplus Shares at Disposal of New Company—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 161.]—A scheme for liquidation and reconstruction of a limited company, which provides, as part of the consideration for the sale of the assets, for the issue to members of the old company of shares in the new company, but also provides that to obtain the shares members must apply within a limited time (*e.g.*, twenty-one days) after receiving notice, that shares not applied for within that time shall be otherwise allotted, and generally that all the shares shall be at the disposal of the new company, is authorised by sect. 161 of the Companies Act, 1862. A member of the old company, therefore, who, having by accident omitted to make an application in due time, applies for shares after the limited period has expired, and is refused an allotment, is not entitled to an injunction to restrain the two companies and the liquidator from carrying out such a scheme without providing for the claim of such member.

*Dicta* of Lord Esher, M.R., in *Nicholl v. Eberhardt Co* ((1889), 59 L. J. Ch. 103; 61 L. T. 489; 1 Meg. 402) not followed.

Decision of Kekewich, J., reversed.

BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) [GOLD MINE, [1899] 2 Ch. 616; 68 L. J. Ch. 692, 48 W. R. 1; 81 L. T. 29; 7 Manson, 85—C. A.

**(d) Supervision Orders.**

497. *Pending Action—Costs Prior to Winding-up—Payment in Full.*]—The costs of an action begun by a company while a going concern and continued, with leave, by the liquidators after the company has been ordered to be wound up under supervision, and in which judgment was entered in favour of the defendant with costs, are pay-

able in full even when the order granting the liquidators leave to continue the action is silent on the subject.

RE LONDON DRAPERY STORES, LD., [1898] 2 Ch. [684; 67 L. J. Ch. 690; 47 W. R. 118, 79 L. T. 592—Wright, J.

498. *Petition for Supervision Order—Need not be Served on Liquidator—Companies (Winding-up) Rules, 1890, r. 35.*]—Where a company in voluntary liquidation presents a petition for a supervision order, the petition need not be served on the liquidator, and the costs of serving it on him and of his appearing will not be allowed in the future.

The whole of Rule 35 of 1890 is governed by the opening words "unless presented by the company."

IN RE EDWARD CHESTER & Co, LD., (1904) 52 [W. R. 189—Buckley, J.

499. *Public Examination under the Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 8, *necessary*.]—The powers which sect. 14 of the Companies (Winding-up) Act, 1890, gives the Court to order a company to be wound up compulsorily on the application of the official receiver includes every case where the powers of the voluntary liquidator are proved, in the opinion of the Court, to be insufficient for the purposes of winding-up in so far as the interests of creditors or contributories are concerned. An order, however, ought not to be made as a matter of course, but a strong case ought to be made out to justify the interference of the Court under that section, *e.g.*, that a public examination under sect. 8 of the Act of 1890 is absolutely necessary.

IN RE JUBILEE SITES SYNDICATE, LIMITED, [1899] 2 Ch. 204, 68 L. J. Ch. 427, 47 W. R. 606; 80 L. T. 869; 15 T. L. R. 391; 6 Manson, 331 Wright, J.

500. *Subsequent Supervision Order—Remuneration of Liquidator—Costs of Solicitor—Priority—Companies Act, 1862* (25 & 26 Vict. c. 89), ss. 110, 144, 151—*Companies Winding-up Rules, 1890, r. 31.*]—The remuneration of the liquidator in a voluntary winding-up continued under the supervision of the Court should come after all costs, charges, and expenses properly incurred. If the money recovered is not sufficient to pay the whole of the costs of the persons who are employed by the liquidator, *e.g.*, a solicitor, the money, so far as it will go, should be applied in payment of those costs before the liquidator can receive any remuneration. The scheme of priority contemplated by rule 31 of the Companies (Winding-up) Rules of 1890 applies.

*In re New York Exchange Co.* ([1893] 1 Ch. 371; 68 L. T. 247; 3 R. 144—Kekewich, J.) considered.

IN RE SANITARY BURIAL ASSOCIATION, LD., [1900] 2 Ch. 289; 69 L. J. Ch. 551, 48 W. R. 529; 82 L. T. 639—C. A.

**Voluntary Winding-up—Continued.**

501. *Supervision of the Court—Conflict of Interest and Duty in Persons Controlling Liquidation.*—A shareholder petitioned the Court to order the voluntary winding-up of a company to be continued, but subject to the supervision of the Court.

HELD—that the liquidation should be placed under the supervision of the Court, and the only reason for doing so was that in the proposed sale of the company's assets the purchasers, the representatives of the new company, were very much the same persons as those who controlled the liquidation, and it might be suggested that such a transaction was not the best mode of realising the full value of the assets

DONALD v. EGLINTON CHEMICAL Co., LD., (1900)  
[2 F 402.]

**(e) Surplus Assets.**

502 *Distribution—Shares not Fully Paid up*—In a voluntary liquidation of a company whose memorandum of association provided (*inter alia*) that "all moneys divisible amongst the holders of any class of shares shall be divided amongst the holders of such class of shares *pro rata* according to the amount paid up thereon for the time being," and whose capital was divided into ordinary shares of £5 each and founders' shares of £1 each fully paid up,

HELD—that the words "all moneys divisible" extended to not merely those assets which were actually in the hands of the liquidator, but also to the calls which could be made and which for the purpose of wind-up must be considered as having been made upon and paid by the holders of all shares not fully paid up, and that the words "according to the amount paid up thereon for the time being" meant according to the amount actually paid up or which, having regard to what the liquidator ought to do, must be considered as paid up. In other words, the assets in hand *plus* the amount of unpaid calls must be divided between all the shareholders in the proportion of £5 to an ordinary shareholder, and £1 to the holder of a founders' share, the holders of unpaid shares being debited with the amount of the calls which they have not in fact paid.

IN RE WELSH WHISKY DISTILLERY Co., LD.,  
[(1900) 16 T. L. R. 246—Cozens-Hardy, J.]

503. *Subsequent Profit—No Dividend Declared—Preference Shareholders—Cumulative Preference Dividend—Distribution as Ordinary Assets.*—A company had preference and ordinary shares, both of which were fully paid up. The holders of the preference shares were entitled to a cumulative preferential dividend of 5 per cent. per annum upon the amount paid up thereon, so long as the company was a going concern. In the four years before the commencement

of the winding-up the company did not declare any dividend. In the first three of those years the expenditure exceeded the income, so that there was a loss of capital amounting in the whole to £4,346. In the fourth year ending March 31st, 1900, there was an excess of income over expenditure amounting to £1,675. The company went into liquidation in August, 1900; another company purchased its undertakings and assets. The question arose whether the sum of £1,675, which was in effect excepted as the profits of one year's trading from the sale, should be employed in paying dividend on the preference shares or divided rateably among all the shareholders. Clause 5 of the articles of association gave the preference shareholders a right to a fixed cumulative preferential dividend of 5 per cent. subject to the provisions of the articles of association, and clause 6 of the article provided that in the event of the company being wound up the "surplus assets" were to be distributed between the holders of preference shares and ordinary shares according to the amount paid thereon.

HELD—that "surplus assets" within clause 6 meant that which remained after all the outside liabilities of the company had been satisfied: that the directors had never exercised their discretion in recommending the declaration of a dividend, and after the commencement of the liquidation they could not do so; that the *onus* was upon the preference shareholders to show that this sum was available for dividend, and this they had not done and could not do; and that the £1,675 must be divided rateably among all the holders of preference shares and ordinary shares.

*In re Bridgwater Navigation Co.* ((1891) 1 Ch. 155; 60 L. J. Ch. 415; 64 L. T. 576—C. A.); and *Bishop v. Smyrna and Cassaba Ry. Co.* ([1895] 2 Ch. 265; 64 L. J. Ch. 617; 43 W. R. 647; 72 L. T. 773; 13 R. 561; 2 Manson, 429—Kekewich, J.) distinguished.

Decision of Wright, J. ([1901] 2 Ch. 184; 70 L. J. Ch. 639; 49 W. R. 556; 84 L. T. 864; 8 Manson, 319), affirmed.

IN RE CRICHTON'S OIL COMPANY, [1902] 2 Ch. 86;  
[71 L. J. Ch. 531; 86 L. T. 787; 18 T. L. R. 556—C. A.]

## COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

## COMPOUNDING FELONY.

See CRIMINAL LAW.

## COMPULSORY PURCHASE AND COMPENSATION.

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### I. THE RIGHT TO TAKE LAND.

#### (a) In General.

1. *Easement—No Power to Acquire Easement Compulsorily—Land Described as “Bounded by a Proposed Road”—No Right to have the Road made—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).—*The provisions of the Lands Clauses Act do not extend to the compulsory acquisition of easement.

Therefore, the compulsory acquisition of land bounded by A. Street and “a proposed new road,” marked B. on the vendor’s land, confers no right to insist on such road being made, if the vendor changes his mind.

Even if, after notice to treat, an agreement is come to as to price, there is no contractual right to have the road made, at any rate, not when the owner has all along set up the case that the acquisition of the site for the particular purpose is destructive of the building scheme, for the purposes of which he intended to make the road.

Decision of Kekewich, J., affirmed.

LONDON SCHOOL BOARD *v.* FOSTER, (1903) 87 [L. T. 700—C. A.]

2. *Illegal Purpose—Land Taken Compulsorily by Lessees for Illegal Purpose—Breach of Covenant in Lease—Forfeiture—Damages—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85.]—*The plaintiffs let freehold land by a lease containing a covenant against altering buildings and a proviso for re-entry.

The defendants took an assignment of the lease, and then proceeded to exercise powers of compulsory purchase; they intended to erect a pupil teachers’ centre, and after giving the bond required by sect. 85 and being lessees in possession, they began to demolish the buildings.

In *Dyer’s Case* ([1902] 2 Ch. 768) the C. A. held that for the defendants to establish

pupil teachers’ centres was *ultra vires*, and the plaintiffs thereupon brought an action claiming that the proceedings for compulsory purchase were nugatory, and that the defendants as assignees of the lease had forfeited it by their breach of covenant.

HELD—that the defendants had forfeited the lease and were liable in damages.

A public body having powers for the compulsory acquisition of land cannot employ them to acquire land for a purpose which it is not legally competent to carry out, and cannot, by proceeding under sect. 85 of the Lands Clauses Act, 1845, confer upon itself a right which it would not otherwise possess.

A conveyance to a public body will pass the property conveyed, although that body was acting in breach of trust in applying its funds to the purchase, and it will be liable for breaches of covenants in the lease assigned to it.

*Ayres v. South Australian Banking Co.* ((1872) L. R. 3 P. C. 548; 40 L. J. P. C. 548, 19 W. R. 860) distinguished as to the former point, but followed as to the latter.

BATSON *v.* LONDON SCHOOL BOARD, (1904) [(No. 1) 67 J. P. 457; 20 T. L. R. 22; 2 L. G. R. 116—Channell, J.]

3. *Interests Omitted—Title—Ejectment.]—*The plaintiffs were authorised to take by compulsory purchase certain lands, including those in dispute in this action. The lands required were mainly the property of G; but the defendant, who held adjoining lands from G. under a lease, had encroached, and had already acquired a title under the Statute of Limitations to portion of the lands required by the plaintiffs for the residue of the term of his lease. This portion was included in the advertisements issued and the plans deposited, but the name of the defendant (of whose claim the plaintiffs were ignorant) did not appear in the schedule, or in the arbitrator’s award, as that of an interested person. No claim was ever made by the defendant to the plaintiffs in respect of any interest in the premises. In an action of ejectment brought by the plaintiffs against the defendant to recover possession of that portion of the lands to which the defendant had so acquired a title,

HELD—that the plaintiffs were not entitled to recover possession.

OMAGH URBAN COUNCIL *v.* HENDERSON, [1907] 2 [Ir. R. 310—C. A.]

4. *Interests Omitted—Entry upon Land—Omission to Purchase through “Mistake or Inadvertence”—Costs of Action—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 124.]—*Where a railway company wrongfully entered upon a small piece of land, as to which they had given no notice to treat, and the owner standing upon his strict rights issued a writ, and the action was by consent disposed of upon the motion for an injunction,

**The Right to Take Land—Continued.**

**HELD**—that the company ought to pay the general costs of the action, but that the plaintiff must pay the costs of a new and unfounded issue as to damage by blasting, which he had raised just before the hearing of the motion.

CARDWELL *v.* MIDLAND RY. CO., (1904) 21 [T. L. R. 23—C. A.]

5. *Limit of Time for "Special Act"—Interpretation—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 123—*Military Lands Act, 1892* (55 & 56 Vict. c. 43), s. 2 (2)—*Military Lands Provisional Orders Confirmation Act, 1895* (58 Vict. c. xxv. loc. and pers.).—The Lands Clauses Consolidation Act, 1845, sect. 123, limits the time for compulsory purchase of lands, if no period is prescribed, to three years after the passing of "the Special Act." The Military Lands Act, 1892, which was passed on June 27th, 1892, to provide for the acquisition of lands for military purposes, incorporates the Lands Clauses Consolidation Act, 1845, and enacts that, "in the construction of this Act and of the incorporated Acts, this Act shall be deemed the Special Act." It also enacts that the provisions of the incorporated Acts with respect to compulsory purchase shall not be put in force until a Provisional Order has been made and sanctioned by Act of Parliament. In 1895 an Act was passed confirming a Provisional Order authorising the Secretary of State for War to take certain lands in the neighbourhood of Londonderry for military purposes, and, in February, 1898, a notice to treat was served, and the other necessary steps were taken to have the amount of compensation to be paid for the lands ascertained by arbitration, pursuant to the Act. The statutory notices were served on the occupier, and on the owner, who was tenant for life. In June, 1898, an action was brought against the arbitrator appointed by the Secretary of State for War and the tenant for life by the owners of the reversion in fee, to restrain the arbitration proceedings on the ground of want of jurisdiction, the compulsory powers having, as they alleged, expired at the end of three years from the passing of the Military Lands Act, 1892, which they contended was the "Special Act."

**HELD**—that a literal construction could not be given to the words of the Military Lands Act, 1892, deeming it to be the "Special Act," and that the "Special Act" within the meaning of the Lands Clauses Act, 1845, sect. 123, was the Military Lands Act, 1892, together with the Act of 1895 confirming the Provisional Order made pursuant to the Act of 1892.

HILL *v.* HAIRE, [1899] 1 Ir. R. 87—M. R.

6. *Time for Exercise of Statutory Powers—Computation—"Three Years from the Passing of this Act"—West Metropolitan Railway Act, 1899* (62 & 63 Vict. c. ccl.), s. 29 ]  
—There is a distinction (though a fine one)

between the creation of a term, which includes the day of creation, and the limitation of a period for doing any act, in which case the first incomplete day is excluded.

The West Metropolitan Railway Act, 1899, which incorporated the Land Clauses Acts, provided by sect. 29 that: "The powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act." The Act received the Royal Assent on August 9th, 1899. On August 9th, 1902, the railway company served upon the plaintiffs a notice to treat for the purchase of certain land for the purposes of the Act.

**HELD**—that in computing the three years the day of the passing of the Act must be excluded, and that therefore the notice to treat was served in time.

*Lester v. Garland* ((1808) 15 Ves. 248) and *Russell v. Ledsam* ((1845) 14 M. & W. 574 (Parke, B.)) followed.

GOLDSMITHS CO. *v.* WEST METROPOLITAN RY. [Co., [1904] 1 K. B. 1; 72 L. J. K. B. 931; 68 J. P. 41; 52 W. R. 21; 89 L. T. 428; 20 T. L. R. 7—C. A.]

**(b) Superfluous Land.**

6a. *Application to Purpose Inconsistent with Original Purpose—Local Government Board's Direction—Injunction—Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 175, 176.]—By sect. 175 (1) of the Public Health Act, 1875, "any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold."

**HELD**—that the language of sect. 175 was not sufficient to enable a local authority to apply such land permanently to a purpose different from that for which it was originally acquired, notwithstanding that the Local Government Board had directed that the land need not be sold and should be applied permanently to a purpose inconsistent with the original purpose.

Decision of Kekewich, J. ([1900] 1 Ch. 51; 69 L. J. Ch. 39; 63 J. P. 824, 48 W. R. 69; 81 L. T. 504, 16 T. L. R. 10), affirmed.

ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT [COUNCIL, [1900] 2 Ch. 377; 69 L. J. Ch. 626, 48 W. R. 690; 82 L. T. 778, 16 T. L. R. 452—C. A.]

7. *Land Acquired by Local Authority for Generating Station—Use thereof for Refuse Destructor—Ultra vires—Electric Lighting Act, 1882* (45 & 46 Vict. c. 56), s. 10—*Electric Lighting (Clauses) Act, 1899* (62 & 63 Vict. c. 19), Sched. cl. 2 and 8—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 175.]—Land acquired by a local authority under the Electric Lighting Acts for the purpose of electric lighting cannot be used by them for any other purpose in the absence of leave specially given by some Act of Parliament.

**The Right to Take Land—Continued.**

*Attorney-General v. Hanwell Urban District Council* ([1900] 2 Ch. 377; 69 L. J. Ch. 626, 48 W. R. 690, 82 L. T. 778—C. A., *supra*) and *Attorney-General v. Teddington Urban District Council* ([1898] 1 Ch. 66; 67 L. J. Ch. 23; 61 J. P. 825, 46 W. R. 88, 77 L. T. 426—Romer, J. (*see* SEWERS, 37)) applied.

Decision of Farwell, J. ([1905] 2 Ch. 441; 74 L. J. Ch. 716, 69 J. P. 459; 54 W. R. 61; 21 T. L. R. 770, 3 L. G. R. 1259) affirmed.

*ATTORNEY-GENERAL v. PONTYPRIDD URBAN DISTRICT COUNCIL*, [1906] 2 Ch. 257, W. N. 117—C. A.

8. *Vesting of—Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), s. 127.]—Where under the provisions of sect. 127 of the Lands Clauses Act, 1845, superfluous lands become, in default of sale within the prescribed period, vested in the adjoining owners, the vesting takes place by force of a conditional limitation and not of a forfeiture.

*MILLER v. WATERFORD HARBOUR COMMISSIONERS*, [1904] 2 Ir. R. 421—K. B. D.

9. *Whether Land has become Superfluous—Railway Company—Lands Clauses Consolidation Act (Scotland)*, 1845 (8 & 9 Vict. c. 19), s. 120.]—The fact that before and after the expiration of ten years from the period limited by the special Act for the completion of the works, the directors of a railway company have entered into negotiations for the sale or lease of land taken by them under the provisions of their Act, is not conclusive evidence that at the expiration of ten years such land had become "superfluous land" within the meaning of the Lands Clauses Acts.

*London and South-Western Railway Company v. Blackmore* (L. R. 4 H. L. 610) distinguished.

Decision of Court of Session ((1897) 24 R. 1156, 34 Sc. L. R. 828) affirmed.

*MACFIE v. CALLENDER AND OBAN RAILWAY CO.*, [1898] A. C. 270, 67 L. J. P. C. 58; 78 L. T. 598—H. L. (Sc.)

**II. COMPENSATION.****(a) Principle of Assessment.**

10. *Church—Compensation—Purchase of Subsoil—Site capable of being used for Building Purposes—Union of Benefices Act*, 1860 (23 & 24 Vict. c. 142)—*Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), s. 63.]—In the year 1893 the City and South London Railway Company obtained an Act which empowered them to purchase for the purposes of their undertaking the site of the church of St. Mary Woolnoth, in the City of London. In 1896 the company served a notice to treat for the purchase of the church and the adjoining lands. In the same year they deposited a bill to extend the time for the construction of the railway. The bill was passed with certain clauses inserted, which provided that the company should not purchase or take any

part of the said church, but that they might take an easement or right of using the subsoil under any part of the property of which the surface should not be purchased, including such part of the crypt and foundations of the said church as they might require, and, further, that the compensation to be paid should, in default of agreement, be determined by an arbitrator, provided that in assessing the compensation to be paid the arbitrator should take into consideration the additional liabilities and expenses entailed upon the company in constructing the railway without removing the church. In 1897 the company gave notice to treat for certain land adjoining the church and for an easement under the church itself.

HELD—that, as there was nothing in the special Acts showing an intention that the church was to remain in perpetuity, the compensation should be assessed upon the basis that the site might possibly be used for business or building purposes, deducting from such amount the expenses the company had been put to in avoiding any injury to the church.

The decision of the Court of Appeal ([1903] 2 K. B. 728, 72 L. J. K. B. 936; 67 J. P. 221, 88 L. T. 530; 19 T. L. R. 363) affirmed.

*IN RE CITY AND SOUTH LONDON RY. CO. AND ST. MARY WOOLNETH AND ST. MARY WOOLCHURCH HAW.*, [1905] A. C. 1, 74 L. J. K. B. 147, 69 J. P. 101, 92 L. T. 31; 21 T. L. R. 127—H. L.

11. *Copyholds—Enfranchisement—Dropping Fines—Assessment of Compensation—Lands Clauses Act*, 1845 (8 & 9 Vict. c. 18), s. 95.]—A railway company in 1867 acquired compulsorily certain copyhold land under the powers of a special Act which incorporated the Lands Clauses Act, 1845, and entered into possession. By the custom of the manor, dropping fines were due on any admittance consequent on the death of a tenant. The conveyance was not enrolled until 1892, and in the meantime the tenant who executed the conveyance had died, and also her customary heir. Subsequently the defendants, the successors in title of the company which had acquired the land, applied to the lord of the manor to enfranchise the land.

HELD—that, upon enfranchisement, the lord was entitled, under sect. 95 of the Lands Clauses Act, 1845, to require the railway company to pay or to take into account in the assessment of the compensation all dropping fines arising between the expiration of one month from possession being taken, as fixed by sect. 96 of the Act, and the actual enfranchisement—namely, those dropping fines payable on the deaths of the above-mentioned tenant and her customary heir.

*In re Wilson's Estate* ((1862), 2 J. & H. 619, 623); *In re Marquess of Salisbury and L. & N.W.R. Co.* ((1879) [1892] 1 Ch. 75, n.); and *Lowther v. Caledonian Ry. Co.* ([1892] 1 Ch. 73; 61 L. J. Ch. 108; 66 L. T. 62; 40 W. R. 225—C. A.) applied.



**Compensation—Continued.**

LORD LECONFIELD *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY AND FURNESS RAILWAY COMPANY, [1907] 1 Ch. 38; 76 L. J. Ch. 33; 95 L. T. 672; 23 T. L. R. 31—Eady, J.

12. *Enhanced Value by Reason of Necessary Combination with other Lands—Liability to Maintain School by Reason of Works—Compensation for.*—In assessing the value of land compulsorily taken for the purpose of forming a reservoir, the arbitrator took into consideration, as enhancing its value, its natural character and position rendering its combination with other lands necessary for the above purpose.

HELD—that he was right.

HELD ALSO—that the possible expense to the claimant of establishing and maintaining a voluntary school for the benefit of the children of workmen engaged on the works, so as to avoid the establishment of a public elementary school, was too remote and uncertain to form a basis of compensation.

CORPORATION OF TYNEMOUTH *v.* DUKE OF [NORTHUMBERLAND, CORPORATION OF TYNEMOUTH *v.* TREVELYAN, and CORPORATION OF TYNEMOUTH *v.* ORDE, (1903) 67 J. P. 425; 19 T. L. R. 630; 89 L. T. 557—Wright, J.

13. *Interest in Land—Chance of Renewal of Lease.*—The probability that his lease will be renewed does not entitle the lessee to compensation under the Lands Clauses Acts. *Ex parte Farlow* ((1831) 2 B & Ad 341) discussed.

LYNCH *v.* GLASGOW CORPORATION, (1904) 5 F [174—Ct. of Sess.

14. *Interest in Land—Grant of Right to Sell Refreshments at Theatre—Right to Use of Necessary Rooms—Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 68.*—By an agreement in writing the lessee of a theatre granted and let to the plaintiffs the free and exclusive right to sell refreshments at the theatre, with the necessary use of the refreshment rooms and bars, cloak rooms and wine cellars, together with the right of free access for the plaintiffs and their servants to and from all parts of the premises as might be necessary and usual for exercising the rights thereby granted, and also the free and exclusive right to supply to the visitors wines, spirits, cigars, programmes, and other articles, and of providing cloak rooms and other accommodation, and also the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak rooms and on all programmes. The theatre having been compulsorily purchased by the local authority for a public improvement, the plaintiffs claimed compensation under sect. 68 of the Lands Clauses Act, 1845.

HELD—that the agreement created merely a licence, and not an interest in land within

sect 68, and that the claim for compensation failed.

*Daly v. Edwardes* ((1900) 49 W. R. 244; 83 L. T. 548; 17 T. L. R. 115—C. A.; (1901) 50 W. R. 358, 85 L. T. 650; 18 T. L. R. 169; *sub nom. Edwards v. Barrington* — H. L. (see LANDLORD AND TENANT, 176)) followed.

Decision of Wright, J. (67 J. P. 403; 88 L. T. 689, 19 T. L. R. 436) affirmed.

FRANK WARR & Co., LD. *v.* LONDON COUNTY [COUNCIL, [1904] 1 K. B. 713; 73 L. J. K. B. 362, 68 J. P. 335; 52 W. R. 405, 90 L. T. 368, 20 T. L. R. 346, 2 L. G. R. 723—C. A.

15. *“Interest” of Landowner—Arrears of Rent Due—“Incumbrance”—Costs of Prior Abortive Arbitration—Defence Acts, 1842—1873.*—Arbitrators appointed under the Lands Clauses Consolidation Acts for the purpose of assessing compensation to be paid for lands compulsorily taken for the defence of the realm.—

HELD—not to be entitled, in assessing the value of the owner's (or reversioner's) interest, to take into account the existence of arrears of rent, due by lessees or tenants, which that taking rendered irrecoverable; nor entitled to award to the owner, as part of the costs of the arbitration, costs of a prior abortive arbitration purporting to be held under the Railways (Ireland) Acts.

IN RE KILWORTH RIFLE RANGE; SECRETARY OF [STATE FOR WAR *v.* COUNTESS OF KINGSTON, [1899] 2 Ir. R. 305—Q. B.

16. *Interests Created after Notice to Treat—No right to Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 18, 68.*—A company served a notice to treat in October, 1891, and the landowner sent in his claim in January, 1892. In October, 1892, he agreed with the company as to the amount of compensation to be paid him, and the conveyance was executed in due course. In June, 1892, the landowner granted a lease of certain building land not included in the notice to treat, but which was subsequently affected injuriously by the company's undertaking; and it was admitted that at the date of the lease the lessee knew nothing of the notice to treat, and that at the date of the agreement as to compensation the company knew nothing of the lease.

HELD—that the lessee could not recover from the company in respect of injury to land leased to him after the date of the notice to treat: the effect of such a notice is to prevent a landlord creating any new interests entitled to compensation either in land to be taken by the promoters, or in land to be injuriously affected by their undertaking.

Decision of Lord Alverstone, C.J. ([1901] 2 K. B. 753; 70 L. J. K. B. 775; 85 L. T. 283; 17 T. L. R. 630; 50 W. R. 155), reversed.

Decision of C. A. ([1903] 1 K. B. 652; 72 L. J. K. B. 123; 67 J. P. 77; 51 W. R. 308; 88 L. T. 374; 19 T. L. R. 210) affirmed.

*Compensation—Continued.*

MERCER v. LIVERPOOL, ST. HELENS AND SOUTH-LANCASHIRE RY. CO., [1904] A. C. 461, 73 L. J. K. B. 960; 68 J. P. 533, 20 T. L. R. 673; 53 W. R. 241; 91 L. T. 605—H. L. (E.)

17. *Lease of Lands—Yearly Rent—Clause of Surrender at End of 7 or 14 Years—Basis of Value—Arbitration.*—P., owner in fee, demised lands in 1887 to the Secretary of State for War for twenty-one years at a rent of £43, with a clause of surrender at the end of seven or fourteen years. In 1898 the Secretary of State for War served a notice to treat

HELD—that the compensation payable to P. in respect of the reserved rent should be assessed on the basis of a purchase at a point of time immediately before the notice to treat, and should be valued at the rent reserved upon a lease for the residue unexpired of a term of twenty-one years, taking into account the likelihood of the lease being sooner determined, and that all the circumstances of the case and the holding should be taken into consideration, and that the arbitrator should find the reasonable value of the rent to be purchased on the basis of what a purchaser would have given for it immediately before the notice to treat.

*Semble*, 20 per cent. is an unreasonable addition for compulsory taking.

IN RE ATHLONE RIFLE RANGE, [1902] 1 Ir. R. 433 [M. R.]

18. *Lease to Railway—Subsequent Compulsory Purchase—Basis of Valuation.*—By an indenture dated 29th May, 1839, the then Earl of Eldon let land to a railway company, with liberty to them to make a railway thereon, at a yearly rent of £144 5s. The railway company constructed the railway on the demised land, and continued to use it up to the present time. In 1890 the defendants obtained powers to take the land in question compulsorily pursuant to the Lands Clauses Act, 1845. An arbitration took place. The umpire recited in his award that "In making this my award, I have considered the said yearly rent of £144 5s. as the proper basis upon which to calculate the value of the said lands and hereditaments."

HELD—that as the rent had been paid ever since 1839, and was likely to continue to be paid, because the defendants had expended so large a sum of money on the land that they were never likely to determine their tenancy, the umpire was justified in coming to the conclusion that, having regard to the state of things existing at the time of the notice to treat, there was a reasonable prospect of the plaintiff continuing to receive the same rent, and that the rent was, in the circumstances, an index of the value of the land to the plaintiff.

EARL OF ELDON v. THE NORTH EASTERN RAILWAY CO., (1899) 80 L. T. 723—Bruce, J.

19. *Rise in Value after Notice to Treat—Basis of Award—Knowledge Subsequently Acquired.*—On October 15th, 1898, a waterworks company under the provisions of their private Act and of the Lands Clauses Acts and other Acts respectively incorporated therewith, gave notice to a coal company that they were willing to make compensation to the latter for their estate and interest in so much of the seam of coal as the waterworks company required the coal company to leave unworked. The coal company desired to have the amount of compensation settled by arbitration. Coal rose in value subsequently to the date of the notice of October 15th, 1898.

HELD—that the measure of damages to be applied need not be taken as of the date of the notice to treat; that in ascertaining the value of the coal the umpire might look at facts occurring subsequently to the notice to treat and might take into account any increase in value between the dates of the notice and the arbitration.

Decision of Divisional Court ([1901] 2 K. B. 798; 70 L. J. K. B. 1041, 65 J. P. 691, 50 W. R. 135; 85 L. T. 233) restored

Decision of C. A. ([1902] 2 K. B. 135; 71 L. J. K. B. 613; 50 W. R. 627; 87 L. T. 291; 18 T. L. R. 604) reversed.

IN RE BWWLLA AND MERTHYR DARE STEAM COLLIERIES, 1891, LD., and PONTYPRIDD WATERWORKS CO., [1903] A. C. 426; 72 L. J. K. B. 805; 89 L. T. 280; 52 W. R. 193, 19 T. L. R. 673—H. L. (E.)

*(b) Injurious Affection.*

20. *Ancient Lights—Railway Company Erecting Workmen's Dwellings in execution of Statutory Obligation—Obstructing Ancient Lights—Action or Compensation—Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 68—South Eastern Railway Co.'s Act, 1897 (60 & 61 Vict. c. cxxxvii.), s. 39.*—The defendant company were, by sect. 39 of their Act of 1897, under the obligation of providing a number of workmen's dwellings to accommodate persons displaced by their works; and, in accordance with a scheme sanctioned (as required by their statute) by the Home Secretary, they were erecting such buildings upon land leased to them by the London County Council.

One result of their building operations was to obstruct, or darken, some ancient lights belonging to the plaintiffs.

HELD—that the company were only doing what they were empowered to do by statute, and could not be restrained from building in such a manner as to interfere with the lights; and further, that the plaintiffs' remedy was to proceed under sect. 68 of the Lands Clauses Act, 1845, for compensation.

COURAGE & CO. v. SOUTH EASTERN RY. CO., [1903] 19 T. L. R. 61—Eady, J.

21. *Artillery Range and Camp—Other Lands of Owner Injurious Affected.*—Where lands are compulsorily taken, under

*Compensation—Continued*

the Defence Code, for use as a camp and artillery range, compensation may be allowed for depreciation in value of other lands of the same owner not taken, resulting from the natural and ordinary use of the lands taken as such camp and range. In estimating such compensation regard may be had to loss of privacy and amenity, and the vulgarisation of the neighbourhood, by the establishment of a camp, but not to loss or injury from apprehended trespass by soldiers or their friends to other lands of the same owner. Compensation may be allowed for injury, caused by the nature of the artillery range, to a fishery attached to the ownership of the lands not taken.

*Semble*, compensation may be allowed for injury to an incorporeal hereditament, such as a several fishery.

IN RE NED'S POINT BATTERY, [1903] 2 Ir. 192—  
[K. B. D.]

22. *Coal-mine—Right to Sink Pit in Land Purchased—Reasonable Approval of Lessor—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 68.]—The claimant was the lessee of the minerals under certain land of an area about 335 acres, and of a pit from which to work them. The lease contained a proviso that if the lessee thought it desirable and should give notice thereof to the lessor, he should have a right to sink another pit or other pits upon the land, the surface of which was not leased, subject to the reasonable approval of the site by the lessor. The railway company agreed with the lessor to purchase his interest in about five acres of this area, and subsequently gave the claimant notice to treat in respect of any rights he might possess in such portion. The claimant served upon the lessor notice of intention to sink a pit on the land in respect of which the notice to treat had been given. He claimed compensation under the Lands Clauses Consolidation Acts on the ground that, having a right to sink a pit on the land in question, he had an interest in the land which was injuriously affected by reason of the exercise of the company's compulsory powers.

*HELD*—that the lessee's interest under the proviso in the lease was a substantial and valuable one; that there was no evidence to show that there were any reasonable grounds on which the lessor could disapprove of such a pit being sunk; and that the amount of value of the interest was a question for the arbitrator.

Decision of Divisional Court ([1900] 2 Q. B. 677; 69 L. J. Q. B. 673; 64 J. P. 647; 49 W. R. 29, 82 L. T. 819) affirmed.

IN RE MASTERS AND GREAT WESTERN RY. CO., [1901] 2 K. B. 84; 70 L. J. K. B. 516; 65 J. P. 420; 49 W. R. 499; 84 L. T. 515—C. A.

23. *Injury Arising from Acts done on Land other than the Land Taken—Whether Compensation Payable—Lands Clauses Con-*

*solidation Act, 1845* (8 & 9 Vict. c. 18), s. 63.]

—An Act of Parliament empowered a railway company to construct a railway, and provided that upon the company commencing the construction of the railway at or near a certain place the owner of certain property should be entitled to be paid by the company compensation for injuriously affecting such property in the same manner and to the same extent as if he were the owner of property part of which had been compulsorily acquired for the purposes of the railway, such compensation to be determined in case of difference in the manner provided by the Lands Clauses Acts. The company constructed the railway line and also a station, the former being nearer to the property in question than the latter. The owner of the property claimed compensation for damage arising from the construction and user of the railway line, and also from the construction and user of the station.

*HELD*—that the owner was entitled to compensation under both heads of claim.

*Dictum* of Phillimore, J., in *R. v. Mountford* ([1906] 2 K. B. 814; 74 L. J. K. B. 1003, 70 J. P. 511; 22 T. L. R. 752; 4 L. G. R. 1058, No. 25, *infra*), followed.

*Dictum* of Bigham, J., in *Horton v. Colwyn Bay and Colwyn Urban District Council* (see *SEWERS* 40), not followed.

IN RE LONDON AND NORTH-WESTERN RAILWAY  
[*Co. v. REDDAWAY*, (1907) 71 J. P. 150; 23 T. L. R. 279—Phillimore, J.]

24. *Land Taken under Defence Acts—Injurious Affection of Other Land—Compensation—Defence Act, 1842* (5 & 6 Vict. c. 94), s. 19.]—Where the Crown purchases land under the Defence Acts for the purpose of building a fort, the landowner is entitled to compensation not only for the land actually taken, but also for the injurious affection of his adjoining land by the natural and ordinary use of the land so taken for firing, &c.

*Reg. v. Abbott* ([1897] 2 Ir. R. 362) and *In re Ned's Point Battery* ([1903] 2 Ir. R. 192, No. 21, *supra*) followed.

BLUNDELL v. THE KING, [1905] 1 K. B. 516; 74 L. J. K. B. 91; 53 W. R. 412; 92 L. T. 53; 21 T. L. R. 143—Ridley, J.

25. *Land Taken Used to Widen Street—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 63.]—By a private Act passed in 1901, a tramway company were empowered to make and lay a tramway along a street, but they were not to use the line for traffic until they had widened the street. By a private Act passed in 1902, the company were empowered to purchase compulsorily land necessary for the widening of the street, including a portion of certain land held by M. on a lease. The land taken from M. was not used for the tram lines, but was thrown into the street.

*HELD*—that M. was entitled to compensation for (a) the land taken from him, (b)

**Compensation—Continued.**

depreciation of his adjoining property due to the land taken being used as a street, but not (c) depreciation due to the running of trams along the old part of the street.

R. v. MOUNTFORD, [1906] 2 K. B. 814; 74 [L. J. K. B. 1003; 70 J. P. 511; 22 T. L. R. 752; 4 L. G. R. 1058, 95 L. T. 675—Div. Ct.

26. *Land Taken by Tramway Company to Widen a Street, but Not Used as a Tramway—Depreciation in the Value of the Property Severed and Not Taken.*—A tramway company, under the powers of a private Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Tramways Act, 1870, took a strip of land for the purposes of widening the street, without any intention of running tramways over the part taken. Injury was caused to land of the same owner which was not taken both by the widening of the street and the tramway

HELD—that the owner was entitled to compensation under the Lands Clauses Consolidation Act, 1845, sect. 63.

TAYLEUR v DOLTER ELECTRIC TRACTION, LD, [(1907) 51 Sol. Jo. 702—Joyce, J.

27. *Land with Benefit of Restrictive Covenant—No Part of Land Taken—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68.*—Land which is entitled to the benefit of a restrictive covenant is injuriously affected within the meaning of sect. 68 of the Lands Clauses Act, 1845, if that benefit is taken away, though no part of the land itself is taken.

Decision of Lawrance, J., (1901) 50 W. R. 120, 85 L. T. 278; 17 T. L. R. 775; 71 L. J. K. B. 74, affirmed.

LONG EATON RECREATION GROUNDS CO., LD., v. [MIDLAND RAILWAY CO., [1902] 2 K. B. 574; 71 L. J. K. B. 837; 50 W. R. 693; 86 L. T. 873; 18 T. L. R. 743—C. A.

And see No. 30, *infra*.

28. *Lessee—Covenant for Quiet Enjoyment—Assignment of Freehold to Company by Arrangement—Compensation.*—Where a railway company acquires by agreement the reversion expectant on the determination of a lease, but does not acquire the lessee's interest, and the lessee is afterwards injuriously affected by the company's workings, he has nevertheless no remedy under the covenant for quiet enjoyment in his lease, although that covenant is not extinguished, but must obtain compensation under the Lands Clauses Consolidation Act, 1845.

Decision of Byrne, J. (78 L. T. 251; 14 T. L. R. 317; 46 W. R. 509), affirmed.

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RY. [Co. v. ANDERSON, [1898] 2 Ch. 394; 78 L. T. 821; 14 T. L. R. 489—C. A.

29. *Lessee Purchasing Freehold after Notice to Treat—Assignment of right to Compensation for Injurious Affection—Whether*

*Assignable—Chose in Action—Right of Assignee to sue in own name—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).*—In March, 1899, a railway company served upon the freeholder of certain houses a notice to treat for an easement or right of using the subsoil for the purpose of making a tunnel. In July, 1899, they served a similar notice on the plaintiff, who was lessee of the houses for a term expiring at Christmas, 1899, and who carried on a drapery business there. In October, 1899, the freeholder agreed to grant to the plaintiff a new lease for twenty-one years, and in August, 1901, he conveyed the fee simple in the houses to the plaintiff, and assigned to her his right to compensation. Between April and December, 1901, structural damage was caused to the houses by reason of the railway company's works, and the plaintiff claimed, as owner in fee, compensation for injurious affection under sect. 68 of the Lands Clauses Consolidation Act, 1845, and also for damage to trade stock.

HELD—(1) that the assignment of the right to compensation was an assignment of a right of property, and not of a mere right to litigate, and that therefore it was an assignment of a legal chose in action within the meaning of sect. 25 of the Judicature Act, 1873, for which the plaintiff was entitled to sue in her own name;

But (2) that the plaintiff could not recover in respect of the damage to trade stock, because she could not consistently with the principle of *Mercer v. Liverpool, St. Helens and South Lancashire Ry. Co.* ([1904] A. C. 461, 73 L. J. K. B. 960; 68 J. P. 533; 20 T. L. R. 673—C. A.) recover a greater amount of compensation than the freeholder at the time of the notice to treat could have recovered; and as he could not have recovered compensation under that head neither could she.

Structural damage was caused to certain other property by reason of the execution of the works of the railway company, and after that damage had been caused a lease of the property was assigned to the plaintiff, and the assignor further assigned to the plaintiff all rights of compensation in respect of structural damage caused by the company's works. No notice to treat was served on anyone in relation to that property. Upon a claim by the plaintiff for compensation for injurious affection under sect. 68 of the Lands Clauses Consolidation Act, 1845,

HELD—that the right to compensation was a legal chose in action within the meaning of sect. 25 (6) of the Judicature Act, 1873, and was therefore assignable; and that the plaintiff was entitled to sue as assignee in her own name.

Decision of Wright, J. ([1904] 1 K. B. 277; 73 L. J. K. B. 174; 68 J. P. 214; 90 L. T. 20; 20 T. L. R. 87), reversed.

DAWSON v. GREAT NORTHERN & CITY RY. CO., [1905] 1 K. B. 260; 74 L. J. K. B. 190; 69 J. P. 29; 92 L. T. 137; 21 T. L. R. 114—C. A.

*Compensation—Continued.*

30 *Restrictive Covenants — not to Erect “any Building other than Private Dwelling-houses” — Embankment for a Railway — Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68.*—The plaintiffs were owners of land, a large proportion of which they devoted to a recreation ground, and the remainder they laid out as building land and sold to purchasers, subject to certain restrictive covenants limiting the user by purchasers of the land bought. The two restrictions material in this case were contained in two covenants. There was a building line drawn on a plan attached to the conveyances, and one set of covenants related to the space between the building line and the actual boundary of the land conveyed; the other set related to the land behind the building line. The railway company acquired from the purchasers the whole of the land they had bought, and upon it they built an embankment for the railway they were making. It was admitted that what was called the toe of the embankment, by which was meant the line at the bottom of the embankment, encroached on the land between the building line and the boundary, and was, in the ordinary parlance, thereon.

The first covenant was that the purchasers “will not erect or permit to be erected upon the said pieces of land respectively any erection or building of any kind, except a fence wall not more than two feet high with suitable iron palisades, nearer to Springfield Avenue aforesaid than the line drawn on the said plan and marked ‘building line.’” That related to the strip of land between the building line and the boundary. The other covenant related to the land behind the building line, and was that the purchasers “will not erect any building on the said piece of land hereinbefore secondly described other than private dwelling-houses with proper conveniences, and all such houses shall front to Springfield Avenue aforesaid.”

HELD—that no objection could be taken ultimately at the hearing of an action to recover the compensation awarded by the verdict of the Sheriff’s jury, the proper course being in such a case to bring up the inquiry to quash it, that if one of the two claims was capable of being supported, it was immaterial that there was another which could not be supported in point of law; that the restriction was such, and was imposed under such circumstances, as to make it a restriction for the benefit of the land retained; that the railway embankment was covered by the word ‘building’ within the sense of the covenant; that a breach of the restrictive covenant against the erection of any building other than a private dwelling-house was the subject of compensation under sect. 68 of the Lands Clauses Consolidation Act, 1845.

Decision of Lawrance, J. ([1901], 71 L. J. B.D.—VOL. I.

K. B. 74; 50 W. R. 120; 85 L. T. 278; 17 T. L. R. 775), affirmed.

LONG EATON RECREATION GROUNDS CO. v. MIDLAND RY. CO., [1902] 2 K. B. 574; 71 L. J. K. B. 837; 50 W. R. 693; 86 L. T. 873; 18 T. L. R. 743; 67 J. P. 1—C. A.

And see No. 27, *supra*.

31. *School Site—Intention to Build a School—Adaptability—Compensation.*—The claimants entered into a contract for the purchase of a plot of land at Margate, with the intention of erecting thereon a ladies’ school, for which purpose the land was by reason of its nature and position well suited. After the contract was entered into, the defendants gave notice that they required a small portion of the said plot of land for the purposes of their railway. The school was not built. There was no other site available for the purpose.

HELD—that as the intention of the parties to use the land for a particular purpose might properly be taken into account, and compensation must always be assessed on the basis of value of the premises to the particular claimant, the claimants were entitled to compensation for the injury to the land as the site of a school although it was not built.

BAILEY v. ISLE OF THANET LIGHT RAILWAY, [1900] 1 Q. B. 722; 69 L. J. Q. B. 442; 43 W. R. 559, 82 L. T. 713—Div. Ct.

32. *Warehouse of Railway Company—Loading and Unloading Vans Across Pavement—Statutory Power to Stop up Pavement—User Amounting to Stopping up—Compensation for Loss of such User.*—A railway company was empowered by Act of Parliament to stop up a certain street for the purpose of providing additional warehouses. The company stopped up and enclosed part of such street, thus forming a *cul-de-sac*. They constructed a warehouse abutting upon the pavement in such *cul-de-sac*. The warehouse had flaps which opened across such pavement, and for forty years the company loaded and unloaded goods from such flaps across the pavement into and from vans standing in the *cul-de-sac* from 6 a.m. to 7 p.m. daily.

The London County Council, by a private Act which incorporated the Lands Clauses Acts, were empowered to make a new street, and they gave notice to treat for certain premises in the possession of the company. The company claimed compensation, *inter alia*, for injurious affection of the above-mentioned warehouse by reason of the works of the Council preventing them from delivering goods from the warehouse across the pavement to vans in the way they had theretofore done.

The arbitrator found that the loading operations had the effect of blocking the pavement on one side of the *cul-de-sac* and of occupying a very large part of the roadway of the *cul-de-sac*, that the user of the pavement and roadway by the company had not been interfered with or objected to by any

**Compensation—Continued.**

private person or local authority, and he also found, so far as it was a question of fact, that the company had stopped up the pavement, although they had not actually enclosed it.

**HELD**—that the use which the company had made of the pavement amounted to a stopping up of such pavement under their statutory powers above referred to, although such pavement had not been enclosed, and that, therefore, the company were entitled to compensation.

**IN RE GREAT EASTERN RY. CO. AND LONDON [COUNTY COUNCIL, (1907) 71 J. P. 95; 95 L. T. 803; 5 L. G. R. 162—Kennedy, J.**

**III. PROCEDURE.****(a) Generally.**

**34. Commonable Rights—Portions of Common Purchased Compulsorily—Apportionment by Committee of Compensation—Action by Sole Commoner for Whole Amount—Jurisdiction—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 102, 104—Inclosure Act, 1854 (17 & 18 Vict. c. 97), ss. 15, 17.]**—The plaintiff alleged that he was the sole person entitled to commonable rights over certain portions of two commons taken by a district council under their Waterworks Act. Meetings of the commoners were duly convened and the defendants were appointed statutory committees of the commoners under the provisions of the Lands Clauses Consolidation Act, 1845, and had in their hands certain sums paid for the extinction of the commonable rights over the parts of the two commons taken for the waterworks. The plaintiff claimed these sums. The defendants raised the objection that the Court had no jurisdiction to entertain the action.

**HELD**—that the defendants being willing to discharge the duties cast upon them by Parliament of apportioning the compensation they had received among the several persons interested, according to their respective interests, and there being not the slightest suggestion that they did not intend to discharge those duties honestly and to the best of their ability, or that if there should arise any difficulties which they could not see their way to solve, they would not have recourse to the very easy means which Parliament had pointed out to them, it was the duty of the Court not to interfere with them in the present circumstances.

Where common lands are acquired compulsorily, the committees appointed by the commoners, or in cases of difficulty the Board of Agriculture, and not the ordinary Courts of law, are the tribunal to determine among what persons and in what shares the compensation money should be apportioned.

So held by Kekewich, J., [1901] 2 Ch. 566; 70 L. J. Ch. 719; 65 J. P. 696; 50 W. R. 87; 84 L. T. 831.

On appeal, the parties agreed to arbitrate.

**RICHARDS v. DE WINTON, RICHARDS v. EVANS, [1903] 1 Ch. 507; 72 L. J. Ch. 269; 88 L. T. 333—C. A.**

**35. Conveyance—Compulsory Sale—Duty of Purchaser to Take Conveyance—Form of Conveyance—Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12.]**—Where, upon a compulsory sale of land under an Act of Parliament, notice to treat for the land has been given and the price fixed, the relation of the parties, as vendor and purchaser, is as fully constituted as in the case of a regular and formal agreement; and the vendor is entitled to insist upon the purchaser taking a duly executed conveyance of the land, except in those cases in which the Act itself operates as a conveyance—the form of conveyance in case of dispute to be settled by the Court.

A duty to take a conveyance is imported also by sect. 12 of the Finance Act, 1895.

**IN RE CARY-ELWES' CONTRACT, [1906] 2 Ch. 143; [75 L. J. Ch. 571; 70 J. P. 345, 54 W. R. 480; 94 L. T. 845; 22 T. L. R. 511, 4 L. G. R. 838—Eady, J.**

**36. Determination of Amount by Justices—Inquiry as to Claimant's Title—"Required to Give Up Possession"—Condition Precedent—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121.]**—In a case where justices have to determine the amount of compensation payable to persons who have no greater interest than as tenants for a year or from year to year under sect. 121 of the Lands Clauses Consolidation Act, 1845, the justices have no power to inquire and determine whether the claimant has the interest he alleges. It is, however, a condition precedent to the right to claim compensation under sect. 121 that the claimant shall have been "required to give up possession" before the expiration of his term or interest therein, and in that case he is entitled to compensation for the value of his unexpired term or interest. The justices therefore must ascertain whether or not the claimant has been "required to give up possession" before the expiration of his term.

**GREAT NORTHERN AND CITY RY. CO. v. TILLET, [1902] 1 K. B. 874; 71 L. J. K. B. 525; 66 J. P. 742; 50 W. R. 652; 86 L. T. 723—Div. Ct.**

**37. Interest—Interest on Award and on Taxed Costs.]**—A sum awarded by an umpire under the Lands Clauses Acts as compensation for injurious affection in a case where no land has been purchased, and the costs (not yet taxed) given by the statute in such a case, although not sums "payable on a fixed day under an instrument in writing," are "debts." Therefore a jury, or judge sitting alone, may give interest on such sums from the date of a formal demand claiming payment and notifying that interest will be charged.

Decision of Bray, J. ([1906] 1 K. B. 607;

*Procedure—Continued.*

75 L. J. K. B. 183; 70 J. P. 170, 94 L. T. 18, 22 T. L. R. 206; 4 L. G. R. 483) affirmed.

FLETCHER v. BIRKENHEAD CORPORATION, [1907] 1 K. B. 205; 76 L. J. K. B. 218, 71 J. P. 111; 96 L. T. 287; 23 T. L. R. 195; 5 L. G. R. 293—C. A.

38. *Items of Claim—Power of Jury to Award More on Any One Item than Amount Claimed—Power to Award More than Total Sum Claimed—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68.*—Where a claimant for compensation under the Land Clauses Consolidation Act gives particulars of his claim, showing the amount claimed in respect of each item of damage complained of, he is not bound by such particulars, and a jury may, in a proper case, award him more than he has claimed in respect of any particular item.

Whether a jury may award a claimant a greater total sum than that claimed in his statutory notice of claim, *quære*.

ROBERTSON v. CITY AND SOUTH LONDON RY. CO., [1904] 68 J. P. 280; 20 T. L. R. 395—Channell, J.

39. *Scotch Award—How far Final—Lands Clauses Consolidation Act (Scotland), 1845 (8 & 9 Vict. c. 19), s. 93—Railway Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), ss. 46, 49, 60.*—Under the law of Scotland, the arbitrator or oversman, who is appointed in the terms of the deed of agreement under which he acts, is constituted judge of law as well as of fact, and consequently cannot have his decision reversed or modified, unless he is proved to have been guilty of misconduct in his office or that he has exceeded the jurisdiction conferred on him by the submission. So, where notice to treat for a portion of a property has been given by a railway company, and the owner required them to take the whole, a finding by the arbitrator that such part cannot be taken with loss to the remainder is binding, and cannot be successfully appealed against.

Gourt v. Manchester, Sheffield and Lincolnshire Ry. ([1896] 2 Q. B. 439; 65 L. J. Q. B. 625) distinguished.

CALEDONIAN RY. CO. v. TURCAN, [1898] A. C. [256; 67 L. J. P. C. 69—H. L. (Sc.)

40. *Sealed Offer—Offer Refused—Jury summoned to assess Compensation—Right to accept Offer at any time before Verdict—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 38, 51—London County Council (Improvement) Act, 1899 (62 & 63 Vict. c. cclxvi.), s. 20.*—Though an owner, whose land is taken compulsorily, has refused to accept a sealed offer, and a jury has consequently been summoned to assess the compensation, the owner may nevertheless accept such offer at any time before the jury return a verdict as to the price to be paid, even after they have decided a preliminary point, *e.g.*, that the premises are “insani-

tary” within the meaning of sect. 20 of the London County Council Act, 1899. The jury should be directed to return a verdict for the agreed amount, so as to make it clear how the costs are to be dealt with.

R. v. HIGH BAILIFF OF WESTMINSTER, EX PARTE [LONDON COUNTY COUNCIL, [1903] 2 K. B. 189, 72 L. J. K. B. 600, 67 J. P. 302, 52 W. R. 10, 88 L. T. 834; 19 T. L. R. 506; 1 L. G. R. 569—Div. Ct.

*(b) Notice to Treat.*

41. *Counter-notice—Withdrawal of Notice to Treat—Second Notice to Treat—Counter-notice—Withdrawal of Second Notice—Third Notice to Treat—Validity—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 18, 92.*—A corporation acting under the powers of their special Act, with which was incorporated the Lands Clauses Consolidation Act, 1845, served on the plaintiffs a valid notice to treat for certain portions of their land. The plaintiffs served on the corporation a counter-notice requiring them to purchase the whole of the property, including a very large amount of property which was not comprised in the notice. The corporation thereupon withdrew their notice and afterwards served on the plaintiffs a fresh notice to treat in respect of the same premises as were comprised in the former notice to treat.

Held—that the corporation were entitled to withdraw their first notice and thereby they were relegated to the position in which they were before the first notice was served, and that they had the right to serve the second notice.

A second notice given by the corporation to treat was met with a counter-notice requiring them to take the whole of the works of the plaintiffs, which entitled the corporation to withdraw, and that was followed by a withdrawal. The corporation then served a third notice to treat in respect of the same premises as were comprised in the former notices, except certain portions thereof.

Held—that the third notice was a valid notice which might be proceeded with.

ASHTON VALE IRON CO. v. BRISTOL CORPORATION, [1901] 1 Ch. 591; 70 L. J. Ch. 230; 49 W. R. 295; 83 L. T. 694; 17 T. L. R. 183—C. A.

43. *Land Comprised in Building Agreement—Effect of Notice to Treat for a Portion only of such Land—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).*—A notice to treat was served in respect of a portion (about one-quarter) of forty-nine plots of land which were the subject-matter of a building agreement in the usual form.

Held—that the agreement was severable and was not determined by the service of the notice to treat, but remained binding upon the parties thereto as to the plots to which the notice to treat did not extend.

IN RE FURNESS AND WILLESSEN URBAN DISTRICT [COUNCIL, (1906) 70 J. P. 25; 22 T. L. R. 52—Farwell, J.  
20—2

**Procedure—Continued.**

**44. Land Required by Local Authority—Part Required—Right to have Whole Taken—Notice to Treat for Part—Claim sent in by Owner—Meeting of Surveyors—Negotiations as to Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92.]**—In October, 1904, notice to treat for part of a butcher's shop was served upon the plaintiff, the lessee. The plaintiff thereupon sent in a claim for compensation in respect of his interest, which was not accepted by the Council, and in September, 1905, the surveyors for both parties met and a sum for compensation was agreed upon between them. The solicitors then prepared a formal agreement on the lines of this arrangement, but could not agree as to certain clauses. On May 18th, 1906, the plaintiff's solicitors served upon the Council a counter-notice stating that the plaintiff declined to sell part only of the premises comprised in the notice to treat, and that he was willing and able to sell the whole of his interest in the premises, and required the Council to purchase all his interest therein.

In this action the plaintiff moved for an injunction to restrain further proceedings under the notice to treat.

**HELD**—that the arrangement made by the surveyors did not amount to an agreement and would not bind the principals until they accepted it; and that the plaintiff was not estopped from claiming his rights under sect. 92 of the Lands Clauses Consolidation Act, 1845.

A counter-notice need not be very specific provided it identifies the property.

**Lavers v. London County Council** ([1905] 69 J. P. 362; 93 L. T. 233; 21 T. L. R. 695; 3 L. G. R. 1025—*Kekewich, J.*, No. 54, *infra*), followed.

**POLLARD v. MIDDLESEX COUNTY COUNCIL**, (1905) [71 J. P. 85; 95 L. T. 870; 5 L. G. R. 37—*Parker, J.*

*And see Nos. 53—56, infra.*

**45. Right of Owner of Land to Sell after Service of Notice]**—An owner of land who has been served with a notice to treat under the Lands Clauses Act cannot create any new interest to the prejudice of the promoters, but, so long as he has not made a binding contract with them, he is entitled to sell the land to a third person, subject to the notice and rights created thereby.

**SEWELL v. HARROW AND UXBRIDGE RY. CO.**, [1903] T. L. R. 130—*Ridley, J.*

This case was argued on appeal, but settled, the Court expressing no opinion as to the correctness of the decision: 20 T. L. R. 21—*C. A.*

**46. Two Notices for Same Land—Notice Bad in Part—Whether Bad in toto—"De-lined."**—A railway company gave notice to treat in respect of two plots of land: in

the case of one plot the deposited plan showed boundaries on three only of the four sides.

**HELD**—that the plot was not properly "de-lined," and that the notice was bad, not only so far as that plot was concerned, but *in toto*.

A company wishing to take land may divide it into two portions and serve a notice in respect of each portion; and the service of one notice, afterwards withdrawn, does not preclude the company from serving another notice in respect of the same land.

**COATS v. CALEDONIAN RY. CO.**, (1905) 6 F. 1042 [—*Ct. of Sess.*

**(c) Costs.**

**47. Costs of Arbitration—Offer by Promoters—Notice for Jury—Notice for Arbitration—Sum Offered Not Less than Sum Awarded—Costs—Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 23, 34, 38.]**—There is nothing in the Lands Clauses Act, 1845, to limit the operation of sect. 34, and to show that the offer mentioned in that section must be made with reference to arbitration and not generally. If the sum offered by the promoters under sect. 38 is not less than that awarded to the claimant by the arbitrators, the claimant must bear his own costs incident to the arbitration.

**LASCELLES AND ANOTHER v. SWANSEA SCHOOL [BOARD]**, (1899) 69 L. J. Q. B. 24, 63 J. P. 742—*Ridley, J.*

**48. Costs of Arbitration—Light Railway—Taxation by Taxing Master—Review of Taxation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 1, 2, 24, Sched. I. (1.)—Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), s. 1—Light Railways Act, 1896 (59 & 60 Vict. c. 48), ss. 12, 13, 28.]**—Where the costs of an arbitration for the assessment of compensation for land taken by virtue of an Order made under the Light Railways Act, 1896, and incorporating the Lands Clauses Acts, are referred to a master of the Supreme Court to be taxed, the taxing master in taxing such costs is acting under the Lands Clauses (Taxation of Costs) Act, 1895, and not under the Arbitration Act, 1889; and he therefore taxes as a *persona designata*, and not as an officer of the Court, and his taxation is not subject to review by the Court.

**IN RE CANNINGS, LD., AND MIDDLESEX COUNTY [COUNCIL]**, [1907] 1 K. B. 51; 76 L. J. K. B. 44; 71 J. P. 46; 95 L. T. 766; 23 T. L. R. 43; 5 L. G. R. 442—*C. A.*

**49. Costs of Conveyance—What Included—Costs of a Lease to the Grantors—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.]**—Undertakers under the Lands Clauses Acts having acquired land from the trustees of a charity, such trustees obtained an order for the re-investment of the purchase-money in land. They accordingly bought land, and the contract (approved by



*Procedure—Continued.*

the Court) provided that a lease of the purchased land at a ground rent should be granted by the trustees to their vendors, and that each party should pay their own costs of the lease.

HELD—that the undertakers were not liable to pay the trustees' costs of the lease as part of the costs of the investment.

EX PARTE THAVIE'S CHARITY TRUSTEES, [1905]

[1 Ch 403; 74 L. J. Ch. 326; 53 W. R. 346; 92 L. T. 287—Farwell, J.]

50. *Costs of Conveyance—Sale of Copyholds—Death of Vendor before Completion—Fine and Fees on Heir's Admission—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 82.]—A company, purchasing copyholds from a trustee, agreed to pay "the vendor's costs of title and conveyance as provided by the Lands Clauses Act, 1845." The vendor died before completion.

HELD—that the company must pay the fine and fees payable upon the admission of his customary heir, who was admitted in order to convey to them under sect. 95.

*In re Lloyd and North London Ry.* ([1896] 2 Ch 397, 65 L. J. Ch. 626; 44 W. R. 522; 74 L. T. 548—Stirling, J.) and *In re Bear Island Defence Works and Doyle* ([1903] 1 Ir. R. 164) followed and applied.

IN RE LONDON UNITED TRAMWAYS ACT, 1900, [1906] 1 Ch. 534; 75 L. J. Ch. 223; 54 W. R. 328; 94 L. T. 608; 22 T. L. R. 286—Eady, J.

51. *Costs of Public Local Inquiry—Land taken for Military Purposes—Military Lands Act, 1892* (55 & 56 Vict. c. 43), s. 2—*Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 34—*Lands Clauses (Taxation of Costs) Act, 1895* (58 & 59 Vict. c. 111).]—Where land is taken compulsorily under the Military Lands Act, 1892, and the owner is entitled to the costs "of and incident to" the arbitration and award, such costs do not include any costs incurred by him in connection with the public local inquiry held previously under sect. 2 of the Act.

The function of a master when taxing costs under the Lands Clauses (Taxation of Costs) Act, 1895, is ministerial only, and cannot be reviewed on certiorari.

R. v. Goff, [1905] 2 Ir. R. 121—K. B. D.

(d) Taking Part only.

And see Nos. 42–43, *supra*.

53. *Part of a House Required by Local Authority—Right to take whole—Street Widening—Severance—Michael Angelo Taylor's Act, 1817* (57 Geo. 3, c. 29), s. 80.]—The plaintiff was assignee of the lease of certain premises where he carried on a tailor's business. In 1905 he was served with notice under Michael Angelo Taylor's Act, that the premises project into, and obstruct or prevent the corporation of W. from widening the street P., and requiring him

to treat for the sale of the premises to the Corporation of W.

The plaintiff alleged that the notice to treat was in fact given at the request of the London County Council, and that it was intended to throw twenty-two feet of the plaintiff's premises into the roadway, and assign the residue to an hotel company. The plaintiff alleged that the back portion of his premises constituted a valuable site for business purposes, and that he was desirous of retaining his interest therein. He asked for a declaration that the adjudication that the premises projected into P. was wrong and *ultra vires*, and for an injunction restraining the defendants from proceeding under the notice to treat. The defence was that if twenty-two feet six inches were cut off, only twenty feet would be left, and that it would be impossible to cut off twenty-two feet six inches from the front of the building without pulling it entirely down.

HELD—that the defendants had *bona fide* adjudicated that the whole house was essential to the widening of P., and that the action must be dismissed with costs.

PESCOD v. WESTMINSTER CORPORATION, [1905]

[2 Ch. 475, 74 L. J. Ch. 664; 68 J. P. 387; 54 W. R. 89, 93 L. T. 160; 21 T. L. R. 743; 3 L. G. R. 1272—Eady, J.]

54. *Part of a House Required by Local Authority—Right to have whole taken—Notice to Treat for Part—Claim made for Part—Claim not Agreed to—Apportionment of Rent of Part agreed to—Delay—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 92.]—A landowner and his lessees were served, in 1901, with notices to treat for a part of their property, and they then claimed a certain sum for that part. They subsequently agreed to apportion the rent of the part at a fixed sum, but their claim for compensation was not agreed to.

HELD—that although the apportionment of the rent had been agreed to, yet as the claim for compensation had not been agreed to, the matter was still *in medio*, and they were not precluded from asserting their right under sect. 92 of the Lands Clauses Consolidation Act, 1845, to have the whole of their property taken.

LAYERS v. LONDON COUNTY COUNCIL, (1905) 69

[J. P. 362; 93 L. T. 233; 21 T. L. R. 695; 3 L. G. R. 1025—Kekewich, J.]

55. *Part only Required—Owner Requiring the Whole to be Taken—Meaning of Word "House"—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 92.]—The term "house" in sect. 92 of the Lands Clauses Consolidation Act, 1845, must be taken to include everything that would pass under the grant of a "house" on a simple conveyance of it as such.

HELD, accordingly—that a paddock at the back of a cottage and garden, and having access only from these latter, was within the meaning of the term "house" as used by its

*Procedure—Continued.*

present, and had been used by its former, proprietor for purposes connected with their respective businesses, inasmuch as it was clear that the paddock would pass under a grant of the "house" on a simple conveyance of the latter as such.

LOW v. STAINES RESERVOIRS JOINT COMMITTEE,  
[1900] 64 J. P. 212, 16 T. L. R. 184—C. A.

56. *Soil of Private Road—Part of "house" —Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92.*—A railway company proposed to take part of a private road leading to a mansion-house with the object solely of carrying a bridge over the road for the purposes of their railway at a spot a quarter of a mile from the house. The owner claimed an injunction to restrain them from so doing without purchasing the whole property.

HELD—that such part of the private road would not pass on a conveyance of the "house" by that description, and was therefore not a part only of the house, within the meaning of sect. 92 of the Lands Clauses Act, 1845, and that the injunction ought not to be granted.

Decision of Stirling, J. (78 L. T. 285; 14 T. L. R. 307; 46 W. R. 388), affirmed.

ALLUSEN v. EALING AND SOUTH HARROW RAILWAY Co., (1898) 78 L. T. 396; 14 T. L. R. 349; 46 W. R. 483—C. A.

## IV. PURCHASE MONEY IN COURT.

57. *Charity Lands—Official Trustee—"Wilful Refusal"—Costs of Investment—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 69, 76, 80.*—A corporation acquired under the provisions of the Lands Clauses Consolidation Act, 1845, compulsory powers for the purchase of lands owned by a charity—a school—the legal estate in the lands being vested in the official trustee. The amount was determined by arbitration. The governors could not accept the money. The Charity Commissioners required the money to be lodged in Court. It was paid in under sect. 76 of the Lands Clauses Consolidation Act, 1845.

HELD—that the corporation must pay the costs of the investment of the purchase-money, as there was no "wilful refusal" within sects. 76, 80.

IN RE LEEDS GRAMMAR SCHOOL, [1901] 1 Ch. 228; 70 L. J. Ch. 89; 65 J. P. 88; 49 W. R. 120; 83 L. T. 499—Cozens-Hardy, J.

58. *Churchyard—Capital Money—Application to Repairs of Chancel—Parliamentary Costs—Jurisdiction.*—The rector of a parish opposed a private Bill in Parliament which sought for powers to take the whole of the churchyard surrounding the parish church. An agreement was arrived at by which the undertakers took part only of the churchyard and paid a sum as compensation, to

include the costs of the rector in opposing the Bill. The Bill provided that this sum should be paid into Court and dealt with as under sect. 9 of the Lands Clauses Consolidation Act, 1845. The Bill was passed and the money paid into Court. Upon an application by the rector for leave to apply part of the sum towards the cost of repairing the chancel of the church and in payment of his costs of opposing the Bill,

HELD—that the Court had jurisdiction to make the order asked.

IN RE LONDON COUNTY COUNCIL, EX PARTE PENNINGTON, (1901) 65 J. P. 536; 84 L. T. 808; 17 T. L. R. 614—Kekewich, J.

59. *Conveyance—Costs—Disentailing Deed—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.*—The costs of a disentailing deed, which is necessary in order to obtain payment of money lodged in Court by a railway company, are payable by the company, and a special order will be made as to such costs.

Ex parte Allen ((1881) 7 L. R. Ir. 124) not followed.

IN RE NAVAN AND KINGSCOURT RY. CO. AND [FINGALL, [1906] 1 Ir. R. 557—M R

60. *Money Deposited—Costs—Administration Obtained after Payment of Money into Court for the Purpose of Making Title—Colonial Administration—Power of Attorney—Grant of Administration in Ireland—Assets—Real Estate—Estate Duty Payable in Respect of Purchase-Money—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80*—An urban district council compulsorily acquired a part of certain freehold lands to which K. was entitled in fee, subject to a life annuity charged thereon. The arbitrator awarded the sum of £385 as compensation for the premises compulsorily taken. After the date of the award K. died in Australia, having by his will devised and bequeathed all his real and personal estate to a trustee in trust to sell and hold the proceeds of the sale in trust for an Australian charity. Administration of the estate of K., with the will annexed, was granted in Australia. After K.'s death the sum of £385, representing the purchase-money of the premises compulsorily taken, was lodged in Court. Administration of the estate of K., with the will annexed, was granted to A. in Ireland, who had been appointed by the Australian administrator his attorney for the purpose of taking out administration in this country and to collect the assets and other property of K. Estate duty was paid by A. on the unsold real estate of K., the fund in Court as representing the premises compulsorily purchased and some book debts due to the deceased. On the application of A. it was ordered that the money in Court should be paid out to him, and that the urban district council should pay all costs properly and necessarily payable.

HELD—that the costs of the power of attor-

**Purchase Money in Court—Continued.**

ney from the Australian administration, the costs of the grant of administration in Ireland, and the portion of the estate duly applicable to the purchase-money of the lands compulsorily taken were properly payable by the urban district council.

EX PARTE LURGAN URBAN DISTRICT COUNCIL, IN  
[RE KEARNS, [1902] 1 Ir. R. 157—M. R.]

61. *Interim Investment—Costs—Condition as to Costs of Future Investment—Lands Clauses Act, 1845* (8 & 9 Vict. c. 18), ss. 69, 70, 80]—Where the purchase-money of land taken has, under the Lands Clauses Act, 1845, been paid into Court and invested in Consols, there is no rule of practice that the Court, upon an application for a second interim investment, will impose a condition that it is to be treated as a permanent investment, and that the promoters are not to be liable to pay the costs of any future investment.

IN RE NEPTON'S CHARITY, (1906) 22 T. L. R. 442  
[—Warrington, J.]

62. *Interim Investment—Brokerage and Other Charges—Railway Stock—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), ss. 70, 80—*R. S. C.*, 1883, *Ord.* 22, r. 17 (1) (1888)]—Land, of which the applicant was tenant for life, had been taken compulsorily by the London County Council under their General Powers Act, 1897, and the purchase-money had been paid into Court. The question raised by the application was, the liability of the promoters, under sect. 80 of the Lands Clauses Consolidation Act, 1845, to pay the increased costs occasioned by an interim investment in railway stock, instead of in "Government securities." It was admitted that the brokerage and other charges for investing in the railway stock would be higher than the charges for investing in Consols.

Held—that the applicant would have in the first instance to pay the Chancery broker "the brokerage and other charges," whatever they might be, and the London County Council would have to pay him; that the investments it was proposed to make were investments sanctioned by the Court, and the London County Council were liable to pay the costs of investing in these securities, including, if necessary, the increased costs of brokerage and other charges.

IN RE GASELEE, [1901] 1 Ch. 923; 70 L. J. Ch. [441; 49 W. R. 372; 84 L. T. 386—Buckley, J.]

63. *Reinvestment in Land—Owners Providing Additional Money Beyond that in Court—Apportionment of Costs—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 80.]—A public body paid into Court the price of land purchased compulsorily. The owners when reinvesting the proceeds in land proposed to add a large sum out of their own resources.

Held—that the public body must pay the

whole costs of reinvestment except so far as they were increased by reason of the purchase-money exceeding the fund in Court.

Form of order discussed.

IN RE CLARK, [1906] 1 Ch. 615, 75 L. J. Ch. [325; 54 W. R. 385; 95 L. T. 143—Eady, J.]

64. *Payment Out—Brokerage on Sale of Investments in Court—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), ss. 69, 80]—The London County Council purchased and took, for the purposes of improvements authorised by the provisions of the London County Council (Improvements) Act, 1897 (with which the Lands Clauses Consolidation Act, 1845, was incorporated), land belonging to the college of St. Mary Magdalen, Oxford. The purchase money was paid into Court, and the land was conveyed to the council. The college presented a petition praying (*inter alia*) that the council should pay the costs including the brokerage on the sale of the investments in Court.

Held—that the brokerage, payable in the first place by the petitioners, should be included in the costs payable by the council.

IN RE MAGDALEN COLLEGE, OXFORD, [1901] 2 Ch. [786; 70 L. J. Ch. 821; 50 W. R. 90, 85 L. T. 479, 66 J. P. 23—Cozens-Hardy, J.]

65. *Payment Out—Consent of Local Government Board—London Government Act, 1899* (62 & 63 Vict. c. 14), s. 6 (5).]—Sect. 6 (5) of the London Government Act, 1899 (as to obtaining the sanction of the Local Government Board), has no application to a case where a metropolitan borough council ask for payment out of moneys paid into Court on a sale by them under the Lands Clauses Consolidation Act, 1845.

RE ISLINGTON BOROUGH COUNCIL (1907) 71 J. P. [396; 97 L. T. 78; 5 L. G. R. 1203—  
Kekewich, J.]

66. *Payment Out—Deposit—Bond Satisfied—Right of Undertakers to have Deposit Paid out—Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), ss. 85, 86, 87, 124.]—Where undertakers have found it necessary to at once enter upon land scheduled by them, and have for that purpose given a bond to the person claiming to be the owner, and deposited the estimated value of the land as required by sect. 85 of the Lands Clauses Act, 1845, they are entitled, upon the joint petition of themselves and the obligee, to have the deposit paid out to them on proof that the conditions of the bond have been satisfied.

They need not show that the person claiming to be owner, to whom they gave the bond and have subsequently paid the purchase-money, is the true owner. Section 124 protects the interests of persons, other than the obligee, who may prove to have a claim to the land.

EX PARTE MIDLAND RY. CO., [1904] 1 Ch. 61; 73 [L. J. Ch. 64; 89 L. T. 545; 20 T. L. R. 72—  
C. A.]

**Purchase Money in Court—Continued.**

67. *Payment Out—Limited Owner—Allowance to Limited Owner for Personal Inconvenience—Rector—Evidence—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 73.*—A company had acquired some glebe land under their compulsory powers, and had paid into Court £1,600, the compensation awarded in a lump sum by two surveyors. On reading affidavits by the surveyors to the effect that £100 of this sum was allowed by them in consideration of personal inconvenience and annoyance,

**HELD**—that this £100 might be paid out to the rector for his own use under sect. 73 of the Lands Clauses Act, 1845.

*Ex parte Rector of Little Steeping ((1848) 14 Beavan 159 (n); 5 Rail. Cases 207) followed.*

**IN RE STANDERTON (or SAUNDERTON) GLEBE [LANDS, EX PARTE RECTOR OF STANDERTON (or SAUNDERTON), [1903] 1 Ch. 480; 72 L. J. Ch. 276; 51 W. R. 522; 88 L. T. 267—Farwell, J.**

68. *Payment Out—Annuity for Lives Secured by Lease—Default in Payment of Annuity—Reversioner—Purchase-money paid into Court—Investment—Dividends—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 79.*—By an indenture dated 1st September, 1810, T. L. and A. H. covenanted to pay S. H., his executors, administrators, and assigns, during the lives of nine persons named therein, and the lives and life of the survivors and survivor of them, an annuity of £100, and for better securing the same devised certain freehold premises to S. H. for the term of 200 years. Default was made in payment of the annuity, and from the year 1829 to 1900 S. H. and his successors in title had been in continuous receipt of the rents of the said premises. The surplus over and above the annuity had been retained by the person for the time being entitled to the annuity, without any claim or demand on the part of any reversioner or other person. The survivor of the nine persons named died on 31st May, 1895. In 1900 the London County Council, under their compulsory powers, acquired the premises and paid the purchase-money into Court. The surviving executor and trustee and tenant for life of the residuary personal estate under the will of S. T. H., a successor in title to S. H. presented a petition for payment out.

**HELD**—that the *corpus* of the fund could not be ordered to be paid out to the petitioner, but that an order could be made directing the investment of the fund and the payment of the dividends thereon to the petitioner until the expiration of twelve years from the dropping of the last of the nine lives, *i.e.*, 31st May, 1895, or until further order.

**IN RE HARRIS, EX PARTE LONDON COUNTY COUNCIL, [1901] 1 Ch. 931; 70 L. J. Ch. 432; 84 L. T. 203—Joyce, J.**

69. *Payment Out—Re-investment in*

*Real Estate—Payment out of Court of Small Sums—Costs—Sheffield Waterworks Act, 1833—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).*—Under a private Act a waterworks company had the power of acquiring land by compulsory purchase from limited owners, including corporations *sole*, the purchase-money to be paid into Court and re-invested in the purchase of lands of like value to be settled to similar uses, the expenses of such purchases, or so much thereof as the Court should think reasonable, to be paid by the waterworks company. Under these powers the company purchased lands from the Vicar of Sheffield, and the purchase price was represented by a sum of Consols. A subsequent private Act repealed the earlier Act, but provided that all debts and moneys due or to accrue due should be recoverable from the company. A later Act transferred the powers and liabilities of the company to the Corporation of Sheffield. The corporation, under the Lands Clauses Consolidation Act, 1845, purchased further lands from the Vicar of Sheffield for the purpose of making improvements, and the purchase-money was invested in Consols. The Vicar of Sheffield petitioned that the two sums of Consols might be invested in the purchase of land, that any small balance not exceeding £20 might be paid to himself, and that the corporation might be ordered to pay his reasonable costs as to the first sum of Consols under the Waterworks Act (above-mentioned), and as to the second sum under the Lands Clauses Consolidation Act, 1845, in respect both to the investment and application.

**HELD**—that the balance, if not exceeding £20, might be paid to the petitioner, and that the petitioner's costs, both of the first and second fund, must be paid in accordance with the Lands Clauses Consolidation Act, the Court having power to make the order as to the first fund under the Lands Clauses Consolidation Act apart from the Waterworks Act.

**EX PARTE VICAR OF SHEFFIELD, (1904) 68 J. P. [313—Farwell, J.**

70. *Payment Out—Wilful Neglect to make out a Good Title—Costs of Petition for Paying out to Incumbrancer—Discretion of Court—Refusal of Vendor to give Possession—Sheriff's Costs—"Deduction" from Purchase-money—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 80, 91—Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.*—£1,000 was the amount of compensation assessed by a jury in respect of some houses belonging to S., which the London County Council had given notice to take under the powers conferred on them by the London County Council (Improvements) Act, 1897. The money was paid into Court under sect. 76 of the Lands Clauses Consolidation Act, 1845, on the ground that S. had wilfully neglected to make out a good title to the property. A petition for payment out

**Purchase Money in Court—Continued.**

of the £1,000 was presented by A. F. A., who had obtained a charge upon the fund. S. refused to give up possession and the council issued a warrant to the sheriff to deliver possession, which he accordingly did.

**HELD**—that the council should pay the costs of the petition, as although S. had been in default, yet there was not default on the part of any of the incumbencers; but even assuming that the case, by reason of S.'s neglect, fell within sect. 80 of the Lands Clauses Consolidation Act, 1845, sect. 5 of the Supreme Court Judicature Act, 1890, gave the Court a discretionary power to order payment of costs in cases excepted by sect. 80; and that the council were entitled to have the sheriff's costs paid out of the fund in Court.

*In re Fisher* ([1894] 1 Ch. 450; 7 R. 97; 63 L. J. Ch. 235; 42 W. R. 241; 70 L. T. 62—C. A.) approved.

*IN RE SCHMARE*, [1902] 1 Ch. 326; 71 L. J. Ch. [219; 50 W. R. 245, 86 L. T. 71; 18 T. L. R. 270—C. A.

**71. Payment Out—Trustees of a Charity—Power of Sale—“Absolutely Entitled”**—*Charitable Trusts Act, 1853* (16 & 17 Vict. c. 137), s. 17—*Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 69.]—The trust deed of a charity empowered the trustees with the consent of the Bishop to sell trust property and to give a full discharge of the purchase-money. A corporation, having acquired some of the property compulsorily, paid the purchase-money into Court.

**HELD**—that the trustees were persons “absolutely entitled” within the meaning of sect. 69 of the Lands Clauses Act, 1845, and that the money might be paid out to them without the consent of the Charity Commissioners.

*In re Hobson's Trusts* ((1878) 7 Ch. D. 708; 47 L. J. Ch. 310; 26 W. R. 470; 38 L. T. 365) followed.

*IN RE LORD MAYOR OF SHEFFIELD AND THE TRUSTEES OF ST. WILLIAM'S R.C. CHAPEL AND SCHOOLS*, [1903] 1 Ch. 208; 72 L. J. Ch. 71; 51 W. R. 380; 88 L. T. 157—Byrne, J.

## V. PARTICULAR CLASSES OF UNDERTAKINGS.

### (a) Railways.

**72. Drainage of Adjoining Lands—Obligation of Railway to Preserve—Time Limit—*Railways Clauses (Scotland) Act, 1845*** (8 & 9 Vict. c. 33), s. 65.]—An action was brought by the respondent against the appellants to compel them to execute certain drainage works for the better drainage of certain parts of his land, the drainage of which was alleged to have been affected by the railway works. More than forty years ago the appellants purchased lands forming part of the Fife estate. The parties went to arbitration. The decree arbitral found that

the sums assessed as purchase-money and compensation were in full satisfaction of all claims competent to the landowner against the railway company, but, at the same time, by way of precaution it noticed that there were certain obligations still incumbent upon the company under the *Railways Clauses Consolidation Act, 1845*.

**HELD**—that the decree arbitral instead of importing an obligation of indefinite duration involving an indefinite liability, merely recognized the limited liability cast upon the company by sects. 60 and 65, and that in each case the provision must be read in connection with the limitation of liability prescribed by the statute.

Decision of the First Division of the Court of Session ((1897), 35 Sc. L. R. 78) reversed.

*GREAT NORTH OF SCOTLAND RY. CO. v. DUKE OF FIFE*, (1900) 82 L. T. 425—H. L. (Sc.)

**73. Easement—Right of Way—Obstruction—Injunction—Compensation—*Lands Clauses Consolidation Act, 1845*** (8 & 9 Vict. c. 18), s. 68—*Railways Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 20), ss. 16, 53-55, 58—*Great Western Railway Act, 1899* (62 & 63 Vict. c. 187), ss. 5, 44.]—Motion by the plaintiff to restrain the defendants from obstructing and interfering with the right of way of the plaintiff over a certain occupation road, and from permitting any railway to continue upon, and from running trains or locomotives for the purpose of carrying the plant and necessary materials for the construction of their lines along the occupation road.

**HELD**—that the plaintiff's remedy was compensation under sect. 68 of the *Lands Clauses Consolidation Act, 1845*, because his interest in the land had been injuriously affected, and that he was not entitled to an injunction.

*BARNARD v. GREAT WESTERN RAILWAY AND OTHERS*, (1902) 66 J. P. 568; 86 L. T. 798—Kekewich, J.

**74. Mines—Compulsory Purchase—Notice to Purchase—Owner ceasing to Enjoy Mine—*Enjoyment of Mine by Railway Company—Award of Amount of Purchase-Money and Compensation—Interest on Amount Awarded.***]—When such a state of things arises between a vendor and purchaser as that the latter has become entitled in equity to the things purchased and to the receipt of the rents (if there be such), or to the enjoyment (if there can be enjoyment) of the thing purchased, there arises in equity a co-relative right in the vendor to have interest on his purchase-money if remaining unpaid.

A railway company, owners of a canal, were empowered by a private Act of Parliament to give notice to adjacent mine-owners not to work their mines within a prescribed distance of the canal. Upon such a notice being given the company were to purchase the mine affected by the notice, the amount of purchase-money and compensation was to

**Particular Classes of Undertakings—Continued.**

be settled by arbitration, and the compensation was to include "all such additional expenses and losses" as should be incurred by the mine-owner by the minerals being left for the support of the canal. On 19th November, 1892, the company gave such a notice to adjacent mine-owners. The amount of the purchase-money and compensation was settled by arbitration in 1901, and was subsequently paid by the company without prejudice to the question of the right of the owners to interest.

**HELD**—that on the 19th November, 1892, the mine-owners ceased to enjoy the seam of coal in the only way in which a seam of coal ungotten could be enjoyed by them, and the company became liable to pay compensation, that from the 19th November, 1892, the company had enjoyed the seam by way of support and had deprived the mine-owners of the enjoyment of it in their way by getting the coal, and so far as such a thing as a subterranean seam could be had, the company had been in possession of it since that date; and that upon equitable principle the company ought to pay to the mine-owners interest at 4 per cent. on the purchase-money from the 19th November, 1892, as that was the date from which the company had kept the purchase-money.

*Birch v. Joy* ((1852) 3 H. L. C. 565) applied.

*Caledonian Ry. Co. v. Carmichael* ((1870) L. R. 2 H. L. Sc. 56) distinguished.

**FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY CO.**, [1902] 1 Ch. 901; 71 L. J. Ch. 590; 66 J. P. 631; 50 W. R. 423; 18 T. L. R. 417—Buckley, J.

**75. Mineral—What is a Mineral?—Clay or Common Brick Earth—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78, 79.**—A bed of clay, or common brick earth, one hundred feet in thickness, lying immediately under the surface, or vegetable soil, is not a "mineral" within the meaning of sects. 77, 78, 79, of the Railways Clauses Act, 1845.

*Lord Provost of Glasgow v. Fairie* ((1888) 13 App. Cas 657; 58 L. J. P. C. 33; 37 W. R. 627; 60 L. T. 274—H. L. (Sc.)), and *Great Western Ry. Co. v. Blades* ([1901] 2 Ch. 624, 70 L. J. Ch. 847, 65 J. P. 791; 85 L. T. 308—Buckley, J., see MINES, 14), followed.

**Decision of Wright, J., affirmed.**

**IN RE TODD, BIRLESTON & CO. v. THE NORTH EASTERN RY. CO.**, [1903] 1 K. B. 603; 72 L. J. K. B. 337; 67 J. P. 105; 88 L. T. 366; 19 T. L. R. 249—C. A.

**76 Minerals—Notice not to Work—Compensation—Interest—Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 78.**—Where the owner of minerals lying under or adjacent to a railway gives notice to the railway company of his intention to work the minerals, and the railway company gives notice, under the Railways Clauses Act, 1845, to the mineral owner requiring him not to work

the minerals, as it would be likely to damage the railway, and that they are willing to pay compensation, the arbitrator cannot, in calculating the amount of compensation, allow interest upon the sum awarded from the date of the notice not to work the minerals down to the date of the award.

*In re Bullfa, &c. Collieries* ([1903] A. C. 426; 72 L. J. K. B. 805; 89 L. T. 280; 19 T. L. R. 673—H. L., No. 19, *supra*), and *Caledonian Ry. Co. v. Carmichael* ((1870) L. R. 2 Sc. App. 56—H. L.) followed and applied.

**Decision of Channell, J.** (68 J. P. 375, 20 T. L. R. 311) reversed.

**RICHARD v. GREAT WESTERN RY. CO.**, [1905] 1 K. B. 68, 53 W. R. 83; 21 T. L. R. 37; 74 L. J. K. B. 9; 69 J. P. 17, 91 L. T. 724—C. A.

**77. Minerals—Notice not to Work—Compensation for not Working—Right of Railway Company to Minerals—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), s. 71.**—Where a railway company gives notice under sect. 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, requiring an owner of minerals under or near their railway to leave such minerals unworked, and pays compensation therefor, the company acquire no right to the minerals thus left unworked.

**DUKE OF DEVONSHIRE v. CALEDONIAN RY. CO.**, [1906] 7 F. 847—Ct. of Sess.

**78 Minerals—Notice to Leave Unworked—Compensation—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 78.**—A coal company who held a lease entitling them to carry away all the coal under certain lands for the term of twenty-one years gave notice under sect. 78 of the Railways Clauses Consolidation Act, 1845, to a railway company of their intention to work coal under the railway. The railway company thereupon required them to leave certain coal unworked.

It would not have been possible for the coal company within the term of their lease to work all the coal under the lands leased to them, and the only result of the railway company's requirement was that they were compelled to work other coal under such lands at an increased cost.

**HELD**—that the compensation payable under sect. 78 of the Railways Clauses Consolidation Act, 1845, to the coal company and the reversioners was the profit which they would have made, respectively, if the coal to which the railway company's requirements related had been worked, and not the damage caused to them by the interference with the working of the coal under the leased lands.

**Decision of C. A.** ([1907] 1 K. B. 402; 76 L. J. K. B. 253; 71 J. P. 91; 96 L. T. 35; 23 T. L. R. 163) reversed.

**IN RE EDEN'S EXECUTOR'S AND JOICEY & CO. AND THE N. E. RY. CO.**, [1907] A. C. 400; 76

**Particular Classes of Undertakings—Continued.**

L. J. K. B. 940; 71 J. P. 450; 97 L. T. 254;  
23 T. L. R. 685—H. L. (E.).

**79. Minerals—Reservation of Minerals—Liability of Railway Company—Limitation of Time for Arbitration—Costs—Lands Clauses Consolidation Act (Scotland), 1845 (8 & 9 Vict. c. 19), ss. 117, 119.]**—The appellants, a railway company, acquired compulsorily certain land of which the respondents were the superiors; the company made their line in a cutting some distance below the surface level, and in 1894 the respondents raised an action claiming that the minerals were reserved to them by the original feu contract to the feuar from whom the company purchased; and that they were entitled to compensation in respect of both the minerals below the level of the line and also the minerals removed in the course of its construction. They were awarded compensation for the minerals below the line level; and the Court expressly reserved to them any claim as to the minerals above the line, such claim to be determined by arbitration under the statute. In the present action the respondents claimed damages in respect of the minerals removed from above the line level, on the basis of the company being trespassers, inasmuch as they did not serve a notice to treat within six months of the determination of the first action.

**HELD**—(1) that, if there had been a final determination of the parties' rights in the first action, it was for the respondents to take the initiative, and send in a definite claim; and that, until they did so, the six months would not begin to run;

(2) There had not been any final determination of the right to the minerals above the line level:

And, therefore, (3) that the company were entitled to rely on sect. 117 of the Lands Clauses (Scotland) Act, 1845, and pay for the minerals removed on the basis of being purchasers under the statute, and not trespassers

**Costs.**—The company having throughout disputed the respondents' right to any compensation for the minerals above the line level, they were ordered to pay such costs as fell within the terms of sect. 119, to be taxed as between agent and client.

**Decision of the Second Division of the Court of Session** ([1899] 37 Sc. L. R. 150, 406) reversed.

**CALEDONIAN RY. CO. v. DAVIDSON & CO.**, [1903] [A. C. 22; 72 L. J. P. C. 25; 87 L. T. 602—H. L. (Sc.)]

**80. Promoters taking Possession before Compensation Assessed—Inadequate Valuation by Surveyor appointed by Board of Trade—Injunction—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85—Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 36.]**—Where a surveyor, who has been appointed by the Board of Trade, under

sect. 36 of the Railway Companies Act, 1867, to value the claimant's interest in land to be taken by a railway company, and the compensation to be paid to him for all damage caused by the execution of the works, so as to entitle the company to take possession of the land under sect. 85 of the Lands Clauses Consolidation Act, 1845, before the compensation is ascertained, has made a valuation which purports to include all damage and injury, the Court has no jurisdiction to grant an injunction to restrain the company from taking possession of the land upon the ground that the surveyor's valuation is grossly inadequate

**Decision of Kekewich, J.** ((1902) 18 T. L. R. 542), affirmed.

**RIVER RODEN CO., LD. v. BARKING TOWN [URBAN DISTRICT COUNCIL]**, (1902) 18 T. L. R. 608—C. A.

**(b) Waterworks.**

**81. Reservoir—Special Adaptability—Right of Arbitrator to take into Consideration—Waterworks Clauses Act, 1847 (10 Vict. c. 17), s. 6.]**—In assessing the amount of compensation to be paid in respect of land taken for the purpose of constructing a reservoir, the natural and peculiar adaptability of the land for that purpose (apart from any value created or enhanced by the scheme or Act under which the land is taken) is a fit and proper matter to be taken into consideration by the arbitrator as an element in the value thereof, although it is not proved affirmatively that there are other possible purchasers of the land for that purpose. It is for the undertakers to disprove the possibility of a market.

*In re Riddell*, No. 82, *infra*, followed.

**Decision of Wright, J.** ([1903] 1 K. B. 574; 72 L. J. K. B. 285; 67 J. P. 137; 51 W. R. 590; 88 L. T. 421) affirmed.

**IN RE GOUGH AND THE ASPATRIA, SILLOTH AND [DISTRICT JOINT WATER BOARD]**, [1904] 1 K. B. 417; 73 L. J. K. B. 228; 68 J. P. 229; 52 W. R. 552; 90 L. T. 43; 20 T. L. R. 179—C. A.

**82. Reservoir—Special Adaptability—Land taken Compulsorily for Reservoir.]**—In assessing compensation in respect of land acquired compulsorily the arbitrator ought to take into account the natural adaptability of the site as enhancing its value to the vendor.

**IN RE RIDDELL AND NEWCASTLE AND GATESHEAD [WATER CO.]**, (1879) (1904) 90 L. T. 44 (n)—C. A.

**(c) Housing of the Working Classes Acts.**

**83. Arbitrator—Powers of—Personal Inspection—Housing of Working Classes Act, 1890 (53 & 54 Vict. c. 70), Sch. II., 7.]**—An arbitrator appointed to determine the amount of compensation to be paid to the occupier of land taken under the provisions of the Housing of the Working Classes Act, 1890, is not, by clause 7 of the second schedule,

**Particular Classes of Undertakings—Continued.**  
 confined within the limit of the amounts at which the land was valued on behalf of the occupier and the local authority respectively. Such an arbitrator himself "viewed" the land and awarded as compensation a sum less than the value placed upon it by the witnesses on behalf of the local authority.

HELD—that he was at liberty to do so.

CRAWFORD v. M'SWINEY, [1904] 2 Ir. R. 15—  
 [K. B. D.]

84. *Tied Public-house—Whether Arbitrator may take into Account the Tying Covenant—Housing of Working Classes Act, 1890* (53 & 54 Vict. c. 70), s. 21.]—A brewery company, the lessees of a public-house, had sub-let it for the residue of their term less ten days, at the same rent as they themselves paid to the freeholders; but their tenant was bound to pay them £200 in each year in which he should sell on the premises any malt liquor not bought from them. The house was taken compulsorily under the provisions of the Housing of the Working Classes Act; and the question arose whether the arbitrator, in assessing the compensation, could take into account the value to the company of the tying covenant. Sect. 21 provides that "the estimate of the value of such lands, or interests, shall be based upon the fair market value."

HELD—that it was a covenant running with the land, and must be taken into account.

CHANDLER'S WILTSHIRE BREWERY CO., LD., AND  
 [LONDON COUNTY COUNCIL, IN RE, [1903] 1  
 K. B. 569; 72 L. J. K. B. 250, 67 J. P. 119;  
 51 W. R. 573; 88 L. T. 271; 19 T. L. R. 268;  
 1 L. G. R. 269—Wright, J.]

85. *Variation of Plans—Plans Deposited to Secure Provisional Order—Extent of Incorporation—Basis of Compensation—Modification of Plans.*]—Prior to the passing of a Provisional Order Confirmation Act empowering the defendants to acquire compulsorily from the plaintiff and others certain lands for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and for the purposes of the widening, opening, enlarging, and otherwise improving certain streets and roads in Bray, plans of the lands to be taken, one of which showed a ground plan of forty-five cottages proposed to be built, a proposed "playground," and a proposed approach fifty feet wide, were duly deposited with the Local Government Board and in Parliament. After the passing of the Act, an arbitrator assessed the compensation to be paid to the plaintiffs for purchase-money and for injury to adjoining lands, and the amount awarded was paid. Subsequently modified plans for the building upon the acquired lands of a larger number of cottages, the use for that purpose of part of the space marked "playground," and the making of a twenty-foot in-

stead of a fifty-foot approach, were prepared by the defendants and approved by the Local Government Board. On an application for an injunction to restrain the carrying out of the modified plans,

HELD—that the only restriction on the use of the lands compulsorily acquired by the defendants was that they should be used for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and also for the purpose of widening, enlarging, or otherwise improving the said streets and roads in Bray; that whilst observing such purposes the defendants were not bound to adhere to the deposited plans; and that the plaintiffs' claim for an injunction should be dismissed.

Decision of Barton, J. ([1906] 1 I. R. 560) affirmed.

BRADSHAW v. BRAY URBAN COUNCIL, [1907] 1  
 [Ir. R. 152—C. A.]

#### (d) Education Authorities.

86. *Depreciation of Adjoining Land by School—Damages.*]—P. was the lessee of land. The L. S. B. served him with notice to acquire a portion of it to erect a school.

On another part he had already erected some houses, and when the value of the land came to be assessed gave evidence of the depreciation of these houses owing to the noise caused by the children at the new school. The jury assessed the damages at £1,000.

HELD—that the jury were entitled to assess the damages under this head, and that the Court would not interfere with their verdict.

R. v. PEARCE, EX PARTE THE SCHOOL BOARD  
 [FOR LONDON, (1898) 67 L. J. Q. B. 842; 78  
 L. T. 681; 14 T. L. R. 465—Div. Ct.]

## CONCEALMENT OF BIRTH.

See CRIMINAL LAW AND PROCEDURE.

## CONDITIONS OF SALE.

See SALE OF GOODS; SALE OF LAND.

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## CONFLICT OF LAWS.

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### (a) Miscellaneous.

And see *BILLS OF EXCHANGE*, 9; *EXECUTORS*, 49—58, 110—115; *LUNATICS*, 37—43; *PRACTICE AND PROCEDURE*, 315, 317.

1. *Cheque—Action Upon—Foreign Law—Cheque given Abroad for Gaming—Gaming Legal by Foreign Law—Right to Sue on Cheque—Gaming Acts*, 1710 (9 Anne, c. 14), s. 1, and 1835 (5 & 6 Will. 4, c. 41), s. 1.]—The defendant, when playing baccarat at a club in a foreign country, where baccarat was legal, borrowed a sum of money from the manager of the club for the purpose of paying his losses, and requested the manager to pay other losses for him. He gave the manager a cheque for the total amount, the cheque being an English one, drawn upon the defendant's London bank. In an action in this country upon the cheque,

**Held** (by Collins, M.R., and Cozens-Hardy, L.J., Moulton, L.J., dissenting)—that, as the plaintiff sued on the cheque, the transaction must be regulated by English law, that the cheque must be regarded as given for an illegal consideration, and that therefore the plaintiff could not recover.

*Semble*—he might have recovered, if he had sued on the original consideration.

*Robinson v. Bland* (1760) 1 W. Bl. 234, 256; 2 Burr. 1077 followed.

*King v. Kemp* (1863) 8 L. T. 255 not followed.

Decision of *Darling, J.* (95 L. T. 460; 22 T. L. R. 770) reversed.

*Moulis v. Owen*, [1907] 1 K. B. 746; [76 L. J. K. B. 396; 96 L. T. 596; 23 T. L. R. 348—C. A.

2. *Chose in Action—Personalty in England—Assignment Abroad—Notice—Priority.*]—A., domiciled in New York, assigned to B. his reversionary interest under the will of an English testator: the trust funds were invested in English securities. B. gave no notice to the trustees, for by New York law no such notice is necessary to complete an assignment of a reversionary interest or personalty. Subsequently A., while in England, mortgaged the same interest to C. who gave notice to the trustees.

**Held**—that in the case of an English trust fund settled by the will of an English testator English law must prevail, and that C. was entitled to priority.

*Kelly v. Selwyn*, [1905] 2 Ch. 117, 74 L. J. Ch. [567; 53 W. R. 649; 93 L. T. 633—Warrington, J.

3. *Company—Liability of Shareholders—Company Incorporated under Companies Acts—Carrying on Business in Foreign State—Debts Incurred Abroad—Law of Foreign State.*]—A company was incorporated in England as a limited company under the Companies Acts, 1862 to 1893, with its registered office in England, and its share capital was fully subscribed and paid up. The objects of the company, according to its memorandum of association, were to acquire mining rights and land in the United States of America and elsewhere, to purchase or hire machinery, and to do all other things incidental or conducive thereto; and by the articles of association the company was empowered to appoint any person as its attorney for the transaction of business abroad, with such powers as it might deem necessary to enable the company's operations to be validly carried on abroad, and to do all such acts as might be necessary to comply with the law of any country where the company might carry on business. The company carried on business in the State of California, in the United States of America, and incurred debts there in the purchase of machinery in that State. By the law of the State of California each stockholder of a corporation is individually liable for debts contracted by the corporation during the time he was a stockholder, according to the proportion which his holding bore to the subscribed capital of the corporation, and no corporation organised outside the limits of the State was allowed to transact business within the State on more favourable conditions than were prescribed by law to similar corporations organised under the laws of the State. The company having gone into liquidation, the unpaid vendors of the machinery in California brought an action in England against the defendant, who was a shareholder in the company at the time when the debts were contracted, to recover his proportion of the amount due, as prescribed by the law of California.

**Held**—that the defendant was not liable, as the facts did not show that he had authorised the company to enter into contracts in California so as to make him personally liable, and the general power given to the company by its memorandum and articles to carry on business abroad was subject to the fundamental condition of limited liability on the part of the shareholders.

Decision of *Kennedy, J.* ([1905] 1 K. B. 304; 74 L. J. K. B. 243; 21 T. L. R. 179; 10 Com. Cas. 53; 12 Manson, 199), affirmed.

*Risdon Iron and Locomotive Works v. Furness*, (1905) 22 T. L. R. 45—C. A.

4. *Contract—Insurance—Fire—Reference to Arbitration—Intention of Parties—Award Condition precedent to Right of Action.*]—That intention of the parties to a contract,

**Miscellaneous—Continued.**

who reside in different countries, is the true criterion by which to determine by what law it is to be governed is too clear for controversy.

*Hamlyn & Co. v. Talisker Distillery* ([1894] A. C. 202, 58 J. P. 540; 71 L. T. 1; 6 R. 188—H. L. (Sc.)) followed.

A fire policy for £1,000 was issued by the Sun Fire Office in favour of the respondent on a collection of foreign stamps. The policy was in the English language, but it was executed in Jersey by the agents of the company. One condition of the policy was to pay out of the funds of the company, another was that no action should be sustained for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition of the policy, which referred to the English Arbitration Acts. The respondent appointed a resident of Jersey an arbitrator, and the appellants appointed a resident of London the other arbitrator, and the arbitrators were not able to agree upon an umpire.

HELD—that the contract between the parties was an English contract, and that wherever sued upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law; that the intention of the parties was too plain to be mistaken; and that the contract was one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract.

*Scott v. Avery* ((1855) 5 H. L. C. 811; 25 L. J. Ex. 303, 2 Jur. (N.S.) 815; 4 W. R. 746) followed.

*SPURRIER v. LA CLOCHE*, [1902] A. C. 446; 71 [L. J. P. C. 101; 51 W. R. 1; 86 L. T. 631; 18 T. L. R. 606—P. C.]

5. *Contract—Locus contractus—Locus solutionis.*—Where a contract is made in a foreign country between two Englishmen, and is intended to be performed primarily in that foreign country, this fact is in itself sufficient, in the absence of evidence to the contrary, to prove an intention on the part of the parties that the contract shall be governed by the law of the foreign country.

Decision of *Kekewich* ([1899] 2 Ch. 173; 68 L. J. Ch. 530; 47 W. R. 681; 81 L. T. 76; 15 T. L. R. 442) affirmed.

*SOUTH AFRICAN BREWERIES, LD. v. KING*, [1900] 1 Ch. 273; 69 L. J. Ch. 171; 48 W. R. 289; 82 L. T. 32; 16 T. L. R. 172—C. A.]

6. *Contract—Promise of Marriage—Corroboration—Letter Written in England to Plaintiff in Denmark—Intention of Parties—Danish Law—Lex Fori.*—The defendant, who resided in England, wrote to the plaintiff, who was a Danish lady residing in Denmark, a letter which was held to be a conditional offer of marriage, and which she

accepted by letter. Both the defendant's and plaintiff's letters were written in English. The plaintiff was at the time in the employment in Denmark of a company which was registered in England and formed to take over the defendant's business. It was intended that the marriage should take place in England, and that the married home should be here. According to the evidence as to the Danish law, only in certain circumstances (which did not exist in the present case) could an action for breach of promise of marriage be brought in Denmark, and no action lay if those circumstances did not exist.

HELD—(1) that the intention of the parties was that the contract should be governed by English law, and that the action was maintainable; and (2) that, if the contract was to be governed by Danish law, the evidence did not show that there was no valid and binding contract according to that law, but only that in the circumstances of the present case there was no remedy in Denmark, and that therefore, the remedy being purely a question of procedure, the action could be maintained.

*HANSEN v. DIXON*, (1907) 96 L. T. 32; 23 [T. L. R. 56—Bray, J.]

7. *Contract—Validity—Contract Made and to be Performed Abroad—Contract Valid according to Law of Foreign Country—Invalid by English Law—Obtained by Duress Abroad—Threat of Prosecution—Right to Sue in England.*—A contract made in a foreign country, between persons domiciled in that country, and intended to be performed there, which is valid according to the law of that country, will not be enforced by an English Court if it conflicts with what are deemed here to be essential public or moral interests.

The defendant's husband had fraudulently misappropriated in France certain moneys of the plaintiff, and the defendant, in order to induce the plaintiff not to prosecute, agreed to herself repay him by instalments. The agreement was intended to be performed in France, and was proved not to be invalid according to French law.

HELD—that, though a contract to stifle a prosecution might be valid in France, yet this contract had been obtained by such moral coercion as precluded an English Court from enforcing it.

Decision of *Wright, J.* ([1903] 2 K. B. 114; 72 L. J. K. B. 596; 51 W. R. 683; 88 L. T. 691; 19 T. L. R. 455), reversed.

*KAUFMAN v. GERSON*, [1904] 1 K. B. 591; 73 [L. J. K. B. 320; 52 W. R. 420; 90 L. T. 608; 20 T. L. R. 277—C. A.]

8. *Criminal Procedure—Arrest out of British Territory—Legality—Jurisdiction along Line of Railway in Independent State.*—The ruler of an independent state in India granted to the British Government civil and criminal jurisdiction along a line of railway running through his territories.

**Miscellaneous—Continued.**

HELD (reversing the judgment of the Court below)—that this jurisdiction only extended to offences committed on the railway, and to matters connected with the administration of the railway, and did not amount to a cession of territory, or justify the arrest of a person on the railway for an offence committed in another part of India in no way connected with it.

SAYAD MUHAMMAD YUSUF-UD-DIN *v.* R. (1898)  
[18 Cox, C. C. 620; 76 L. T. 813—P. C.]

9. *Infants—Payment out of Court—French Legal Guardian—French Infants—Discretion of Court—Trustee Act, 1893* (56 & 57 Vict. c. 53), s. 42.]—A French subject who, according to French law, is the legal guardian of his infant children (also French subjects and domiciled in France), and is empowered by that law to receive and give legal discharge for all moneys coming to them during their minority, is not entitled as of right to payment out of Court of a fund to which such infant children have become absolutely entitled. The Court, however, can, in its discretion, pay the fund out to him upon the production of satisfactory evidence that it will be applied for the benefit of the infant children.

IN RE CHATARD'S SETTLEMENT, [1899] 1 Ch. 712,  
[68 L. J. Ch. 350; 47 W. R. 515; 80 L. T. 645—Kekewich, J.]

10. *Jurisdiction—Scotland.*]—In order to maintain an action *ex delicto* in Scotland in respect of a wrong committed in another country, the wrong must be actionable both by the law of Scotland and by the law of the other country.

Therefore, where an abusive letter, posted in Scotland, which if addressed to a person in Scotland would have given him a right of action on the ground of injury to his feelings, was addressed to a person in England:

HELD—that such person could not maintain an action in Scotland.

EVANS & SONS *v.* STEIN & Co., (1905) 7 F. 65—  
[Ct. of Sess.]

11. *Ship—Collision on the High Seas—Personal Injury.*]—In the case of a person who is injured in a collision between two ships on the high seas, the liability of the owner of the ship in fault will be the same as that attaching to him, by the law of the country where he is domiciled; but that liability will only arise when the person injured is domiciled in the country where the law imposes on its subjects a corresponding liability.

KENDRICK *v.* BURNETT, (1898) 25 R. 82; 35 Sc.  
[L. R. 62—Ct. of Sess.]

12. *Proclamation of Foreign Sovereign—Wrongful Act complained of—Defence of Authority of Foreign Sovereign—Act of State—Liability of British Officer.*]—The re-

spondents in November, 1897, shipped arms and ammunition upon the "Baluchistan" ss., to Bahrein *viâ* Bushire, and to enable them to get the most advantageous market they were marked Bahrein *viâ* Bushire, "optional Muscat." In 1898 the Sultan of Muscat proclaimed that all arms and ammunition found within the territorial waters of Muscat belonging to British, Persian, or Muscat subjects, and intended for Indian or Persian ports, would be confiscated, and the Sultan authorised the commanders of all British and Persian men-of-war to search all vessels within the territorial waters of Muscat, sailing under the British, Persian, or Muscat flags, and to confiscate all arms and ammunition found on board such vessels intended for Indian or Persian ports. The appellant, while in command of H.M.S. "Lapwing," searched the "Baluchistan" on her arrival within the territorial waters, and seized and landed the arms and ammunition on board. The Sultan's Court decided that the goods had been lawfully seized. The respondents brought an action against the appellant for wrongfully depriving them of the arms and ammunition.

HELD—that the Sultan's authority was supreme within his own territory, that the Sultan's declaration was an act of State, which could not be impugned in an action in this country, that an act done by such authority by a British subject and participated in by the British Government could be recognised by British Courts as lawful, being such an act as would not have been lawful elsewhere, and that the answer to the claim was final and complete—that the question had been decided by the Sultan himself.

Decision of the Court of Appeal ((1900) 82 L. T. 698; 16 T. L. R. 405, 8 Asp. M. C. 418—C. A.) reversed.

CARR *v.* FRACIS, TIMES & Co., (1901) 85 L. T. [144; 17 T. L. R. 657; [1902] A C. 176; 71 L. J. K. B. 361; 50 W. R. 257—H. L. (E.)

**(b) Domicil.**

13. *Acquisition—Scotchman—Domicil Acquired in Ceylon*]—B., a Scotchman, went to Ceylon at the age of twenty-two and remained there actively engaged in business for the rest of his life, a period of over thirty years. He was successful in business, and had built for himself a country residence within a few miles of Colombo. He was never married. During the period of his residence in Ceylon he visited Great Britain on six occasions, mainly on business, and during these visits he never, except on one occasion, stayed in Scotland for more than three or four days. He repeatedly expressed his dislike for the climate of Scotland and for its inhabitants, and never spoke of any intention of retiring from business in Ceylon and returning to take up his abode in Scotland. His only property in Great Britain consisted of a villa in Scotland, valued at £1,400, which he had inherited from his father a few years before

**Domicil—Continued.**

his death, and some shares in companies registered in London but doing business in Ceylon. He died while on his sixth visit to England.

**HELD**—that he had abandoned his domicil of origin and had acquired a domicil of choice in Ceylon.

**LORD ADVOCATE v. BROWN'S TRUSTEES**, [1907]  
[S. C. 333—Ct. of Sess.]

**14. Change of—Domicil of Origin—Intention.**—In order to effect a change of domicil of origin and to acquire a domicil of choice, there must be a fixed determination in a person *exuere patriam*—to strip himself of his nationality. The character of the person and his pursuits must all be taken into account. The mere fact that he had a residence in a country, which was not the country of his domicil of origin, where he resided during the greater part of the later years of his life, he, at the same time, having other residences in the country of his domicil of origin where he occasionally resided, is of very slight importance in determining whether there has been a change of domicil.

Decision of the Ct. of Sess. (4 F. 1014) affirmed.

**THE MARCHIONESS OF HUNTLY AND ANOTHER v. GASKELL AND OTHERS**, [1906] A. C. 56, 75  
L. J. P. C. 1; 94 L. T. 33; 22 T. L. R. 144—  
H. L. (Sc.)

**15. Change of—Long Residence—Evidence.**—A native of the United States had lived for twenty-seven years in England. He nevertheless always described himself as an American citizen, and had hoped to make his home finally in Boston; but an internal complaint from which he suffered made a voyage across the Atlantic impracticable for him.

**HELD**, upon the facts (Lord Lindley dissenting)—that he had not abandoned his American domicil.

**WINANS AND ANOTHER v. ATTORNEY-GENERAL**,  
[1904] A. C. 287; 73 L. J. K. B. 613; 90  
L. T. 721; 20 T. L. R. 510—H. L. (E.)

**16. Domicil of Origin—Animus Reverendi.**—A mariner sailing on a Liverpool line of ships lived when on shore in Liverpool, and died there at the age of sixty-two. A Scotsman by birth, he had gone to sea as a lad, and never resided for any time in Scotland; but (1) he had expressed his intention to return there; (2) had married a Scotswoman; (3) had his settlement prepared in Scottish form by Annan solicitors; (4) deposited his savings in an Annan bank; (5) secured a family burying-place in the Annan cemetery, where he was finally laid.

**HELD**—that he had never lost his Scottish domicil.

**KER v. COULTHART AND OTHERS**, 1898 (O. H.),  
[6 S. L. T. 319.]

*Cf. Hope, Todd and Kirk v. Bruce*, 1899 (O. H.), 6 S. L. T. 384.

**17. Evidence of Renunciation of Domicil.**—A Scotsman went, in 1888, to America, accompanied by his wife. She returned to Scotland in 1893, as her health was bad. He stayed on, and for a few months made remittances home. In October, 1898, the wife raised in the Scottish Courts an action for divorce for desertion. There was no defence. It appeared that when the wife left America her husband had expressed the intention of following her; and so late as September, 1898, he had written to a sister that he hoped to return to Scotland soon.

**HELD**—that the Scottish Courts had jurisdiction, as there was no evidence that the husband had renounced his Scottish domicil.

**ROSS v. ROSS**, [1899] 36 S. L. R. 707.

(c) Foreign Judgments.

**18. Action Upon—Defendant a British Subject Resident in England—Agreement to Submit to Jurisdiction of Foreign Court—Final Judgment Binding.**—By a contract made in Belgium between the plaintiffs and the defendant, who was a British subject neither domiciled nor resident in Belgium, it was agreed that all disputes should be submitted to the Belgian jurisdiction. Disputes having arisen, the plaintiffs brought an action in Belgium against the defendant, the summons being sent by registered post to the defendant's address in England in accordance with the Belgian law, and duly and regularly recovered judgment in default of appearance. In an action in England on the judgment:

**HELD**—that as the defendant had agreed to submit to the jurisdiction, he was bound by the final judgment of the foreign Court, there being nothing in the proceedings in Belgium contrary to natural justice.

**FEYERICKS AND OTHERS v. HUBBARD**, (1902) 71  
[L. J. K. B. 509; 50 W. R. 557; 86 L. T.  
829; 13 T. L. R. 381—Walton, J.]

**19. Authority of American Judgment Creditor to Sue in English Court—Californian Code.**—Where an American Court had made an order authorizing a person who had recovered judgment in that Court against an American company to bring actions against an English company "in any and all proper Courts, in his own name, or in the name of the said American company."

**HELD**—that the jurisdiction of the American Court was limited to the exact scope of the Californian Code conferring it, and that, in an action brought by the said person in an English Court, he was not properly authorized to sue, and could not sue, in the name of the said American company.

**BARBER v. MEXICAN LAND AND COLONIZATION Co., Ltd.**, (1900) 48 W. R. 232, 16 T. L. R. 127—Stirling, J.

**Foreign Judgments—Continued.**

**20 Competent Jurisdiction—Substantial Justice—Irregularities of Procedure—Validity.**—A judgment pronounced by a foreign Court competent to deal with the case must, if not contrary to English notions of substantial justice, be treated in this country as valid until it is set aside, though the irregularities of the proceeding by which it was obtained were such as by the local law to deprive the foreign Court of jurisdiction. A decree of divorce pronounced by a Florida divorce Court between persons whom it was competent to summon before it will, therefore, be received here as valid, even if it be the law of Florida that, the summons having been issued only ten days (instead of ten clear days) before the return day, the Court had no jurisdiction, and its decree is an absolute nullity.

PEMBERTON v. HUGHES, [1899] 1 Ch. 781; 68 [L. J. Ch. 281; 47 W. R. 354, 80 L. T. 369, 15 T. L. R. 211—C. A.]

**21. Enforcing—Partnership in Foreign Country—Winding-up Partnership—Submission to Foreign Jurisdiction.**—The defendant, whilst residing in Western Australia, entered into a partnership with the plaintiffs for working a gold mine there. The defendant subsequently left Western Australia and came to England and resided here, and while here an action was brought by the plaintiffs against him in the Court of Western Australia claiming that the partnership should be dissolved, that the mine should be sold, and that the accounts of the partnership should be taken. The writ in the action was served upon him in England. The defendant did not appear in the action, but he was kept informed from time to time of the proceedings in the action, and judgment was pronounced as claimed. Upon the accounts being taken the partnership liabilities were found to be £7,687 9s 9d. The plaintiffs sued the defendant in England to recover one-sixth of that sum, being the defendant's share thereof.

Held—that the mere fact that the defendant was the owner of real property in Western Australia did not give the Courts of that country jurisdiction as against the defendant; nor did the defendant by joining the partnership for working the mine impliedly agree that he should be subject to the jurisdiction of the Courts of Western Australia in matters connected with the partnership, there being no express agreement to that effect.

Becquet v. MacCarthy (2 B. & Ad. 951) not followed.

Decision of Channell, J. ([1907] 1 K. B., 235; 76 L. J. K. B. 147; 96 L. T. 231; 23 T. L. R. 94) reversed.

EMANUEL AND OTHERS v. SYMON, (1907) 24 [T. L. R. 85—C. A.]

**22. How far Binding on our Courts.**—A default judgment held not to be binding.

THE DUC D'ANMALE, [1903] P. 18—

[Per Mathew, L. J.]

**23. Payment out of Court—Foreigner—French Subject—"Prodigue"—"Conseil Judiciaire"—Disability—Status—Conflict of Laws.**—E. P., a French subject, was a man of extravagant habits, and was by the judgment of a French Court of competent jurisdiction placed as a "*prodigue*" (prodigal) under the control of a "*conseil judiciaire*" (legal adviser) and barred from mortgaging, receiving movable property, or giving a discharge therefor without the intervention of his "*conseil judiciaire*." Under these circumstances the trustees of a will paid into Court under the Trustee Act, 1893, the sum of £10,397 6s 10d., which represented E. P.'s share of the residuary personal estate of a testator. E. P. presented a petition asking that certain principal, interest, and costs due to his mortgagees might be paid to them, and that the balance of the fund might be paid out to him on his sole receipt. His "*conseil judiciaire*" opposed the application.

Held—that the judgment of the French Court was not to be regarded by the Court, as the disability or the disqualification in question arose from the principles or custom or positive law of a foreign country of a penal nature, that the Court was not satisfied on the evidence that there was a change of status; and that the Court had no jurisdiction to refuse to pay out to E. P. that which was his property; and the order for payment out must go.

Worms v. De Valdor (1880) 49 L. J. (Ch. 261; 28 W. R. 346, 41 L. T. 791—Fry, J.) not followed.

IN RE SELOT'S TRUST, [1902] 1 Ch. 488; 71 [L. J. Ch. 192—Farwell, J.]

(d) Marriage and Divorce.

And see HUSBAND AND WIFE, 15, 16, 27, 177.

**24. Foreign Divorce—Frenchman and Englishwoman—Irregularity by French Law—French Divorce—Subsequent Marriage with Englishman—Lex domicilii—Lex loci contractus.**—The *lex loci contractus* must govern questions arising out of prohibitions against marriage. The respondent to a petition for nullity of marriage, brought on the ground that at the time of the ceremony she, the respondent, had a husband living, pleaded that her former marriage had been declared null and void by a Court of competent jurisdiction. She was a domiciled Englishwoman, and had married in England a domiciled Frenchman temporarily residing in England. The marriage was pronounced void by the French Court on the ground that the Frenchman was not of full age according to French law, and had not obtained the necessary permission of his parents to marry.

Held—that as the marriage with the

**Marriage and Divorce—Continued.**

Frenchman was valid according to English law, though not according to French law, the petitioner was entitled to a decree of nullity.

Decision of Deane, J. ([1907] P. 107; 76 L. J. P. 9, 96 L. T. 505; 23 T. L. R. 158) affirmed.

OGDEN v. OGDEN (otherwise PHILIP), (1907) [24 T. L. R. 94—C. A.]

**25. Foreign Divorce — Husband having Foreign Domicil—Decree of Divorce Recognised by State where Husband Domiciled—Recognition by English Court—Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 1.]—English Courts will recognise as binding a decree of divorce obtained in a State where the respondent husband was not domiciled, if the Courts of his own domicil would so recognise it.**

The petitioner, who was an Englishwoman by birth, married a man who was domiciled in the State of New York, in the United States of America, and she subsequently acquired a domicil of her own in the State of South Dakota, as she was enabled to do by American law, and obtained a divorce from her husband in the Courts of that State upon the grounds of cruelty and desertion. It appeared that the State of New York, where the husband was domiciled, would only grant a divorce on the ground of adultery, but it would recognise the Dakota divorce as binding upon the husband upon the ground that he had appeared and taken part in the suit.

Held—that the Court would recognise as binding in this country the decree of the Dakota Court, though the husband was not domiciled there, inasmuch as it was recognised as binding in the State where he was domiciled.

ARMITAGE v. ATTORNEY-GENERAL (GILLIG cited), [1906] P. 135; 75 L. J. P. 42; 94 L. T. 614; 22 T. L. R. 306—Barnes, P.

**26. Foreign Divorce — Jurisdiction of Foreign Court—Domicil—American Law—English Marriage — American Decree of Divorce—Residence in America—Validity of Decree in England.]—A divorce granted by a foreign Court cannot be questioned in this country, even on the ground of fraud by a person not a party to the divorce proceedings.**

Castrique v. Behrens ((1861) 30 L. J. Q. B. 163; 4 L. T. 445) approved.

Jurisdiction to dissolve a marriage depends upon the domicil of the parties at the time, although they were formerly domiciled, and were married, in another country.

Le Mesurier v. Le Mesurier ([1895] A. C. 517; 64 L. J. P. C. 97; 72 L. T. 873—H. L.) followed.

Lolly's Case ((1812) Russ. & Ry. 237) discussed.

A. (husband) and B. (wife) were domiciled and married in England. A. having failed

to obtain a divorce, owing to his own cruelty, went to New York, where he acquired a domicil and lived in adultery. B. then went to New York, and without collusion obtained a divorce there.

Held—that, as A. was domiciled in New York, and B. had adopted his domicil for the purpose of the divorce proceedings, the divorce must be recognised in England although B. had concealed her own adultery from the New York Court, such non-disclosure not going to the root of the jurisdiction of the Court.

Decision of Barnes, P. (21 T. L. R. 517) affirmed.

BATER v. BATER (or LOWE), [1906] P. 209; 75 L. J. P. 60; 94 L. T. 835; 22 T. L. R. 408—C. A.

**27 Foreign Marriage — Capacity — Uncle and Niece—Celebrated abroad between Domiciled British Subjects—Jews—Marriage Act, 1835 (5 & 6 Will. 4, c. 54), s. 2—Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2—Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 5]—A marriage between a niece and an uncle, who are members of the Jewish faith and domiciled British subjects, is invalid, although celebrated abroad where such a marriage would be legal.**

IN RE DE WILTON, DE WILTON v. MONTEFIORE, [1900] 2 Ch. 481; 69 L. J. Ch. 717; 48 W. R. 645, 83 L. T. 70, 16 T. L. R. 507—Stirling, J.

**28. Foreign Marriage—Domicil — French Law—Contract of Marriage — Change of Domicil—Movable Property—Community of Goods.]—Two French subjects, born and domiciled in France, married there, without a contract of marriage, and became therefore subject to the system of "community of goods." They afterwards acquired an English domicil, and the husband died in this country possessed of movable property.**

Held—that the change of domicil did not affect the rights acquired by their marriage in France, and consequently the French law of "community of goods" was still applicable, so that the husband's power of disposition by will was limited to a moiety.

Lashley v. Hog ((1804), 4 Paton, 581; Robertson Sc. App. Cas. 4) distinguished.

The decision of the Court of Appeal ([1898] 2 Ch. 60; 67 L. J. Ch. 419; 46 W. R. 532; 78 L. T. 541; 14 T. L. R. 428) reversed, and the decision of Kekewich, J. ([1898] 1 Ch. 403, 67 L. J. Ch. 274; 46 W. R. 326; 78 L. T. 152), restored.

DE NICOLS v. CURLIER, [1900] A. C. 21; 69 L. J. [Ch. 109; 48 W. R. 269; 81 L. T. 733; 16 T. L. R. 101—H. L. (E.)]

**29. Foreign Marriage—Validity—Domicil—Marriage Ceremony Performed by Minister not of the same Religious Community as one of the Contracting Parties—Argentine Code, Art 183]—A marriage between a member of the Church of England and an Episcopalian Methodist was held to be good according to**

**Marriage and Divorce—Continued**

Argentine law, although only celebrated once at a Methodist Episcopal Church by a minister of that denomination, and although the husband's domicile was not proved to be Argentine.

Decision of *Jeune*, P. ((1902) 50 W. R. 494, 87 L. T. 138; 18 T. L. R. 526) affirmed.

*LIGHTBODY v. WEST*, (1905) 88 L. T. 484; 19 [T. L. R. 319—C. A.

30. *Ireland—Decree Nisi under English Divorce Acts—Doubt as to Validity of Decree.*—Where there are doubts as to the operation of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree and removing all doubts.

*GRIMSHAW'S DIVORCE BILL*, (1907) 51 Sol. Jo [529—H. L. (Ir.).

31 *Ireland—Domicil—Petitioner a Domiciled Irishman—English Decree Nisi—Doubt as to Operation in Ireland—Bill to Remove Doubts.*—Where there are doubts as to the operation in Ireland of an English divorce decree, the petitioner being domiciled in Ireland, the proper course is to obtain an Act confirming the decree and removing doubts.

*MALONE'S DIVORCE BILL*, [1905] A. C. 314—[H. L. (Ir.).

33. *Matrimonial Suits between same Parties in England and Scotland—Motion to Restrain Scotch Proceedings—Order.*—The wife instituted proceedings in England, claiming a judicial separation on the grounds of the husband's alleged cruelty, desertion, and adultery. The husband appeared under protest, and filed an act on petition, disputing the jurisdiction. Negotiations were afterwards entered into for a separation to be effected by deed, and after these had been pending for some time the husband commenced proceedings in the Scotch Court, praying for a dissolution of marriage on the ground of alleged malicious desertion for a period of four years.

The Court, upon the application of the wife, granted an injunction restraining the husband from prosecuting the proceedings in Scotland until the act on petition should be heard and determined in this Court, or until further order.

*CHRISTIAN v. CHRISTIAN*, (1898) 67 L. J. P. 18; [78 L. T. 86—*Jeune*, P.

35 *Nullity—Nullity Suit—Matrimonial Residence—Jurisdiction.*—Matrimonial residence, not domicil, is the test of jurisdiction in a nullity suit.

The petitioner, born in Wales, went through the ceremony of marriage with the respondent, whose domicil was in Ireland. They lived together in the Isle of Man and in England and Scotland. The respondent

at the time of the marriage had a lawful wife living who had been married to him in Liverpool.

*Held*—that the petitioner was entitled to a decree nisi of nullity.

*ROBERTS v. BRENNAU*, [1902] P. 143; 71 L. J. P. [74; 50 W. R. 414, 86 L. T. 599; 18 T. L. R. 467—*Jeune*, P.

36. *Nullity—Petition for Marriage celebrated in India—Respondent domiciled and Resident in Ireland—Jurisdiction*—A domiciled Irishman intermarried in Ireland with B., and afterwards, during B's lifetime, went through the ceremony of marriage, according to the rites of the Church of England, with C. at Kashmir, in India. C. presented a petition to have the marriage in India declared null and void, and the citation was served upon A. at his residence in Dublin. The petition contained no allegation relating to the domicil of the petitioner, then resident in England. The respondent did not appear.

*Held*—that the respondent's domicil and residence in India gave the Court jurisdiction, and (the facts having been proved) the marriage in India was accordingly declared null and void.

*JOHNSON v. COOKE*, (1898) 2 Ir. R. 130—[*Madden*, J.

**(e) Marriage Settlements.**

See also (e) *WILLS AND TESTACY*

37. *Marriage in Scotland—Colonial Husband—Scotch Wife—English Settlement—Governed by Scotch Law.*—A marriage was solemnized in Scotland between a gentleman domiciled in Mauritius and a domiciled Scotchwoman. Two settlements were executed in Scotland previously to the marriage—one of property brought into settlement by the wife's family in Scotch form; the other of property brought into settlement by the husband in English form. The English settlement was settled by English counsel, on instructions given by the Scotch lawyer, who prepared the Scotch settlement, through an English firm of solicitors. There was evidence that English counsel was employed, and by his advice a provision was inserted in each settlement to the effect that the law of Mauritius should not apply so far as it was or might be at variance or inconsistent with the provisions, clauses, and agreements contained in the settlements. In the English settlement there was a limitation of the property, on the death of the wife, in the events which happened (namely, the death of the husband without issue and the remarriage of the wife) to the persons who would have been entitled to the husband's property, if he had died without issue and unmarried, according to the English Statutes of Distribution. This limitation could be revoked and the property disposed of by the will of the husband if the law of Scotland governed the settlement. The wife

**Marriage Settlements—Continued.**

survived her husband, she had married twice since, and recently died. The question raised was whether the law of Scotland prevailed so as to give the first husband a testamentary power to revoke the above limitation.

**HELD**—that the instrument was governed by Scotch law.

**IN RE MUSPRATT-WILLIAMS, MUSPRATT-WILLIAMS**  
[v **HOWE**, [1901] W. N. 14; 110 L. T. Jo. 310  
—**Cozens-Hardy, J.**

**38. English Husband—Scotch Wife—Scotch Settlement of Wife's Property—Husband's Life Interest—Provision against his alienating—"Heritable Bonds"—English Trustees—Whether assignable to English Creditors]**  
—The rule that the law of the matrimonial domicile applies to a marriage settlement is not an absolute one: the parties may indicate impliedly that they contract with reference to some other law.

An English Court will treat Scotch "Heritable Bonds" as real property, and therefore governed by Scotch law.

A man whose domicile was, and has always been since, in England, married a Scotch wife, whose property was settled by a settlement in Scotch form. By it the husband, after the death of his wife (which had in fact occurred) took a life interest in the property settled by her, the income being payable to him, such payments to be "strictly alimentary, and not assignable or liable to arrestment." The trustees were English and were also the trustees of an English settlement of the husband's property. The husband having mortgaged his interest in his wife's property to English creditors,

**HELD**—that the parties intended the contract to be governed by Scotch law; and by **Vaughan Williams** and **Cozens-Hardy, L.J.J.** (**Stirling, L.J.**, dissenting), that, as Scotch law recognises such alimentary provisions, the mortgagees could not claim from the trustees the income of the wife's property.

**Decision of Joyce, J.** ([1893] 1 Ch. 933; 72 L. J. Ch. 430; 51 W. R. 586; 88 L. T. 326; 19 T. L. R. 347) reversed.

**IN RE FITZGERALD, SURMAN AND FITZGERALD,**  
[1904] 1 Ch. 573, 73 L. J. Ch. 436; 52 W. R. 432; 90 L. T. 266; 20 T. L. R. 332—**C. A.**

**39. General Testamentary Power of Appointment—Will—Effective Disposition.]**—In contemplation of the marriage solemnised in England between a domiciled Frenchman and a domiciled Englishwoman, a settlement of personal property belonging to the intended wife was executed. The settlement was in English form, the trustees were English, and the property subject to it was and remained English. The settlement gave the wife a general testamentary power of appointment over the settled property, which was given to her for her separate use in

default of appointment. The lady made a will purporting to dispose of the property that to some extent would not be permitted by the law of France if it were her absolute property.

**HELD**—that though there was no declaration in the settlement that English law was to prevail, it was a necessary consequence from the circumstances under which it was executed and the form of the settlement, that the will was a good exercise of the power given by the settlement; and that the will was an effective disposition of the whole property.

**In re Bald** ((1897) 66 L. J. Ch. 524; 45 W. R. 499; 76 L. T. 462—**Byrne, J.**) followed.

**IN RE MEGRET, TWEEDIE v. MAUNDER,** [1901] 1 Ch. 547; 70 L. J. Ch. 451; 84 L. T. 192—**Cozens-Hardy, J.**

**40. Power to Appoint to Subsequent Husband and Children—Domicil of Parties—Marriage with Deceased Husband's Brother—Marriage Act, 1835 (5 & 6 Will. 4, c. 54), s. 2.]**—The domicil of the parties governs the essentials of the contract of marriage.

By a marriage settlement in English form made between an Englishwoman domiciled in England and her intended husband, an Italian domiciled in Italy, it was provided that if the wife survived the husband she might appoint one-third in favour of a subsequent husband and the children of a subsequent marriage. On the death of her husband, the widow having obtained the necessary dispensations from the civil and ecclesiastical authorities, married her deceased husband's brother, an Italian subject domiciled in Italy. There were several children of this last marriage, which was valid by the law of the domicil, and which was not stamped as incestuous by the general consent of Christendom. The wife was desirous of exercising her power of appointment, and the question was whether her second marriage was valid according to English law.

**HELD**—that the marriage was valid, and that the wife could exercise the power.

**IN RE BOZZELLI'S SETTLEMENT, HUSEY-HUNT v. [BOZZELLI,** [1902] 1 Ch. 751; 71 L. J. Ch. 505; 50 W. R. 447; 86 L. T. 445; 18 T. L. R. 365—**Eady, J.**

**(f) Wills and Intestacy.**

*See also (e) MARRIAGE SETTLEMENTS, and see WILLS, 386—389*

**41. Intestacy—Foreign Movables—Intestacy of British Subject Dying Abroad—Colonial Domicil of Origin—Subsequent Foreign Domicil—Nationality—Distribution of Movables—German Civil Code, arts. 25, 27.]**—Certain States (e.g., Germany), in distributing the movables of a foreigner resident within their jurisdiction at the date of his death, take no account of domicil, but distribute his movables in accordance with the laws of the State of which he was a subject at that date. In such a case, the deceased being of



**Wills and Intestacy—Continued.**

English nationality, the English Courts will distribute his movables according to the law of his domicile, or of his domicile of origin, if he has acquired a domicile only in one of the States in question.

A British subject born in Malta, died domiciled (not naturalised), in Baden, leaving movables in Baden and England not disposed of by her will

**HELD**—that such movables should be distributed according to Maltese law.

**IN RE JOHNSON, ROBERTS v. ATTORNEY-GENERAL**, [1903] 1 Ch. 821, 72 L. J. Ch. 682; 51 W. R. 444; 88 L. T. 161; 19 T. L. R. 309—Buckley, J.

**42. Intestacy—Intestate's Estates—Widow's Charge—Dower—Lex domicilii—Lex loci, as applied to Proceeds of Sale of Victorian Lands—Order of Application of Assets—Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29)—Victorian Intestates' Estates Act, 1896 (59 Vict. No. 1419).—**A domiciled Irishman died in Ireland, intestate, without issue, leaving a widow surviving. His property in Ireland consisted of freeholds, chattels real, furniture, stock and cash. He was also possessed of lands in the colony of Victoria, granted to him in fee by the Crown, which lands, by the law of the colony, were regarded and devolved as personal estate. The only creditors were in Ireland. Administration was taken out in Ireland by the widow, and in Victoria by a person appointed for the purpose, who sold the lands, and remitted the net proceeds to the widow.

By the Victorian Intestates' Estates Act, 1896, a widow is entitled, on the death of her husband, and without issue, if his estate is over the value of £1,000, to a charge of £1,000 upon it, and the residue is divisible between the widow and the next of kin.

The widow brought an action against the heir-at-law and one of the next of kin of the deceased and claimed (1) £1,000 out of the proceeds of sale of the Victorian lands, as well as £500 out of the real and personal estate in Ireland; (2) dower out of the Irish freeholds; and (3) a moiety of the residue of the proceeds of sale of the Victorian lands, and of the Irish personal estate, after payment thereof of the debts of the intestate.

**HELD**—(1) that the plaintiff was entitled, under the Victorian Act, to £1,000 out of the proceeds of sale of the Victorian lands; (2) that the balance was to be taken as personal estate, and added to the Irish personalty, and that the debts were to be paid out of this blended fund; (3) that the widow was entitled to £500 out of the remainder of this blended fund, and out of the Irish real estate, to be apportioned as directed by the Intestates' Estates Act, 1890, (4) that of the residue of the personalty the widow was entitled to one moiety, and the next of kin to the other moiety; (5) that the widow was entitled to dower out of the residue of the

realty, which, subject thereto, went to the heir-at-law.

**REA v. REA**, [1902] 1 Ir. R. 451—M. R.

**43. Will—Domicil—British Subject Permanently Residing in France.**—A British subject, born in England, lived permanently in France so as to be in fact domiciled there, though he had not acquired a legal domicile there in the manner prescribed by French law, which recognised only a legal domicile. He died in France, having made his will.

**HELD**—that both as to construction and administration the will was governed by English law.

**In re Johnson** ([1903] 1 Ch. 821; 72 L. J. Ch. 682, 51 W. R. 444; 88 L. T. 161; 19 T. L. R. 309—Buckley, J., No. 41, *supra*), followed.

**IN RE BOWES, BATES v. WENGEL**, (1906) 22 [T. L. R. 711—Eady, J.

**44 Will—Domiciled Foreigner—Unattested Will—Bequest of Leaseholds in England—Lex Rei Sitæ—Lex Domicilii—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9.**—The will of a foreigner domiciled abroad, though valid according to the *lex domicilii*, and though admitted to probate in England, will not pass the beneficial interest of leaseholds in England unless executed in accordance with the formalities required by the Wills Act, 1837.

Decision of Kekewich, J. ([1900] 2 Ch. 504; 69 L. J. Ch. 730; 48 W. R. 671; 83 L. T. 100) affirmed.

**PEPIN v. BRUYÈRE**, [1902] 1 Ch. 24; 71 L. J. Ch. [39; 50 W. R. 34; 85 L. T. 461—C. A.

**45. Will—Foreign and English Wills—English Will Appointing Executors—Foreign Domicil—Foreign Will—Grant to Foreign Administrators—Executors passed Over.**—Our Courts cannot follow the foreign law so far as to grant administration to a person by our law disqualified from taking the grant, but, otherwise, they will follow the law of the foreign domicile.

The deceased, who died domiciled in Belgium, left a Belgian will, and also an English will and codicil appointing executors and dealing with his English property. The Belgian Court having appointed administrators of his estate in Belgium, the English Court passed over the executors, and made a grant of administration, with all three documents annexed, to the foreign administrators.

**IN THE GOODS OF MEATYARD**, [1903] P. 125; 72 [L. J. P. 25; 89 L. T. 70—Jeune, P.

**46. Will—Jurisdiction—Land and Personalty in Crown Colony—Personalty in England—Will of—Trust of—English Court interfering as regards Realty as well as regards Personalty.**—An Englishman domiciled in the Gold Coast Colony left by his will his personal estate in England to his wife in trust for his children. He also gave some directions as to his business and freehold

**Wills and Intestacy—Continued.**

and leasehold concessions in the Colony (which might eventually be held to be a devise of them upon trust to A. and B.), for the benefit of his wife and children. The trustees and widow were before the Court.

**HELD**—that the Court could exercise jurisdiction, and consider the validity of an agreement and assignment by which the widow and A. and B. purported to sell part of the concessions and deal with the business, on the ground that, if there was no actual devise on trust, the widow was a trustee of the leaseholds and personality.

*Semble*, if realty and personality are closely mixed together, the Court, having jurisdiction over the personality, may also deal with the realty, though not within the jurisdiction.

**IN RE CLINTON, CLINTON v. CLINTON**, (1903) 51 [W. R. 316; 88 L. T. 17, 19 T. L. R. 181—Joyce, J.

**47. Will—Power of Appointment—Personal Property—Foreigner—Will Valid by Foreign Law—Wills Act, 1837 (1 Vict. c. 26), s. 27.]**—The testatrix, who was then domiciled in England, had, under a will, a general testamentary power of appointment over personal property. She subsequently married a Frenchman, who was domiciled in France, and she thereupon became a domiciled Frenchwoman. By an unattested codicil to her will she made her niece her universal legatee. The codicil was valid by French law, and according to that law its effect was to pass all property over which the testatrix had any power of disposition to her niece. Letters of administration, with the will and codicil annexed, were granted to the niece in England.

**HELD**—that the codicil, not being attested according to English law, did not operate as an exercise of the general power of appointment under sect. 27 of the Wills Act, 1837.

**IN RE SCHOLEFIELD, SCHOLEFIELD v. ST. JOHN; IN RE YOUNG, SMITH v. ST. JOHN**, [1905] 2 Ch. 408; 74 L. J. Ch. 610; 54 W. R. 56; 93 L. T. 122; 21 T. L. R. 675—Kekewich, J.  
On Appeal: compromised.  
[75 L. J. Ch. 720; 22 T. L. R. 704—C. A.

**48. Will Made Abroad—24 & 25 Vict. c. 114, s. 1 (Lord Kingsdown's Act)—Law of the Congo Free State—General Principles of Law and Equity]**—The testator, an English subject, residing in the Congo Free State, made a will in holograph unattested form in that State.

**HELD**—that such a will was good as “made according to the forms required by the law of the place where the same was made” because in fact the Courts of the Congo Free State would have upheld the will.

*Semble*, also, that where there is an absence of any specific provision in the law of a foreign country as to the forms of wills,

and there is a general provision that where no specific provision exists cases are to be decided according to general principles of law and equity, any form is sufficient which carries out the necessary requirements of testamentary disposition.

Meaning of general principles of law and equity discussed.

If no particular form is prescribed by the *lex loci*, any form allowed by it is sufficient to satisfy 24 & 25 Vict. c. 114, s. 1.

**STOKES v. STOKES** (1898) 67 L. J. P. 55; 78 [L. T. 50—Jeune, P.

**49. Will of British Subject—Made in Foreign Country According to Law of that Country—Effect on English Leaseholds—“Personal Estate”—Wills Act, 1861 (24 & 25 Vict. c. 114), ss. 1, 4.]**—The Wills Act, 1861, does not define “personal estate,” but it was an Act to amend the Wills Act, 1837, which defines such words as including leaseholds; and, therefore, the same meaning must be given to them in the Act of 1861.

A British subject made in Italy a will, valid by Italian law, disposing of English leaseholds.

**HELD**—that in such a case, when the will has been proved in England, the beneficial estate in the leaseholds passes to the person mentioned under sect. 1 of the Wills Act, 1861, provided that the terms of the gift infringe no rule of English law.

**IN RE GRASSI, STUBBERFIELD v. GRASSI**, [1905] [1 Ch. 584; 74 L. J. Ch. 341; 53 W. R. 396; 92 L. T. 455; 21 T. L. R. 343—Buckley, J.

**50. Will of Frenchwoman—Subsequent Marriage in England to French Fugitive Criminal—Rescission—Domicil—Animus Revertendi—Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 18.]**—The validity of a pre-nuptial will, so far as it affects moveable property, depends not only on the law of the domicile of the testator at the time of his death, but also on the law of his domicile at the time of his making his will, and at the time of his subsequent marriage; but the domicile of the testator on each of these occasions must be determined by the English Court of Probate in the English sense, *i.e.*, according to those legal principles which are recognised in this country and are part of its law.

To acquire an English domicile in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period.

According to international law as understood and administered in England, the effect of marriage on the moveable property of spouses depends *prima facie* on the domicile of the husband in the English sense at the time of the marriage; and even assuming that it is possible for the parties to accept in this respect by express agreement (*e.g.*, by marriage settlement) a matrimonial *régime* different from that of

**Wills and Intestacy—Continued**

the country of the husband's domicile at the time of the marriage, yet no such intention ought to be circumstantially inferred in the absence of such express agreement.

Per Vaughan Williams, L.J. The rule that a pre-nuptial will is revoked by the subsequent marriage of the testator is part of the matrimonial régime of England.

A Frenchwoman, in 1870, made a will in England in the French language, which was a holograph will valid by the law of France, whether she was domiciled in England or France. She was in service in England, and thus by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was in England, and according to French law, she was domiciled (in the French sense) in England. In May, 1874, she married a French refugee, known by the name of Martin, and continued to live in England until her death in 1895. According to French law and in the French sense, her husband was domiciled in England when he married. He dared not go back to France for many years, but he could safely do so at the end of twenty years from the time he fled from his own country.

He went back in 1890, a few years after it was safe to do so, and remained there, living with his own relatives. One of his reasons for returning was the state of his health; another, probably, the unsatisfactory state of his relations with his wife.

**HELD**—by Rigby, L.J. and Vaughan Williams, L.J. (Lindley, M.R. dissenting), that (in the English sense) the domicile of the testatrix at the time of her marriage was English, and her marriage revoked her will, and that the grant of letters of administration with the will annexed must be revoked.

Decision of Jeune, P. (68 L. J. P. 106; 81 L. T. 459) reversed.

**IN RE MARTIN, LOUSTALAN v. LOUSTALAN**, (1900) [P. 211; 69 L. J. P. 75; 48 W. R. 509; 82 L. T. 807; 16 T. L. R. 354—C. A.]

**CONJUGAL RIGHTS.**

See HUSBAND AND WIFE.

**CONSIDERATION.**

See CONTRACT.

**CONSPIRACY.**

See CRIMINAL LAW AND PROCEDURE;  
TORTS; TRADE AND TRADE UNIONS.

**CONTAGIOUS DISEASES.**

See ANIMALS; PUBLIC HEALTH.

**CONTEMPT AND ATTACHMENT.**

And see HUSBAND AND WIFE, 132, 244, 246, PATENTS, 197, 267, 276—280, 282, TRADE MARKS, 201.

(a) Contempt of Court . . . . . 654  
(b) Practice . . . . . 660

**(a) Contempt of Court.**

1. *Abuse of Judge in his Conduct as Judge—Means for Checking and Punishing Contempt of Court—Summary Process.*—The publication in a newspaper, after the conclusion of a trial in Court, of an article containing scurrilous abuse of the judge in his character of judge in the hearing of the case, is a contempt of Court which may be punished by the Court on summary process.

**REG. v. GRAY**, [1900] 2 Q. B. 36; 69 L. J. Q. B. [502, 64 J. P. 484; 48 W. R. 474; 82 L. T. 534; 16 T. L. R. 305—Div. Ct.]

2. *Abuse of Process—Ulterior Motive—Fraud on Court.*—The motive of a party who commences proceedings before a Court, however reprehensible, is not enough to make it an abuse of process or a fraud upon the Court, unless it be shown that the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others.

*Ex parte Wilbran* (5 Madd. 1) approved.

**LISTER v. PERRYMAN** (L. R. 4 H. L. 521) distinguished.

**KING v. HENDERSON**, [1898] A. C. 720; 67 [L. J. P. C. 134; 79 L. T. 37; 14 T. L. R. 490; 47 W. R. 157—P. C.]

3. *Bankruptcy—Evidence at Public Examination—Offer of Money to Bankrupt to Suppress.*—It is a contempt of Court to offer money to a bankrupt to induce him at his public examination to suppress evidence, which, although capable of satisfactory explanation, would be liable to misconstruction, and which might damage a limited liability company of which the offeror is a director.

**RE HOOLEY, RÜCKER'S CASE**, (1898) 79 L. T. 306 [—Wright, J.]

4. *Company Directors—Order—Attachment—Service—R. S. C., 1883, Ord. 42, r. 31.*—The Court ought not to order an attachment against a director of a limited company and send him to prison until he has been personally served with the order which has been disobeyed.

**McKEOWN v. JOINT STOCK INSTITUTE, LD.**, [1899] 1 Ch. 671; 68 L. J. Ch. 390; 80 L. T. 641; 6 Manson, 338—North, J.]

**Contempt of Court—Continued.**

5 *Company — Newspaper Comments — Bankruptcy.*—It would be wrong for the Court to use the very extraordinary and exceptional power of the Court to commit for contempt of Court for publishing and printing a paragraph in a newspaper on the report of the Official Receiver, except where it can be shown that something has been done which is really calculated to prejudice the due course of justice. A limited company cannot be committed for such contempt of Court.

IN RE HOOLEY, *EX PARTE* HOOLEY, (1899) 79 [L. T. 706; 6 Manson, 44—Wright, J.]

6. *Company — Winding-up — Circular to Shareholders—Object to remove Liquidator—Statements against Liquidator—Interference with due Administration of Justice.*—A shareholder in a company being voluntarily wound up distributed among his co-shareholders a circular containing statements impugning the conduct of the voluntary liquidator of the company, the circular being sent with the object of obtaining the support of the shareholders to an application by the shareholder, which had been made on behalf of himself and the other shareholders, to the Court to remove the liquidator. The liquidator thereupon applied for an injunction to restrain the distribution of the circular, and to commit the shareholder for contempt of Court as being calculated to interfere with the due administration of justice.

HELD—that no ground had been shown for the application, which must be dismissed with costs.

IN RE CROWN BANK; IN RE O'MALLEY ((1890) 44 Ch. D. 649; 59 L. J. Ch. 739; 38 W. R. 666; 62 L. T. 823—North, J.), and *Coats v. Chadwick* ((1894) 1 Ch. 347; 63 L. J. Ch. 328; 42 W. R. 328; 70 L. T. 228; 8 R. 159—Chitty, J.) not now followed.

IN RE NEW GOLD COAST EXPLORATION CO., LD., [1901] 1 Ch. 860; 70 L. J. Ch. 355; 17 T. L. R. 312; 8 Manson, 296—

Cozens-Hardy, J.

7. *Company — Winding-up — Petition for Compulsory Winding-up—Fraudulent Circular to Obtain Proxies — Proxies Used for Voluntary Winding-up—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 145.*—Where, after a creditor's petition for the compulsory winding-up of a company has been presented, a false circular is issued at the instigation of the directors by a shareholder asking for proxies to be used by him in order to obtain an investigation into the conduct of the directors, and such proxies are intended to be, and are in fact, used in support of the directors and a resolution for voluntary winding-up, those responsible for the circular and such action are guilty of a contempt of Court, in that they have attempted to mislead the Court by representing that a voluntary winding-up is already in existence, with the view of destroying the power of the Court

to make an order for compulsory winding-up, unless there was proof, which it is sometimes not very easy to obtain, that the petitioning creditor would be prejudiced by the continuance of the voluntary winding-up

IN RE SEPTIMUS PARSONAGE & CO., [1901] 2 Ch. [421; 70 L. J. Ch. 706; 49 W. R. 700; 81 L. T. 866; 17 T. L. R. 617—Wright, J.]

8 *Criminal Proceedings before Justices—Committal of Prisoner to Quarter Sessions—Comments pending Trial—Jurisdiction of High Court to Attach for Contempt*—The High Court of Justice has general power to punish by attachment a person who publishes statements relating to proceedings before inferior Courts, where those statements tend to prejudice or interfere with the due administration of justice.

This power extends to a case where statements are published in a newspaper reflecting upon an accused person who has been charged before justices, but has not yet been committed for trial, and may be committed (if at all) either to quarter sessions or assizes.

REX v. PARKE ([1903] 2 K. B. 432; 72 L. J. K. B. 839; 67 J. P. 121; 52 W. R. 215; 89 L. T. 439; 19 T. L. R. 627—Div. Ct., *infra*), followed and extended.

THE KING v. DAVIES, [1906] 1 K. B. 32, 75 [L. J. K. B. 104; 93 L. T. 772; 22 T. L. R. 97—Div. Ct.]

9. *Criminal Proceedings before Justices—Newspaper—Comments while Proceedings Pending—Jurisdiction of High Court to Punish for Contempt.*—The King's Bench Division has jurisdiction to entertain an application calling upon a person to answer for a contempt of Court in publishing comments tending to prejudice the fair trial of a person who, at the time of the publication of the comments, is charged before justices with a criminal offence, for which he must be committed (if at all) to the Assizes. The fact that there has been no committal at the time makes no difference.

*Semble*, also, the King's Bench Division has the same jurisdiction in the case of any proceedings before any inferior Court.

REX v. PARKE, [1903] 2 K. B. 432, 72 L. J. K. B. [839; 67 J. P. 421; 89 L. T. 439; 19 T. L. R. 627; 52 W. R. 215—Div. Ct.]

And see No. 8, *supra*.

10. *Divorce—Examination as to Means—Decree Absolute—Order for Examination of Husband as to Means—Refusal to Attend—Conduct Money.*—A divorce decree having been made absolute upon the wife's petition, an order was made for the husband to attend before the registrar for examination as to his means for the purposes of assessing permanent alimony. He refused to attend.

HELD—that, as no conduct money had been paid to him, an order of committal could not be made against him for contempt in not attending.

**Contempt of Court—Continued.**

TOWNEND v. TOWNEND, (1905) 21 T. L. R. 657;  
[93 L. T. 680—Barnes, P.]

11. *Lunacy Proceedings—Publication in Newspaper of Doctors' Reports—Lunacy Act, 1890* (53 & 54 Vict. c. 5), ss. 49, 116.]—A reception order having been made against a person under the Lunacy Act, 1890, proceedings were taken under sect. 49 of the Act for the examination of the patient by two medical practitioners appointed by the Commissioners in Lunacy with a view to his discharge. Reports were made by two medical practitioners under the section, but the Commissioners refused to order the discharge of the patient. A newspaper subsequently published the two reports in an article commenting on the detention of the patient. A day before the publication of the reports an application was made under sect. 116 of the Act for the appointment of a receiver of the patient's property during his detention, and the reports of the two doctors were made exhibits to an affidavit in these proceedings. Neither the publisher nor the editor of the newspaper knew of these proceedings under sect. 116, nor did the article discuss them. Upon an application to commit for contempt of Court in publishing the reports of the doctors and the article,

HELD—that as the proceedings under sect. 49 were concluded, it was not a contempt of Court to publish the reports and the article, and that, as to the pending proceedings under sect. 116, there was no evidence that the respondents knew of these proceedings, and they were therefore not guilty of contempt.

IN RE THE MARQUIS TOWNSHEND, (1906) 22  
[T. L. R. 341—C. A.]

12. *Married Woman—Judgment Debtor—Neglect to Comply with Order for Payment into Court—Default—Writ of Attachment—Separate Estate—Married Women's Property Act, 1882* (45 & 46 Vict. c. 75), ss. 1, sub-s. 2, ss. 18, 24.]—A married woman, before 1882, was, as administratrix of a deceased intestate, ordered to pay into Court a sum forming part of the estate. In default a motion was made for leave to issue a writ of attachment against her.

HELD—that, in the absence of proof of a breach of trust, or *devastavit*, an order for payment by the defendant out of her separate estate would not be appropriate, and that the order for the issue of the writ of attachment ought to go.

IN RE TURNBULL, TURNBULL v. NICHOLAS, [1900]  
[1 Ch. 180; 48 W. R. 136; 81 L. T. 439; 16  
T. L. R. 45—Stirling, J.]

13. *Pending Litigation—Article Complained of not Prompted by—Article one of a Series.*]—The Court refused to commit the publisher of an article in a newspaper for contempt of Court, on the ground that the

article complained of was not prompted by the fact that litigation was pending between the applicant and another person, but was one of a series of articles, attacking the applicant, that had appeared for a number of years in the newspaper in question.

IN RE LABOUCHERE; KENSIT v. THE "EVENING  
[NEWS, LIMITED," (1902) 18 T. L. R. 208—  
Div. Ct.]

14. *Pending Litigation—Articles in Newspaper—Repetition of Previous Statements—Motion to Commit*]—The defendant had for three or four years on a variety of occasions used of the plaintiff libellous language, and had used expressions respecting him which were of exactly the same character as those complained of on his motion to commit the defendant for alleged contempt of Court in commenting on the plaintiff in his newspaper. No proceeding had been taken by the plaintiff against the defendant in respect of any of these libels. The matter complained of did not refer directly to the action pending.

HELD—that the Court ought not to come to the conclusion that the repetition of similar accusations not connected with the particular matter in dispute in the action was so likely to interfere with the course of justice that they ought to interfere; and that the motion must be dismissed, but without costs.

PHILLIPS v. HESS, (1902) 18 T. L. R. 400—  
[Div. Ct.]

15. *Innocent Loan of Paper Containing Libel—Contempt—In Face of the Court.*]—The appellant, who was neither printer nor publisher, innocently and without any knowledge of the contents of a newspaper handed a copy to a friend.

HELD—that there was no obligation on the appellant to make himself acquainted with its contents, and should scandalous matter reflecting on the Court thus become known, these circumstances were not in themselves sufficient to justify a committal for contempt of Court.

Committals for contempt of Court by scandalising the Court itself have become obsolete in this country.

MCLEOD v. ST. AUBYN, [1899] A. C. 549, 68  
[L. J. P. C. 137, 48 W. R. 173; 81 L. T. 158;  
15 T. L. R. 487—P. C.]

16. *Power to Commit—Comments in Newspaper while Action Pending—Power to Commit.*]—On a motion to commit an editor of a newspaper for commenting in a leading article upon the proceedings in a pending action, on the ground that such comments constituted an interference with the course of justice, the Court, while stating that it had no doubt full powers vested in it to prevent and punish such offences, expressed its fullest approval of the necessity of jealously and carefully guarding this jurisdiction, and of the language used by Jessel, M.R., in *Hunt v. Clarke* (37 W. R. 724).

**Contempt of Court—Continued.**

GREENWOOD v. LEATHER-SHOE WHEEL CO., LD.,  
[1898] 14 T. L. R. 241—Stirling, J.

17. "Pending" Proceeding—Criticism by Journal—Application—Form of]—Where the trial of a prosecution for seditious libel had been held, but the jury had disagreed, and it was intended (though not formally stated) that a new jury would be empanelled,

HELD—that the proceeding was still a "pending" one, and that it was a contempt of Court for a journal to criticise the proceeding.

REX v. FREEMAN'S JOURNAL, [1902] 2 Ir. R. 82  
[—K. B. Div.]

18. Rule Nisi to Commit—Withdrawal of Rule upon Payment of Money—Attempt to Extort Money by such Proceedings a Contempt of Court.]—Applications to commit persons for contempt of Court are analogous to criminal informations. In future the sanction of the Court will be necessary before any rule nisi, which has been obtained for the purpose, will be allowed to be withdrawn.

N., a solicitor defending D, obtained a rule nisi to commit the editor of a newspaper for publishing an article calculated to prejudice D on his trial. He then suggested a money payment in consideration of the rule being withdrawn.

HELD—that such conduct amounted to contempt of Court, but that under all the circumstances the Court would take no further notice of the matter.

REX v. NEWTON, (1903) 19 T. L. R. 627, 67  
[J. P. 453—Div. Ct.]

19. Salvage Suit—Foreign Ship—Arrest by Admiralty Court—Moving Ship without Sanction of the Court]—Where a foreign ship is under arrest and has been with the Court's permission placed in a wet dock to enable her cargo to be discharged, but it is necessary for the safety of the ship to put her into dry dock, the proper course before moving the ship is to communicate to the agent for the Admiralty Marshal, otherwise there will be a technical contempt of Court.

THE VICTOR PRETOL, (1898) 14 T. L. R. 244—  
[Jeune, T.]

20. Trustee Ordered to Pay Money "in his Possession, or Under his Control"—Actual Possession or Control—Constructive Receipt—Debtor's Act, 1869 (32 & 33 Vict. c. 62, s. 4 (3)]—On motion to commit a trustee for not lodging £1,409 19s. 3d. in Court, it was not proved that the money had ever been actually "in his possession or under his control" within s. 4 of the Debtor's Act, 1869, but it was stated in the master's certificate that "he received personal estate not specially bequeathed to the amount of £2,290 18s. 5d., and he has during the same

period paid or is entitled to be allowed on account thereof sums to the amount of £1,880 19s. 9d., leaving a balance due from him of £1,409 19s. 3d. on that account."

HELD—(following *In re Fewshur, Herdman v. Fewshur*, [1901] 1 Ch. 447) that the certificate was not sufficient evidence to satisfy the Debtors Act, and that there would be no order.

RE WILKINS, [1901] W. N. 202; 46 Sol. J. 14;  
[36 L. J. N. C. 543—Buckley, J.]

**(b) Practice.**

21. Attachment—Conduct Money]—Conduct money must be tendered to a person whom it is sought to attach for not complying with an order under sect. 26 of the Court of Probate, 1857.

IN RE HARVEY, (1907) 51 Sol. Jo. 357—  
[Barnes, P.]

22. Attachment—Conduct Money—Proauction of Books—Order—Non-compliance—Motion to Attach]—Where a respondent was ordered to produce books relating to his income at his place of business for inspection by the petitioner's solicitor, on motion to attach for non-compliance with the order,

HELD—that he was not entitled to conduct money to appear on the hearing of the motion.

JEFFRIES v. JEFFRIES, (1907) 51 Sol. Jo. 572—  
[Bucknill, J.]

23. Attachment—Costs of—Order to Pay Money—Attachment for Disobedience—Subsequent Compliance—Discharge from Custody—Costs of Attachment Proceedings.]—Where a person had been committed to prison for non-compliance with an order to pay a sum of money, and he subsequently complied with the order, the Court refused to order him to pay the costs of the attachment proceedings as a condition precedent to his discharge from custody.

JACKSON v. MAWBY ((1875) 1 Ch. D. 86; 45 L. J. Ch. 53; 24 W. R. 92—Hall, V.-C.) followed.

AYRES v. AYRES, (1902) 71 L. J. P. 18; 85 L. T.  
[648; 18 T. L. R. 2—Barnes, J.]

24. Attachment—Four-day Order—Judgment for Recovery of Money—Form of Judgment—R. S. C., Ord. 41 r. 5, Ord. 42, r. 3.]—A judgment that the plaintiff "do recover from the defendant" a sum of money cannot be followed by a four-day order fixing a time for payment so as to render the defendant liable to attachment.

So HELD—where a plaintiff had recovered judgment against a trustee for the "recovery of" a certain sum representing loss to the trust estate, the judgment being one for "recovery" and not for "payment."

IN RE ODDY; MAJOR v. HARNES, [1906] 1 Ch.  
[93; 75 L. J. Ch. 141; 54 W. R. 291; 94 L. T.  
146—Buckley, J.]

*Practice—Continued*

25. *Attachment—Motion to Commit Heard after New Trial of Action—Newspaper*—The Court fined the proprietor of a newspaper for contempt of Court in making comments in his newspaper which tended to prejudice the cause of justice, though the trial had taken place before the motion to commit came on for hearing.

IN RE LABOUCHERE AND ANOTHER; EX PARTE [COLUMBUS CO., LD., (1901) 17 T. L. R. 578—Div. Ct.]

26. *Attachment—Notice of Order—Trustee—Disobedience to Order—R. S. C., Ord. 41, r. 5.*—A writ of attachment against a trustee for disobedience to an order of the Court cannot, as a rule, issue, unless the order has been personally served, or the person sought to be attached has had notice of it and is evading service thereof. The fact that the person sought to be attached was in Court when the order was made by consent, is not sufficient to give jurisdiction.

*Hyde v. Hyde* ((1888) 13 P. D. 166; 57 L. J. P. 89; 36 W. R. 708; 59 L. T. 529), dictum of Cotton, L.J., not followed.

In order to avoid the difficulty arising from an order not being perfected, and therefore not being capable of service until after the date named for obeying the order, the proper course is for the Registrar to insert in every such order, "or subsequently within four days after service."

IN RE TUCK; MURCH v. LOOSEMORE, [1906] 1 Ch. [692; 75 L. J. Ch. 497; 94 L. T. 597; 22 T. L. R. 425—C. A.]

27. *Attachment—Order of Irish Court—Not Served in Ireland—Disobedience—Enrolment of Order in High Court in England—Jurisdiction to Commit in England.*—An order of the Land Judges of the Chancery Division in Ireland was served on the respondent in England, and the order was enrolled in the Chancery Division in England. On an application to commit the respondent for disobedience to the order of the Irish Court,

HELD—that as the order had not been served in Ireland, the Court could not commit because there had been no valid service of the order.

Decision of Kekewich, J. ((1901) 84 L. T. 756; 17 T. L. R. 592) affirmed.

IN RE SYNGE, (1902) 17 T. L. R. 759; 85 L. T. [736—C. A.]

28. *Attachment—Order on Two Persons—Service on One—Effect.*—Where an order is made upon two persons, but can only be served on one, that person may be attached for disobedience of it.

IN RE ELLIS, *HARDCASTLE v. ELLIS*, (1906) 54 [W. R. 526; 95 L. T. 80—Buckley, J.]

29. *Attachment—Order not Stating Time for Doing Act—Registrar Subsequently Fixing Time—R. S. C. Ord. 41, r. 5.*—An order

was made by a judge of the Divorce Division that the respondent to a suit in that division should attend before one of the registrars for the purpose of being examined as to giving certain security. The order was subsequently endorsed by the registrar with a statement that he had appointed a certain place and time for the attendance of the respondent to be examined. The respondent failed to attend, and the petitioner applied for a writ of attachment.

The judge ordered a writ of attachment to issue.

HELD—that the order and the endorsement thereon were not sufficient to support a writ of attachment, Order 41, rule 5 not having been complied with, and that the writ of attachment ought not to have been issued.

TOWNEND v. TOWNEND, 22 T. L. R. 50—C. A.

It does not necessarily follow from this decision that all applications in the Divorce Division for writs of attachment must be made either under Order 41, rule 5, or under the practice of the old Court of Chancery as governed by sect. 52 of the Matrimonial Causes Act, 1857.

TOWNEND v. TOWNEND, (1905) 22 T. L. R. 128.

30. *Attachment—Personal Service of Order—Evading Service—Orders 41, r. 5, and 44.*—A writ of attachment for disobedience to an order of the Court need not be served personally where the person against whom the order has been made knows of the order, and is evading service thereof.

The rule requiring personal service is intended to ensure a person having knowledge of the proceeding and has an obvious and necessary exception where such knowledge is obtained *aliunde*, and personal service is evaded.

*Hyde v. Hyde* ((1888) 13 P. D. 166, 57 L. J. P. 89; 36 W. R. 708; 59 L. T. 529—C. A.) followed.

KISTLER v. TETTMAN, [1905] 1 K. B. 39; 74 [L. J. K. B. 1; 53 W. R. 230; 92 L. T. 36; 21 T. L. R. 24—C. A.]

31. *Attachment—Service of Order Extending Time for Compliance—"Four Day" Order*—Where an order has been made and served, requiring an act to be done within a specified time, and by a subsequent order such time is extended, then, before an attachment can be moved for for disobedience, such last-mentioned order must be drawn up and served; or, if the extended time allowed by it has elapsed before it is drawn up, a peremptory (or "four day order") must be obtained and served.

IN RE SEAL; IN RE SEAL v. EDGELOW, [1903] [1 Ch. 87; 72 L. J. Ch. 58; 51 W. R. 164; 87 L. T. 731—Byrne, J.]

32. *Attachment—Undertaking to Pay "Forthwith"—No Time Fixed—Need for a Supplemental, or "Four Day" Order.*—Where a person has undertaken to "forthwith" pay money into Court, and fails to do

**Practice—Continued.**

so, he may in a very gross case be committed for contempt without any further order. But, as a general rule, it is necessary to obtain a supplemental (or "four day") order fixing a definite date for fulfilment of the undertaking

CARTER v. ROBERTS, [1903] 2 Ch. 312; 72 [L. J. Ch. 655—Byrne, J.

**33. Company—Proceedings Against—Application—Form Of.]**—An application against a company for alleged contempt of Court should be by motion not for attachment, but to attend and answer in respect of such contempt.

REX v. FREEMAN'S JOURNAL, [1902] 2 Ir. R. 82 [—K. B. Div

**34 Person in Contempt—Right to be Heard in Court on other Matters]**—The general rule that a person who is in contempt cannot be heard to make any application to the Court applies to voluntary applications, i.e. where the person comes to the Court asking for something. It does not prevent such person from appealing against an order on the ground of want of jurisdiction, at any rate when such order has been made after the contempt was committed.

GORDON v. GORDON AND GORDON, [1904] P. 163, [73 L. J. P. 41; 52 W. R. 389; 90 L. T. 597, 20 T. L. R. 272—C. A.

**CONTRACT.**

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*See also* ARBITRATION; BANKERS AND BANKING; BUILDERS, &c.; BURIAL AND CREMATION; CARRIERS; CONFLICT OF LAWS; EVIDENCE; INSURANCE, 57; MASTER AND SERVANT, 426, 427; PUBLIC HEALTH, 41, 43, 46, 47, 49; SALE OF GOODS, SALE OF LAND, and other headings involving Contracts.

**I. ASSIGNMENT.**

*See also* CHOSE IN ACTION.

**1. Assignment by Company of Contract to New Company—Winding-up of Old Company for purpose of Amalgamation—Liability of Contractor.]**—A landowner agreed with a

cement company, which owned a piece of land next his chalk quarries, to supply them for a certain period, at a fixed price, with at least 750 tons of chalk per week, and so much more "as the company shall require for the whole of their manufacture of Portland cement on their said land." The company subsequently went into voluntary liquidation for the purpose of transferring their business to a new and larger company, which was formed to take over the businesses of several cement manufacturers, and the above contract was assigned to the new company. The landowner refused to supply chalk to the new company at the contract price.

**HELD** (Lord Robertson dissenting)—that the contract was assignable, and that the new company could sue upon it.

Decision of C. A. ([1902] 2 K. B. 660; 71 L. J. K. B. 949; 51 W. R. 81; 87 L. T. 465; 18 T. L. R. 827) affirmed.

TOLHURST v. ASSOCIATED PORTLAND CEMENT [MANUFACTURERS (1900), LD., AND OTHERS, [1903] A. C. 414, 72 L. J. K. B. 834; 89 L. T. 196; 19 T. L. R. 677; 52 W. R. 143—II. L. (E).

**2. Assignability—Vendor to supply Goods as required by Purchaser for his Business—Purchaser to deal only with Vendor for that Particular Class of Goods—Purchaser assigning Business to Company—Vendor discharged from Duty to Supply.]**—The defendant agreed to supply at specified prices to K., a cake manufacturer, all the eggs of a certain quality that K. should require for manufacturing purposes for one year; K. in return undertook not to purchase elsewhere so long as the defendant performed his contract.

Before the year expired K. transferred his business to a company.

**HELD**—that the defendant's contract was with K. personally, and that he was not bound to supply eggs to the company.

Tolhurst v. Associated Portland Cement Manufacturers ([1903] A. C. 414; 72 L. J. K. B. 834; 89 L. T. 196; 19 T. L. R. 677—H. L., *supra*) distinguished.

KEMP v. BAERSELMAN, [1906] 2 K. B. 604; 75 [L. J. K. B. 873—C. A.

**3. Assignment of Voidable Contract—Money paid by Purchaser to Vendor's Assignee—Contract Rescinded—Right of Purchaser to recover Money so Paid.]**—A vendor having assigned the benefit of his contract to sell mines, the purchaser made payments to the assignee. Subsequently the purchaser for a good and valid reason declined to complete, and claimed to recover the money paid by him.

**HELD**—(upon the facts) that the money must be treated as having been paid to the assignee by arrangement between all parties for a particular purpose; and that, so far as they had been applied to such purpose, the payments could not be recovered.



**Assignment—Continued.**

Decision of C. A. (s. n., *Fleming v. Lee* [1902] 2 Ch. 359; 71 L. J. Ch. 687; 87 L. T. 213, 183 L. R. 736) affirmed.

*MACKUSICK v. FLEMING*, (1904) 73 L. J. Ch. 826; [20 T. L. R. 263—H. L. (E.)

**II. BREACH.**

See also **BANKRUPTCY**, 213.

4 *Author and Publisher—Agreement to Edit “Temple” Shakespeare* — “Cheaper, or other form of Edition” — “Temple Shakespeare for Schools” — Damages, or Injunction.]—In 1894, in consideration of a royalty, the plaintiff agreed to edit the whole of Shakespeare’s plays for the “Temple” Shakespeare; and it was provided that “in the event of a cheaper or other form of edition of any or either of the plays being thought advisable by the publishers (the defendant), it shall form the subject of an agreement with the author on similar *pro rata* terms to those embodied herein.” In 1899 a large “Temple” Shakespeare was produced, including the plaintiff’s text, introduction, notes and glossary, but with the addition of illustrations. Both parties treated this edition as within the provision, and the plaintiff received a royalty on it.

In 1901 a “Temple Shakespeare for Schools” was discussed, and the plaintiff alleged a definite agreement for a one-sixth royalty. Eventually, however, the defendant employed to edit this work another author, who wrote introduction, note and glossary of his own.

**HELD**—that the plaintiff was entitled to damages, but not an injunction.

*GOLLANCZ v. DENT*, (1903) 88 L. T. 358—[Eady, J.

5 *Damages—General Damage—Reduction of Amount by Court.*]—The plaintiff claimed damages for breach of an agreement, whereby the plaintiff was given the sole agency for the sale of defendants’ pianos within a certain area. The jury, over and above the amount of the proved special damage, gave the plaintiff £450 as general damages.

**HELD**—that the plaintiff was not entitled to general damages, and that the amount found by the jury must be reduced to £164, the amount of the plaintiff’s actual loss.

*MILSON v. BECHSTEIN*, (1898) 14 T. L. R. 159—[C. A.

6 *Penalty—Liquidated Damages.*]—An agreement contained a clause that A. would not teach or instruct any person in London, or within seventy miles thereof, in the event of his leaving B.’s employ, or that of his successor, and for the performance of that clause and all other provisions of the agreement on the part of A., A. bound himself in the sum of £1,000, to be re-

coverable as liquidated and ascertained damages, and not as a penalty.

**HELD**—that the £1,000 was a penalty and not liquidated damages.

*CLARKE v. McTURG*, (1898) 14 T. L. R. 27—[Bigham, J.

7. *Breach by One Party—Right of Other Party to Repudiate—Intention not to Fulfil if Little Remains to be Performed.*]—If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may treat the contract as at an end.

*Withers v. Reynolds* ((1831), 2 B. & Ad. 882, 1 L. J. K. B. 30), *Hochster v. De la Tour* ((1853), 2 E. & B. 678; 22 L. J. Q. B. 455; 17 Jur. 972), and *Mersey Steel and Iron Co. v. Naylor* ((1884), 9 App. Cas. 434; 53 L. J. Q. B. 497, 32 W. R. 989, 51 L. T. 637—H. L. (E.)) referred to.

Short of such refusal, the true principle to be deduced from all the cases is that you must ascertain whether the conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions. (See last case, *supra*, per Lord Blackburn, and see *Johnstone v. Milling* (1886), 16 Q. B. D. 460; 55 L. J. Q. B. 162; 50 J. P. 694; 34 W. R. 238; 54 L. T. 629—C. A.

It is going too far for the plaintiffs to contend that, however little remained to be performed by the defendants, if it was to be gathered from the facts that they did not intend to fulfil their obligations to perform that part, the plaintiff company were justified in treating the agreement as wholly determined.

Judgment of North, J. (83 L. T. 111; 16 T. L. R. 119), reversed.

*RHYMNEY RY. CO. v. BRECON AND MERTHYR TIDFIL JUNCTION RY. CO.*, (1900) 69 L. J. Ch. 813; 49 W. R. 116; 83 L. T. 111—C. A.

7A. *Agreement to Use Machines—Better Machines Invented—No Excuse for Breaking Contract—Public Policy*]—In 1900 the plaintiffs leased certain “lasting” machines to the defendants, who were boot manufacturers, for a term of twenty years. The defendants agreed to use the machines to their full capacity so far as the number and kind of boots and shoes made in their factory would permit, and to pay a rent calculated at the rate of 3d. per 1,000 revolutions of each machine’s shaft. After three years the defendants discontinued the use of the machines, alleging that if they used them they could not compete with other firms.

**HELD**—that the defendants had shown no ground for not adhering to their contract, which might have been a foolish one commercially, but could not be said to be contrary to public policy. Machines could not be said to be worked to their full capacity unless they were worked continuously during

**Breach—Continued.**

working hours, and defendants ought to have used them for all work that they were capable of doing without regard to the fact that newer machines might do the work better and cheaper.

**BRITISH UNITED SHOE MACHINERY CO. v. SOMER-BELL BROS & Co.,** (1907) 95 L. T. 711—Joyce, J

**8. Implied Term—Agreement to Pay Bonus and Shares of Profits to Customers—Agreement to last for Definite Period—Sale of Business during Period—Liability**—In consideration of the defendants agreeing not to join the Imperial Tobacco Co., which intended to boycott the plaintiffs' goods, and agreeing to sell the goods of the plaintiffs, the latter agreed with the defendants and their other customers to distribute among them during the next four years all their net profits and a bonus of £200,000. Shortly afterwards the plaintiffs sold their business to the Imperial Tobacco Co.

**HELD**—that they were liable in damages to the defendants for so doing, on the ground that they had broken the manifest intention of the contract, on the faith of which the defendants had declined an advantageous offer from the other company, and had wilfully prevented themselves from performing their share of the contract.

Decision of C. A. ([1904] 2 K. B. 410; 73 L. J. K. B. 865; 53 W. R. 71, 90 L. T. 656; 20 T. L. R. 466) affirmed.

**OGDENS, LD., v. NELSON; OGDENS, LD., v. TEL-FORD,** [1905] A. C. 109, 74 L. J. K. B. 433; 53 W. R. 497; 92 L. T. 478; 21 T. L. R. 359—H. L.

**9. Liability to Perform—Declaration by Court that Parties are not Bound.**—Where sufficient reason is shown parties to a mercantile contract are entitled to ask the Court to make a declaration as to whether they are bound by it or not.

Therefore, where a contract (if in fact binding) would have continued in force for a year and a half, but the plaintiffs contended that the defendants had no right to call for performance, and it appeared that the plaintiffs would be liable in heavy damage if at the end of the period it was held that the contract was binding, the Court made a declaration in an action by the plaintiffs to the effect that, so long as the existing state of affairs continued, the defendants had no right to have the contract performed.

**SOCIETE MARITIME ET COMMERCIALE v. VENUS** [STEAM SHIPPING CO., LD., (1904) 9 Com. Cas. 289—Channell, J.

**10. Payment—Creditor Abroad—Direction to Pay Bank Within Jurisdiction.**—The defendant agreed to pay to the plaintiff during her life a yearly allowance, payable quarterly on the usual quarter days. Before the

quarter's allowance became due on December 25th the plaintiff, who was about to go abroad, by a written authority directed the defendant to pay the quarter's allowance to her account at a London bank. The plaintiff was abroad when the quarter's allowance became due, and the defendant, desiring to obtain her endorsement, and thus to ascertain that she was alive, sent to her solicitors a cheque for the amount drawn to the plaintiff's order. The solicitors returned the cheque, and issued a writ for the amount of the quarter's allowance.

**HELD**—that the direction to pay the amount to the plaintiff's account at the bank was a valid direction, it being in effect a direction to pay to her at the bank, and that the plaintiff was entitled to have the amount paid there.

**SHREWSBURY v. SHREWSBURY,** (1907) 23 T. L. R. [277—Kennedy, J.

**11. Right to Repudiate—When a Question for the Judge.**—Where the question whether a breach of a particular contract goes to its root and justifies the other party in repudiating it, depends upon the construction of a document, the question is one for the decision of the judge.

*Witness v. Reynolds* ((1831) 2 B. & Ad. 882) followed.

**G. D. EMERY CO. v. WELLS,** [1906] A. C. 515; [75 L. J. P. C. 104; 95 L. T. 589—P. C.

**III. CONSIDERATION.**

*And see BANKERS AND BANKING, 5.*

**12. Absolute Oral Promise—Promisee Altering his Position—Detriment.**—If a person makes a representation on the faith of which another person alters his position, enters into a deed, or incurs an obligation, the person making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity, or to make a provision by will. That in the eye of a Court of Equity is a contract, an engagement which the man making it is bound to perform.

The plaintiffs brought an action against the defendant for £500 for supplying heating, ventilating and lighting to certain shops and premises. An absolute oral promise to complete the work by November 4, 1897, had been given by the plaintiffs, on the strength of which the defendant incurred large expenses in advertising the opening of the premises on that day, and hiring managers and shop assistants. The premises, however, were not lighted by that date, and the expenditure thereby wasted formed the subject-matter of the defendant's counter-claim.

**HELD**—that the defendant was entitled to recover on the counter-claim, as the expenses incurred were a detriment to the defendant and she had altered her position as the result of the plaintiff's promise, and that there was a contract with good consideration.

*Consideration—Continued.*

*Dashwood v. Jermyn* ((1879), 12 Ch. D. 776; 27 W. R. 868—Bacon, V.-C.) followed.

*ASWELL AND NESBIT, LD. v. STANTON*, (1900) 16 [T. L. R. 399—Div. Ct.]

13. *Accord and Satisfaction—Debtor and Creditor—Promise to pay Debt by Instalments—Consideration—Nudum pactum.*—An agreement by a debtor to pay, and by the creditor to accept payment of, an existing debt by instalments is *nudum pactum*.

Therefore, where a judgment creditor has put in an execution upon the goods of the judgment debtor, a promise by the debtor to pay part of the debt at once and the balance by monthly instalments affords no consideration for a promise by the creditor to withdraw the sheriff.

*HOOKHAM v. MAYLE*, (1906) 22 T. L. R. 241—[Walton, J.]

14 *Accord and Satisfaction—Intention—Cheque—Receipt annexed to Cheque—Unconditional Order to Pay—Negotiable Instrument.*—The defendants, who were tobacco manufacturers, agreed with their customers to distribute among them annually for four years from April, 1902, their entire net profits on goods sold by them in the United Kingdom, and in addition the sum of £50,000, each quarter, in proportion to their purchases. The defendants paid the first quarterly bonus, but before the time for the second distribution arrived sold their business and went into voluntary liquidation. They paid the second bonus to each customer by means of a cheque signed by themselves and the liquidator, the cheque being stated to be sent as the customer's share of the second and final bonus distribution. The cheque was payable to the customer or order, and at the foot were the words—"The receipt at the back hereof must be signed, which signature will be taken as an endorsement of this cheque." On the back were the words—"Received from H. (liquidator of Ogden's, Limited,) this cheque for" the amount specified "being my share of the second and final bonus distribution of the company." The customers did not intend by signing this receipt to waive any right they might have against the defendants. It having been decided that the sale by the defendants of their business did not get rid of their liability under the contract,

**HELD**—(1) that the acceptance of the above cheque was not an accord and satisfaction of the customer's claim against the defendants; (2) that the cheque was a negotiable instrument, as the order to pay was unconditional, the words at the foot not being addressed to the bankers and not affecting the order to them.

*Decision of Lawrence, J.* ((1905) 93 L. T. 553; 21 T. L. R. 775; 94 L. T. 126) affirmed.

*NATHAN AND OTHERS v. OGDENS, LD.*, (1905) 22 [T. L. R. 57—C. A.]

15. *Agreement to accept Debt by Instalments—Subsequent Agreement for Payment by Instalments after Death—Right to Claim whole Debt—Appropriation of Payments—Rule in Clayton's Case.*—For many years A. had been accustomed to pay moneys to the defendant, who had out of such moneys made all necessary payments for the deceased; and a balance was struck every quarter, and on such balance the defendant allowed interest at 10 per cent. per annum.

By an agreement in February, 1897, in consideration of the defendant making use of A.'s money and paying interest for the same at 10 per cent, A. agreed to accept £25 every quarter in part payment of the principal that might be due from the defendant; and some months afterwards another agreement was made whereby A. agreed that in the event of his death all his moneys in the possession of the defendant at the time of his death should be repaid in quarterly payments of £25, to include principal and interest, until the whole should be paid, and that no person should be entitled to enforce payment of any larger sum.

No instalments as such had been paid by the defendant under the first agreement; but the defendant had continued to make payments on A.'s behalf, as requested, out of the moneys from time to time paid to him.

A. died some years afterwards, the defendant then having a considerable sum belonging to him.

In an action brought by the executors of A. to recover the whole sum due to the deceased at the time of his death—

**HELD** (giving judgment for the defendant)—that there was sufficient consideration to support both agreements, which were therefore good, and that under the second agreement the defendant was not bound on the death of the deceased to pay the whole sum then due; and, further, that as to the instalments alleged to be due under the first agreement, the payments made by the defendant from time to time to the deceased must, according to the rule in *Clayton's Case*, be taken to have been appropriated to and paid in respect of these instalments, which were therefore satisfied.

*EGG v. CRAIG*, (1903) 89 L. T. 41—Phillimore, J.

16. *Agreement to "reveal" Particulars of Money to which a Party is entitled—Failure of Consideration.*—The defendant agreed in consideration of the plaintiff "revealing" to her full particulars of a sum of money to which she was entitled, she stating that she was unaware of having any right or title to any money not already in her possession, and in the event of the said money being recovered by her, to pay the plaintiff a sum equal to one-third share of the net amount recovered.

**HELD**—that the word "revealing" meant "disclosing something before unknown to the recipient of the information"; that the plaintiff had not revealed anything before

**Consideration—Continued.**

unknown to the defendant; and that the consideration for the agreement had failed.

PAYV v. SMITH, (1901) 17 T. L. R. 471—  
[Farwell, J.]

17 *Agreement to Let Refreshment Bars at a Theatre so long as it should remain in Defendant's hands—Construction.*—The defendant agreed to let to the plaintiffs the free and exclusive use of the bars, etc., of the Court Theatre so long as it "should remain in his hands."

Held—that these words meant so long as the theatre was under his control.

Decision of Kekewich, J. ((1897) 143 L. R. 47) affirmed.

EDWARDE'S MENU CO., LD. v. CHUDLEIGH  
[(1898) 14 T. L. R. 64—C. A.]

18 *Agreement to Repay Advance on proposed Company going to Allotment—Construction*—The plaintiff advanced to the defendant a sum of £1,000, and on the same day the defendant wrote to the plaintiff, "In consideration of your having advanced £1,000 in connection with" (a particular business which was to be purchased and converted into a company), "I hereby undertake to repay the same with £1,000 bonus. . . . Such payment of £2,000 to be made by me to you after allotment, as and when I receive payment from the company."

It was found, as a fact, that the defendant had done his utmost to bring out the company, but had failed. The company was never registered, and, therefore, no allotment of shares ever took place. In an action brought by the plaintiff to recover the £1,000, Wills, J., gave judgment for the defendant.

Held—by the Court of Appeal, that this judgment was right.

WHEELER v. FRADD (No. 1), (1898) 14 T. L. R. 302—C. A.

19 *Appropriation of Payments—Time for Election—Unregistered Dentist—Claim for Fees and Goods Supplied—Payment by Cheque—Cheque Stopped—Appropriation to Goods Supplied—Dentists' Act, 1878 (41 & 42 Vict. c. 33), s. 5.*—Where a debtor does not appropriate a payment made by him, the creditor may appropriate it "up to the very last moment," (see *per* Lord Macnaghten, in *The Mecca*, [1897] A. C. at p. 294), even when being examined in an action brought by him for the balance of his account. The plaintiff, an unregistered person, operated as a dentist on the defendant, and also supplied him with false teeth and gold fillings. The plaintiff's charges amounted to £45, and the defendant gave him two cheques, one for £20, and the other for £25, which was post-dated. The £20 cheque was paid, but defendant, not being satisfied with the work, stopped payment of the cheque for £25. The

plaintiff thereupon sued him in the County Court upon it, and the defendant gave notice that he intended to rely upon sect. 5 of the Dentists' Act, 1878, which prohibits a person from recovering "any fee or charge for the performance of any dental operation, unless he is registered under this Act, or is a legally qualified medical practitioner." The County Court Judge gave judgment for the plaintiff for the amount of the cheque, but the Divisional Court held that the plaintiff was prevented by sect. 5 from recovering so much of the consideration for the cheque as was for dental attendance or advice or dental operation, and remitted the action to the County Court to determine how much was attributable to work and materials outside sect. 5. The plaintiff while being examined at the second trial claimed to appropriate the £20 cheque to his fees. The County Court Judge allowed such appropriation, assessed the value of the materials supplied at £21, and gave judgment for that amount. The Divisional Court reversed this judgment on the ground that there had been no valid appropriation.

Held—approving of the former decision of the Divisional Court upon sect. 5 of the Act, but reversing the second decision, that in the circumstances the appropriation by the plaintiff at the second trial was not too late, and that the judgment in his favour in the County Court was right.

SEYMOUR v. PICKETT, [1905] 1 K. B. 715; 74  
[L. J. K. B. 413; 92 L. T. 519, 21 T. L. R. 302—C. A.]

And see LIMITATION OF ACTIONS, No. 19.

20 *Covenant to Pay Annuities to Third Parties—Action by Third Parties and Personal Representatives of Covenantor—Right to Enforce Covenant.*—By deed made between A. and B., A, who carried on business as a dentist, and B, his son, agreed to become partners as dentists for five years. A valuation was to be made of the furniture, instruments, &c., the property of A. upon the premises where he carried on business. In the event of a dissolution B. was to have the right to purchase that property at the amount of the valuation, and in the event of the death of A. during the continuance of the partnership B. agreed to pay to his brothers and sisters certain annuities. A. died within the five years, and B. exercised his right of purchase. In an action brought by the executors of A., and B.'s brothers and sisters, against B, to enforce payment of the annuities,

Held—that the plaintiffs were entitled to maintain the action.

DRIMMIE v. DAVIES, [1899] 1 Ir. R. 176—V.-C.;  
[186—C. A.]

21 *Contract of Employment—Implied Term to find Work for Servant—Custom*—The plaintiff was regularly employed at the defendant's tin-plate works as a roller

**Consideration—Continued.**

man, being paid by piecework. The terms of the plaintiff's employment were embodied in certain rules, one of which provided that "no person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing, such notice to be given on the first Monday of any calendar month before twelve o'clock at noon"; and other rules provided for fines for a workman refusing to work, and that every workman would, when required by the manager, perform such duties as might be deemed necessary in case of emergency other than the special work he might be engaged in. On July 20th, 1903, and subsequently, the defendants were unable to get orders at remunerative prices, and accordingly they closed their works on that date, and the works remained closed for some months. After July 20th the defendants ceased to provide any work for the plaintiff and their other workmen, and on Monday, August 3rd, they gave twenty-eight days' notice that the contracts of employment would cease. The plaintiff claimed damages for breach of contract to find him employment up to August 31st.

HELD—that there was an implied term in the contract of employment to find the plaintiff a reasonable amount of work until the termination of the contract by twenty-eight days' notice; that upon the facts the defendants had not proved the existence of a custom to close the works without notice for want of remunerative orders.

Decision of Jelf, J. (93 L. T. 274; 21 T. L. R. 595), affirmed.

DEVONALD v. ROSSER & SONS, [1906] 2 K. B. 728, [75 L. J. K. B. 688, 95 L. T. 232; 22 T. L. R. 682—C. A.]

**22. Direction to Debtor to Pay Third Party—Debtor Agreeing to do so—Third Party Releasing Lien.**—The plaintiffs held goods of K. and had a lien on them for advances. K. sold the goods to the defendants, who at K.'s request wrote to the plaintiffs undertaking to remit the price to them.

HELD—that there might be inferred an agreement by the plaintiffs to release their lien, which would form a good consideration for the defendants' promise to pay.

KLEINWORT, SONS & Co. v. REDDAWAY & Co., [(1905) 9 Com. Cas. 292—C. A.]

**23. Failure of—Coronation Procession—Money Paid for Seats to View—Expenses Incurred in Erecting Stand and Providing Lunch—Partial Failure of Consideration.**—The plaintiff took and paid for seats on a stand, which the defendants had erected, to view the Coronation procession. Both the receipt and the tickets of admission made use of the words "to view procession on June 26." The defendants incurred considerable expense in erecting and decorating the stand, &c., and in providing a lunch.

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After the abandonment of the procession the plaintiff claimed to recover back the amount paid by her.

HELD—that there had not been a total failure of consideration, and that she could not recover.

Krell v. Henry ([1903] 18 T. L. R. 823—Darling, J., No. 83, *infra*) explained.

LUMSDEN v. BARTON & Co., (1903) 19 T. L. R. [53—Darling, J.]

**24. Husband and Wife—Marriage Contract—Promise by Wife's Father that Daughter will have a Share of What he Leaves—Specific Performance.**—Testator wrote to the plaintiff, his intending son-in-law: "You are, of course, aware that, with my large family, E. (his daughter) will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in a comfortable independence if I leave her a widow."

The plaintiff married the daughter, relying upon the letter. The testator, dying subsequently, leaving eight children, left E. a legacy of much less than one-eighth of his estate.

HELD—that if the letter was an offer, the Court would presume it to be accepted; and

HELD ALSO—that the letter was not an offer resulting in a contract, but a mere statement of intention as to the future, and which, although relied on, gave no right either to specific performance or damages.

HELD ALSO—that, if the letter imposed an obligation upon the testator, it was satisfied by the bequest of the legacy.

IN RE FICKUS, FARINA v. FICKUS, [1900] 1 Ch. [331, 69 L. J. Ch. 161, 48 W. R. 250; 81 L. T. 749—Cozens-Hardy, J.]

**25. Remuneration—Services Rendered by Relative—Implied Contract to Pay Wages—Niece Attending on Aunt.**—For six years a niece, who had no home of her own and would otherwise have had to earn her living, resided with her aunt at the latter's request. During the last three years she had to nurse her aunt, and (as was found by the Court) did so most efficiently, and by rendering unnecessary the employment of trained nurses performed services worthy of a considerable remuneration, had such services been performed by a stranger.

HELD—however, that, having regard to their relationship, the niece could not, in the absence of express agreement, sustain any claim against her aunt's estate.

RUSSEL v. DAVIDSON, (1906) 8 F. 821—Ct. of [Sess.]

**IV. CONSTRUCTION.**

See also Sect. VII., IMPOSSIBILITY OF PERFORMANCE.

**26. Ambiguity—Instructions—Recipient bonâ fide acting upon them—Meaning Not**

**Construction—Continued.**

*Intended by Sender.*—Where a person makes a communication to another in ambiguous terms, he cannot afterwards complain if the recipient of the communication *bonâ fide* puts upon it a meaning not intended by the sender.

The principle is not confined to cases between principal and agent; and was held to extend to a joint telegram in ambiguous terms sent by shipowners and charterers to the captain of the chartered ship.

*Ireland v. Livingston* ((1872) L. R. 5 H. L. 395, 41 L. J. Q. B. 201) applied.

*MILES v. HASLEHURST & Co.*, (1907) 23 T. L. R. [142; 12 Com. Cas. 83—Channell, J.

27. "*Be Concerned or Interested in the Erection or Use of Works.*"—The respondents made an agreement with the appellants to purchase all the output of their works for the period of three years, and during that time not to "erect or assist or be in any way concerned or interested in the erection or use of" any other similar works.

Held—that the words must be construed in a business sense, and that the agreement was not broken by the respondents during the period of three years, (1) agreeing to purchase all the output of other works; (2) agreeing to purchase such other works after the expiration of the three years, subject to certain additions being made to them; (3) lending money to the owner of such other works, there being no evidence that it was to be spent on the works.

*SOUTHLAND FROZEN MEAT, & Co. v. NELSON [BROTHERS]*, [1898] A. C. 442; 67 L. J. P. C. 82, 78 L. T. 363—P. C.

28. "*Book Debt*"—*Bill of Exchange—Bill Entered in Books and Handed to Bankers for Discount.*—A company received a bill of exchange on the 22nd of a month in the ordinary course of business; they entered it in their books, and at once handed it to their bankers to be discounted. On the 28th the bankers credited the company with the amount of the bill.

Held—that on the 27th, when it had not yet been actually discounted, it was a debt due to the company, that, as it had been entered in their books, it was a book debt; and therefore it must be regarded as a "book debt" for the purposes of an agreement signed on the 27th and relating to the sale of the business.

*In re Stevens* ((1888) W. N. 110, 116) followed.

*DAWSON v. ISLE*, [1906] 1 Ch. 693; 75 L. J. Ch. [338, 54 W. R. 452; 95 L. T. 385—Warrington, J.

29. *Condition Precedent or Concurrent Act—Payment of Money—Delivery of Securities—Duty to Tender Securities.*—The defendant had agreed upon the happening of certain events (which admittedly had happened) to pay to the plaintiff within

fourteen days £4,000 advanced by him to a third party "against delivery by you of all securities held by you against the loan."

Held—that payment of the money and delivery of the securities were concurrent acts to be performed at the same time; and that, the fourteen days having expired, the plaintiff was not bound to tender the securities before issuing a writ for the £4,000.

*NEWGASS v. BOTTOMLEY*, (1903) 19 T. L. R. [309—Lawrance, J.

30. *Contract to Pass Goods Through Custom House—Obligation to Expedite Clearance to Avoid New Duty.*—The respondents agreed to lighter from a ship and load on rail certain goods of the appellants, and also pass them through the Custom House for one inclusive charge.

A new duty was imposed on goods of the particular kind, which might have been avoided by clearing the appellants' goods in a time less than the twenty-four hours allowed by the Customs Act, but the appellants made no request for the clearance to be expedited.

Held—that the respondents were under no obligation to specially expedite the clearance, and were not liable in damages to the appellants for not having done so.

*COMMONWEALTH PORTLAND CEMENT Co., LD. v. [WEBER, LOHMANN & Co., LD.]*, [1905] A. C. 66; 74 L. J. P. C. 25, 53 W. R. 337; 91 L. T. 813; 21 T. L. R. 149—P. C.

31. *Garden Produce—Failure of Crop—Liability.*—The defendants, who were market gardeners, offered to supply gherkins to the plaintiffs. The latter accepted the offer by letter:—"We accept your offer for fifty hogsheds at 30s. . . . terms as usual." The crop was a failure, but not owing to any negligence on the defendants' part.

Held—that the contract was merely for a specified quantity of gherkins, and not necessarily for gherkins grown on the defendants' land, and that, therefore, the latter were not excused by the failure of their crop, and were liable in damages for non-delivery.

*HAYWARD BROS., LD. v. JAMES DANIEL & SON*, [1904] 91 L. T. 319—Bigham, J.

32. *Coronation Procession—"June 27th or such Other Day as the said Procession shall Pass the Premises"*—"In the Event of the Procession being Postponed."—Held—that the procession on August 9th was "the Coronation procession" within the terms of a contract letting seats "for the Coronation procession of the 27th June, or such other day as the said procession shall pass the premises."

Also—that it was "the" procession within the meaning of the words, "in the event of either, or both, of the processions being postponed."

**Construction—Continued.**

FENTON v. VICTORIA SEATS AGENCY, (1903) 19  
[T. L. R. 16—Wills, J.]

33. *Duration—Hire “by the year”—Continuance of Hiring after First Year.*—A person agreed to hire from the plaintiffs two carriage horses “by the year” from August 2nd, 1904, at a charge of £105 “per annum,” payment to be made quarterly. The agreement also provided that “after the expiration of the first year the hiring can be terminated by either party giving one quarter’s written notice from a quarter day.”

HELD—that this was an agreement for the hire of the horses for a year certain, with a right to keep them after the expiration of the year, in which case a quarter’s notice would then be necessary to terminate the hiring after the first year.

THOMAS TILLING, LD. v. JAMES AND ANOTHER,  
[1906] 94 L. T. 823; 22 T. L. R. 599—  
Div. Ct.

34. *Duration—Terminable on reasonable Notice.*—The owner of patent rights in a machine entered into an agreement with a manufacturer in these terms:—“I hereby appoint you sole makers of [my machine] and accept a royalty of 10 per cent. on all you sell.” There was no counter obligation on the makers to manufacture.

HELD—that the agreement was terminable on reasonable notice.

RENDALL v. STEWART, [1899] 36 S. L. R. 775; 7  
[S. L. T. 185.]

35. *Exception Clause—Agreement to Let a Theatre from a Certain Date—Theatre Closed on Account of Refusal of Patent—Liability of Owner of Theatre.*—The plaintiff, in January, 1902, entered into an agreement with the defendant, who was the proprietor of a provincial theatre, whereby the latter agreed to let him the theatre for a fortnight from March 31st, 1902. The agreement contained a clause which rendered it null and void in the event of the theatre being closed on account of any public calamity, Royal demise, epidemic, fire, or accident, “or when theatrical performances are suspended from any cause whatever.” The theatre was licensed by patent from the Lord Chamberlain, and the patent was granted annually on March 25th. In March, 1902, the renewal of the patent was postponed in consequence of certain alterations having been ordered in the theatre which entailed its being closed. In an action to recover damages for breach of contract,

HELD—that the theatre was not closed in consequence of any event covered by the clause in the contract, the last sentence of which only referred to a general closing of theatres; and that, therefore, the defendant was liable.

BLOW v. LEWIS, (1903) 19 T. L. R. 127—  
[Wright, J.]

36. *Expressio unius—Expression only found in some Clauses of Contract.*—In the construction of a contract the rule as to *expressio unius exclusio alterius* does not apply where the expression relied upon appears in some but not in other clauses of the contract.

WADE & SONS AND OTHERS v. COCKERLINE & Co.,  
[1905] 53 W. R. 420, 21 T. L. R. 54—C. A.

37. *Goods sent for Manufacture—Receipt Note stating that “all goods in trust are covered by insurance”—Effect.*—A manufacturer on receiving goods to be worked up for the owners sent a receipt note containing the words “all goods held in trust covered by insurance against fire.”

HELD—that he was bound to insure the goods for the owner, and that, if he insured them in his own name and received the policy moneys, he held such moneys on behalf of the owners.

COCHRAN & SON v. MITCHELL, (1906) 8 F. 975—  
[Ct. of Sess.]

38. *Implied Obligation—Agreement to Perform at a Theatre on a Given Date—Work of Reconstructing Theatre not completed on the Date—Contractor’s Default—Risk Undertaken by the Manager of the Theatre—Liability.*—The plaintiff, who was the manager of a theatrical company, agreed with the defendant, who was the manager of a provincial theatre, to produce a play at the theatre on a certain date for six nights. The agreement contained a clause that in the event of the theatre being closed through fire, death in the Royal Family, “or any other cause whatsoever” the engagement was to be null and void, or terminated as the case might be. At the time of the contract the theatre was being reconstructed owing to the requirements of the County Council, and the work was being carried out by a builder under a contract with the defendant. At the date fixed for the performances the work had not been completed, and in consequence a licence could not be obtained from the County Council and the play could not be produced. In an action against the defendant to recover damages for breach of the contract,

HELD—that the defendant was liable, as he took upon himself the risk of the theatre not being ready at the time by reason of the contractor, whom the defendant employed, not having finished the work; that the words “any other cause whatsoever” did not include a cause brought about by the defendant himself; and the fact that the theatre was not ready in time was due to a cause within the control of the defendant himself, and he had undertaken the risk.

HARDIE v. BALMAIN, (1902) 18 T. L. R. 539—  
[C. A.]

39. *Implied Obligation—Agreement to Contribute towards the Expenses of Building a Theatre—No Implied Obligation to Build a Theatre.*—The plaintiffs and defendants entered into an agreement, which contained a

**Construction—Continued.**

recital that the defendants had purchased some land and were intending to build a theatre thereon, and by which it was agreed that the plaintiffs should contribute in a certain proportion towards the expenses of building, and should become managing directors of the theatre at a salary for a term of years.

**Held**—that there was no implied obligation on the defendants to build the theatre.

**MORELL AND ANOTHER v. LONDON DISCOUNT CO.,** [Ld., (1902) 18 T. L. R. 507—Radley, J.]

**40. Implied Term—Contract for Supply of Horses, Harness, etc., “as may be Required”—Whether Implied Contract to Employ Contractor.**—The plaintiff entered into a contract with the defendants whereby he agreed to supply horses, harness, etc., for scavenging work during the period of one year “whenever thereto required” by the defendants’ engineer. The conditions annexed to the contract provided that the defendants might, if they thought proper, without in any way vitiating the contract, execute on their own account, or employ other contractors to execute, any works ordered by them. Some time before the expiration of the time covered by the contract the defendants ceased to employ the plaintiff, and gave the work to another contractor. In an action by the plaintiff to recover damages for breach of contract,

**Held**—that there was no obligation, either express or implied, on the part of the defendants to employ the plaintiff.

**Churchyard v. Regina** ((1865) L. R. 1 Q. B. 173; 14 L. T. 57) explained.

**MOON v. CAMBERWELL BOROUGH COUNCIL,** (1904) [68 J. P. 57; 89 L. T. 595; 20 T. L. R. 43; 2 L. G. R. 309—C. A.]

**41. Implied Term—Contract with Partners—Dissolution of Partnership—Liability of Partners.**—The plaintiffs entered into a contract with the defendants, who carried on business in partnership, whereby the latter were appointed sole buying agents for the plaintiffs for a certain district in England, the intention being that the whole district should be represented by the defendants for a period of five years. The plaintiffs agreed that the defendants should retain the agency so long as they met their engagements and kept strictly to the terms of the engagement for a period of five years, and in consideration the defendants agreed to act as buying agents for the district on the terms stated in the agreement, and to accept delivery and pay for a *minimum* quantity of the plaintiffs’ products during each year of the term. The defendants had the option of renewing the agreement at its termination. During the five years the defendants dissolved partnership, and the plaintiffs sued for damages for breaches of the contract committed after the dissolution.

**Held**—that there was no implied term in the contract that the defendants would not dissolve partnership during the term, and thus disable themselves from carrying out the contract, and that therefore the defendants were not liable.

**Ogdens, Ltd. v. Nelson** ([1904] 2 K. B. 410; 73 L. J. K. B. 865; 53 W. R. 71, 90 L. T. 656; 20 T. L. R. 466—C. A., No. 8, *supra*) distinguished.

**BOVINE, LD. v. DENT AND WILKINSON,** (1905) 21 [T. L. R. 82—Kennedy, J.]

**42. Implied Term—Coronation Naval Review—Contract to Supply Refreshments for Steamer—In the Event of the Cancellation of the Review before any Expense is Incurred by the Caterer, there shall be no Liability on the Defendant’s Part—Cheque Given in Part Payment—Cancellation of Review—No Refreshments Supplied.**—In March, 1902, a contract was entered into between the plaintiff and the defendants, whereby the plaintiff agreed to do the catering on a steamer hired by the defendants for the Royal Naval Review which was proposed to be held on June 28th, 1902, upon the occasion of the coronation of the King. As part of the arrangement as to the catering, the sum of £300 was to be paid to the plaintiff on account of the refreshments on the Monday previous to the review day. The defendants, in a letter confirming the arrangements, stated in a postscript that “it is, of course, understood that, in the event of the cancellation of the review before any expense is incurred by the caterer, there shall be no liability on our side.” On Monday, June 23rd, being the Monday before the review day, the defendants sent the plaintiff a cheque for £300, with a covering letter stating that it was sent in accordance with the agreement made with the plaintiff in March. The plaintiff received the cheque and retained it until July 15th. At the time of its receipt the plaintiff had incurred some small expense for extra knives, forks, etc., but had incurred no expenses for refreshments. On June 24th the King’s illness was made known to the public, and on June 25th the review was countermanded. On the same day (June 25th) the defendant wrote to the plaintiff abandoning the proposed trip, and suggesting that the greater part of the cheque for £300 should be returned to them. On July 15th the defendants stopped the cheque, which had not been presented up to that time, and informed the plaintiff that they had done so. The plaintiff claimed the amount of the cheque and interest.

**Held**—that the plaintiff was not entitled to recover, as in the events which had happened there was no liability on the defendants beyond the small amount for actual expenses incurred, which the defendants had always been willing to pay.

Decision of the C. A. ([1904] 1 K. B. 565; 73 L. J. K. B. 406; 52 W. R. 499; 90 L. T. 497; 20 T. L. R. 286), affirmed.



**Construction—Continued.**

ELLIOTT v. CRUTCHLEY, [1906] A. C. 7; 75 [L. J. K. B. 147; 54 W. R. 349; 94 L. T. 5; 22 T. L. R. 83—H. L. (E.)

43. *Meaning of the Words "Fatal Accident in a Mine."*—It was agreed between the appellants and their workmen that in case of a fatal accident in the mine the workmen might in certain cases leave the mine. A boy was injured in the mine, and when extricated from beneath the truck which had run over him gave no signs of life. He was, however, still, in fact, living, but died two hours after his removal to the hospital.

HELD—that this was a fatal accident within the words of the agreement.

DENABY AND CADEBY MAIN COLLIERIES Co. v. [FENTON, (1898) 14 T. L. R. 268—Div. Ct.

44. *Mode of Payment—Automatic Gas Meter—Theft of Money from—Liability for Loss.*—Without any negligence on the part of a householder, money placed by him in an automatic "slot" meter in payment for gas, which he subsequently consumed, was stolen.

HELD—that the householder had adopted the method of payment contemplated by the contract, and could not be called upon to pay again.

EDMUNDSON v. MAYOR OF LONGTON, (1903) 19 [T. L. R. 15—Div. Ct.

45. *Obvious Error—Policy of Insurance—Correction by Court.*—In an action upon an accident policy the Court, in order to give effect to the obvious intention of the parties, disregarded the word "not" in a proviso that the right to recover should be forfeited after the lapse of a certain time "unless" a settlement had been agreed on, or the claim referred to arbitration "or legal proceedings have not been taken" to enforce the claim.

GLEN'S TRUSTEES v. LANCASHIRE AND YORKSHIRE [INSURANCE Co., (1906) 8 F. 915—Ct. of Sess.

46. *Parties—Title to Sue—Contract Made with Minister of Marine—Continuity of Contractual Obligation—Omission of Words "or His Successors."*—There is nothing in the municipal law of Scotland which places any obstacle which is unknown in England in the way of the enforcement of contracts, and therefore in the way of making of contracts, with foreign Governments.

Contracts with respect to the building of certain ships dated June 4th and November 24th, 1896, were made in this country "between the Chief of the Spanish Royal Naval Commission" and "the commissary of the Commission"—mentioning their names—"both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government, on the one part, and James and George Thompson, Limited, engi-

neers and shipbuilders, Clydebank, Scotland, in their own name and representation, on the other part." The Spanish Minister of Marine for the time being brought an action for breaches of the contract.

HELD—that it was exceedingly plain that one of the contracting parties was the "Spanish Minister of Marine," and that he had a right to bring an action on the contract; that though the words "or his successors" were not used, it was what the contracting parties meant; and what the parties contemplated was the continuity of the contractual obligation; and that the Spanish Minister for the time being was entitled to bring the actions, though he was not Minister of Marine at the dates of the contracts.

Decision of the Second Division of the Court of Session ([1901] 4 F. 319) reversed.

YZQUERDO Y CASTENADA v. CLYDEBANK ENGINEERING AND SHIPBUILDING Co., [1902] A. C. 524; 71 L. J. P. C. 94; 87 L. T. 339; 18 T. L. R. 773—H. L. (S.).

47. *Personal Contract—Agreement to Perform at Music-hall—Death of One of the Proprietors—Liability of Surviving Partners.*—The plaintiffs entered into a contract with three partners, the proprietors of a music-hall, to perform at the music-hall for two separate periods. The contract contained a clause that the partners should not be liable if an "unforeseen calamity" prevented the fulfilment of the contract. One of the partners died, and the plaintiffs fulfilled their engagement for the first period. Before the second period arrived the hall was sold by the mortgagees under their power of sale.

HELD—that the surviving partners were liable for breach of the contract, the contract being of a kind which could be enforced notwithstanding the death of one of the partners, and that the sale of the hall by the mortgagees was not an "unforeseen calamity" contemplated by the contract.

PHILLIPS AND OTHERS v. ALHAMBRA PALACE Co., [(1900) 83 L. T. 431; 17 T. L. R. 431—Div. Ct.

48. *Personal Contract—Music-hall—Engagement of Troupe—Death of One Member of Troupe—Right to Terminate Contract.*—By a contract between the proprietors of a music-hall and a troupe consisting of three brothers, called the Harvey Boys, the former engaged the latter to perform for a week at the music-hall. The contract was signed "Harvey Boys" by one of the troupe. The two elder brothers shared the profits of the troupe, and paid their younger brother a salary. One of the elder brothers died before the time for the performance arrived, and the surviving elder brother engaged another person to take his brother's place, he himself taking the profits and paying salaries to the two others. The proprietors of the music-hall cancelled the contract on

**Construction—Continued.**

account of the death of one of the members of the troupe. In an action by the three members of the troupe to recover damages for breach of contract,

**HELD**—that the contract was a personal one made with the three original persons who composed the troupe, and that the present members were not entitled to sue upon it.

**HARVEY AND OTHERS v THE TIVOLI, MANCHESTER, LD.,** (1907) 23 T. L. R. 592—Div. Ct.

**49. Personal Contract—Whether Terminated by Death of one of the Contracting Parties.**—The plaintiff company had invented a scheme of advertising by means of "hotel tariff frames." A "tariff frame" consisted of a framed printed tariff surrounded by advertisements of various tradesmen, and containing a list of hotels recommended by the management. An hotel-keeper agreed to take fifty of these tariff frames, and to hang and maintain them in various parts of his hotel for a period of five years in consideration of the company inserting a notice of his hotel in 2,000 of their tariff frames to be exhibited in other hotels. The fifty tariff frames were delivered and were duly exhibited. Before the expiration of the five years the hotel-keeper died.

**HELD**—that this contract was personal in its terms, and was not meant to be continued after Brabey's death.

**HOTEL AND GENERAL ADVERTISING Co. v. [WICKENDEN & STENE,** (1898) 14 T. L. R. 480—Bigham, J.

**50. Personal Services—Jockey—Temporary Incapacity from Accident—"Failure to Procure Licence."**—The plaintiff agreed to give the defendant the first call upon his services as a jockey during the flat racing seasons of 1900, 1901, and 1902, in consideration of a retaining fee of £2,000 a year. The defendant could terminate the agreement by paying a penalty of £1,000 and the retaining fee for the current year, and the agreement was to come to an end if the plaintiff should "fail to procure a licence."

The season for 1901 began on March 17th, at which date the plaintiff was incapacitated by an accident; he had previously applied for his licence, and had been told by the stewards to apply again when he was able to ride. He applied again on April 14th, received his licence before he was fit to ride, and, in fact, rode a race on May 14th.

**HELD**—that the letters written by the defendant did not amount to a termination of the contract, and that the £1,000 was not payable; but that the plaintiff had not "failed to procure a licence," and that he was entitled to the £2,000 retaining fee for 1902.

**LOATES v. MAPLE,** (1903) 88 L. T. 288—[Wright, J.]

**51. Right to Advertise on Programmes Sold in a Theatre.**—The plaintiffs, who owned a long lease of the Prince of Wales's Theatre, had let it to the defendant for a term of years, and the defendant had let to the plaintiffs the "front of the house"—that is to say, the management of the refreshment-rooms, bars, and cloak-rooms, the supply of programmes, and the right to take the fees in respect thereof. The plaintiff was to have the sole privilege of advertising and letting spaces for advertisements "upon all the programmes sold within the theatre," but it was expressly provided that the defendant could give seven days notice to the plaintiff of his desire to discontinue the charging of fees for the cloak-rooms or for the supply of programmes. This notice the defendant gave, and he contended that as the plaintiff had thereupon no right to "sell" programmes at the theatre, and as the agreement merely contemplated advertising upon "sold" programmes, the plaintiff was not entitled to continue advertising thereon. The plaintiff, on the other hand, contended that the defendant had interfered with him in the distribution of programmes on which advertisements had been printed, and claimed an injunction to restrain him from interfering with him in the distribution of programmes containing advertisements in the theatre.

**HELD**—that for the purposes of this motion the defendant was not entitled to insist that the programmes supplied by the plaintiff should not contain advertisements.

**BRUCE v. LOWENFELD,** (1898) 14 T. L. R. 169—[Stirling, J.]

**52. Sale of a Business—Assignment of Debts due and securities for the same—Cheque not cashed till after sale—Conditional Payment.**—H. sold to H. & Co. his business as it existed on the 31st Dec., 1887, and "all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts." On the 1st Jan., 1888, H. held bills and cheques which had been given to him by debtors to the business before that date. H. subsequently received the proceeds of the bills and cheques.

**HELD**—that debts which had been paid conditionally or unconditionally at the date of the taking over of the business by the company did not pass to the company under the terms of the agreement; that the debts in respect of which the bills and cheques had been given were conditionally paid at the date of the taking over of the business, and that the condition having been fulfilled by the bills being honoured and the cheques met, the debts must be taken to have been paid as from the date the bills and cheques were given.

**HELD ALSO**—that the bills and cheques were not "securities" for debts in the sense in

*Construction—Continued.*

which the word was used in the agreement, in which the term "securities" meant those held for debts which had not been paid either conditionally or unconditionally at the date of the taking over of the business.

HADLEY (FELIX) & Co., LD. v. HADLEY [1898], 2 [Ch. 680; 67 L. J. Ch. 694; 79 L. T. 299; 47 W. R. 238—Byrne, J.

53. *Share to be paid to retiring Partner in Bills at Six, Twelve and Eighteen Months each for One-third—Exclusion of Interest.*—A contract of partnership provided that on the retiring of a partner his share should be paid to him in bills at six, twelve and eighteen months respectively, each for one-third of the interest in the business.

HELD—that the terms of the agreement excluded a claim for interest on the instalments between the date of dissolution and payment.

M'ARTHUR v. SCOTT, 1899 (O. H.), 6 S. L. T. [208.

54. *Theatrical Contract—Engagement of Actor—Option to Retain Services for Another Year—Uncertainty.*—The defendants agreed to engage the plaintiff, who was an actor, for the principal part in pantomime at a salary of £130 per week for the first year, £140 a week for the second year, and £150 a week for the third year, with the option, in consideration of the engagement, of retaining the plaintiff's services on the same terms and conditions as set forth in the agreement for the forthcoming pantomime season.

HELD—that the contract meant that if the option was exercised, the weekly salary payable would be that which was payable for the third year, and that the contract was not void for uncertainty.

WADE v. ROBERT ARTHUR THEATRES Co., LD., [1907] 24 T. L. R. 77—Parker, J.

55. *Theatrical Contract—Meaning of "Re-engagement"—Question for Jury.*—It would seem that it is a question for the jury whether certain engagements are fresh engagements or "re-engagements" within the meaning of theatrical agents' contracts.

Decision of Darling, J., (1897), 14 T. L. R. 39, varied.

ROBEY v. ARNOLD, (1898) 14 T. L. R. 220—C. A.

56. *Theatrical Contract—Music Hall Artiste—Agreement not to "perform" elsewhere.*—By the plaintiff's contract of engagement with the defendants she undertook not to perform elsewhere during the engagement.

HELD—that this stipulation applied only to the days for which she was engaged by the contract, viz., week-days, and did not apply to Sundays.

Decision of Hawkins, J., affirmed.

KELLY v. LONDON PAVILION, LD., SAME v. THE [OXFORD, LD., SAME v. NEW TIVOLI, LD., (1898) 14 T. L. R. 234—C. A.

57. *Underwriting Agreement—Absolute or Conditional.*—One Bonner, at the request of one Edwin Oakden, signed an underwriting letter, by which he undertook to subscribe for 200 preference shares in the Crown Lease Proprietary Company, LD., which had been promoted by Oakden for the purpose of acquiring a lease of a site of land, and to pay for the same on the conditions named in a prospectus to be issued to the public. He further agreed to sign and lodge with the company the necessary application for shares and to pay the deposits as provided by the terms of the prospectus, and if he omitted to do this, his underwriting agreement was to be sufficient authority to Mr. Oakden to apply for the shares on his behalf. This Oakden subsequently did, and 189 preference shares were allotted to Bonner. Prior, however, to Oakden's application, it became evident that the company could not prosper, and the contract which had been entered into for the purchase of the land was rescinded. Bonner now asked, the company having gone into liquidation, to have his name removed from the list of contributors, on the ground that Oakden, as his agent, had been authorized by him to buy shares in a company formed for a particular purpose, and, that purpose having been relinquished, his authority had come to an end.

HELD—that his application must fail.

RE CROWN LEASE PROPRIETARY Co., LD., (1898) [14 T. L. R. 47—C. A.

58. *Varying—Independent Agreement.*—A written contract cannot be varied or modified by word of mouth, but proof may be given of a perfectly independent parol contract, not abrogating or in any way inconsistent with the original written contract.

Decision of C. A. reversed.

MERCANTILE AGENCY Co v. FLITWICH CHALY- [BEATE Co., (1898) 14 T. L. R. 90—H L (E)

## V. FORMATION.

59. *Acceptance—Offer—"Quotation"—Whether Concluded Contract.*—Plaintiffs wrote to defendants: "Please give us your lowest quotation for 3,000 yards of canvas, 32½ in. wide, to the enclosed sample or near, and your shortest time for delivery." Defendants replied. "We enclose sample nearest we have to match yours. Lowest price, 32½ in. wide, is 4½d. per yard. Delivery of 3,000 yards in five to six weeks." Plaintiffs replied: "Please get made for us 3,000 yards canvas, 32½ in wide, as per your quotation, at 4½d. per yard. Deliver same as quickly as possible. Also please quote" for other goods. The plaintiffs concluded by giving references as to their financial position.

HELD—that the defendants' letter was a "quotation" and not an offer; and that, upon the letters, there was no completed contract.

**Formation—Continued**

BOXERS & Co. v. DUKE, [1905] 2 Ir. R. 617—  
[K. B. D.]

60. *Acceptance by Post—Option—Exercise of by Post.*—The exercise of an option to purchase patent rights is within the rule laid down in *Henthorn v. Fraser* [1892] 2 Ch. 27; 61 L. J. Ch. 373; 40 W. R. 433; 66 L. T. 439—C. A., and will be deemed exercised at the time of posting an acceptance if the circumstances show that the parties contemplated the post office being used as a means of communication in matters connected with the contract.

BRUNER v. MOORE, [1904] 1 Ch. 305; 52 W. R. [295, 89 L. T. 738; 20 T. L. R. 125—  
Farwell, J.]

61. *Offer and Acceptance—Fire Insurance—Binding Contract.*—The plaintiffs made a proposal to the defendant company to effect with it an insurance which had previously been effected with another company. The defendants intimated to the plaintiffs their acceptance of the proposal, and stated that the policy would be forwarded "as early as possible." The plaintiffs' premises were burned down prior to the receipt of the policy and the plaintiffs wrote the defendants that it was needless to draw one. Before the receipt of this letter by the defendants, they had executed and forwarded to the plaintiffs a policy dated prior to the burning of the premises.

Held—that there was a binding contract, which could not be affected by any subsequent letter.

ADIE & SONS v. INSURANCE CORP., LD., (1898)  
[14 T. L. R. 544—Bigham, J.]

62. *Offer and Acceptance—Mere Quotation or Firm Offer.*—A Leith merchant wrote to a firm of oil millers: "I am offering to-day Plate linseed for Jan.-Feb. shipment to Leith, and have pleasure in quoting you 100 tons at 41s. 3d., usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply." The millers wired: "Accept 100 Jan.-Feb. Plate, 41s. 3d. Leith, per steamer Leith," and confirmed the wire by a letter in which they said: "Thus buying from you 100 tons Plate linseed Jan.-Feb. steamer shipment, usual contract."

Held—that the first letter was a firm offer to sell and was duly accepted by the wire, though the latter did not expressly refer to the "usual Plate terms" mentioned in the offer.

*Harvey v. Facey* ([1893] A. C. 552; 62 L. J. P. C. 127; 69 L. T. 504; 42 W. R. 129—P. C.) distinguished.

PHILP & Co. v. KNOBLAUCH, [1907] S. 994—  
[Ct. of Sess.]

63. *Offer and Acceptance—Sale by Tender—"Highest Net Money Tender"—Tender by*

*Reference to Another Tender.*—The liquidator of the defendant company asked for sealed tenders for the purchase of certain property of the company, and wrote to the two parties who were desirous of purchasing, saying that he would at once accept "the highest net money tender" he received.

B. tendered £31,000 for the property, and the plaintiff company tendered "such a sum as will exceed by £200 the amount to-day offered by the other proposing purchaser."

Held—that the plaintiffs' tender did not answer the description of "the highest net money tender."

Decision of North, J. (78 L. T. 8; 14 T. L. R. 176), affirmed.

SOUTH HETTON COAL CO., LD. v. HASWELL, [SHOOTON AND EASINGTON COAL AND COKE CO., LD., [1898] 1 Ch. 465; 67 L. J. Ch. 238; 78 L. T. 366; 14 T. L. R. 277; 46 W. R. 355—C. A.]

64. *Offer and Acceptance—Offer of Reward—Alternative Offer—Acceptance—Performance of Conditions—Question for Jury.*—M., a public entertainer, in introducing a box-trick, was in the habit of offering a reward of £500 to anyone who could discover the secret of his box-trick, or produce a correct imitation of it. S. and E. made a box in size and appearance exactly like M.'s box. Many witnesses, strangers to S. and E., had seen the rival box-tricks, and they declared that there was apparently no difference whatever between them and that they were exactly alike. The jury on the new trial found for the plaintiffs, S. and E., who claimed to have won the £500 reward offered, and judgment was given accordingly. The Court of Appeal unanimously refused an application asking that judgment should be entered for M., the defendant, or a new trial directed.

Held—that as there had been no misdirection, and each party had put his view clearly and forcibly and the jury had chosen between them, there was no ground for disturbing the verdict.

Decision of Court of Appeal (15 T. L. R. 79) affirmed.

MASKELYNE v. STOLLERY AND ANOTHER, (1900) 16  
[T. L. R. 97—H. L. (E.)]

65. *Mutuality—Uncertainty—Promissory Expressions Reserving an Option as to the Performance—Salary to be Mutually Arranged Between the Parties—No Existing Contract until Salary Ascertained.*—The defendant wrote a letter to the plaintiff saying, "I hereby agree to engage you for the principal lady's part, 'Victoria Chaffers,' in my play 'H.M.S. Irresponsible,' for a suburban tour at the salary we have agreed to. In the event of the piece coming to town under any West End management I agree to engage you to play the part of 'Victoria Chaffers' as played by you on tour at a West End salary, to be mutually arranged between us."

**Formation—Continued.**

**HELD**—that there was no existing contract as to the West End until the amount of salary had been ascertained; that the arrangement could not be construed otherwise than as an arrangement under which the two parties were to have a discretion, the one as to the salary which he would pay, the other as to the salary which she would accept, and until they had mutually agreed on that point there was no contract on which an action could be brought.

LOFTUS v. ROBERTS, (1902) 18 T. L. R. 532—  
[C. A.]

**66. Promise to "Favourably Consider"—Effect of.]**—By letter the appellants promised that if they were satisfied with the respondent as a customer they would "favourably consider" an application from him, at the expiration of the term, for a renewal of a sale to him of an ammoniacal liquor, produced by them in their manufacture of gas.

**HELD**—that there was not in the promise made in the letter that the appellants would "favourably consider" an application to renew anything binding the appellants, and that such an undertaking fell short of a contract.

MONTREAL GAS CO. v. VASEY, [1900] A. C. 595;  
[69 L. J. P. C. 134; 83 L. T. 233—P. C.]

**66A. Tender—Acceptance under Seal—Acceptance Cancelled before Execution of Contract.]**—In March, 1901, the defendant council advertised for tenders for the carrying out of certain sewerage works. One of the conditions was that the person tendering should undertake to execute a contract for the due performance of the works and enter into a bond with two responsible sureties for the due and satisfactory completion of the works. The plaintiff tendered for the work, and on May 10th, 1901, the council resolved that the plaintiff's tender should be accepted, and they instructed their clerk to write to the plaintiff to that effect, and to affix the seal of the council to the latter. Such letter was duly sent.

**HELD**—that the acceptance of the tender did not conclude a contract between the parties.

BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL, (1903) 67 J. P. 397; 1 L. G. R. 639—  
[C. A.]

**67. Validity—Agreement with Syndicate—Not Signed by all Members.]**—An agreement intended and purporting to be entered into with a syndicate, but which was in fact only executed by seven of its eight members, is not binding.

COOPER AND OTHERS v. THE UNITED CONTRACT CORPORATION, LD. AND DANZEGGER, (1898) 14 T. L. R. 29—Bigham, J.

**68. Voluntary Trust—Intended Transfer**

**of Property — Representations Influencing Conduct]**—N., a promoter of, and vendor to, an unsuccessful mining company, publicly and in good faith promised to create a trust under which the company and its shareholders would have benefited, but died before the trust was created.

**HELD**—that a person who heard of the contemplated trust could not, in virtue of the fact that he bought or held shares of the company in confidence of N.'s promise being carried out, establish a case of contract as against N., and, in the absence of any fraud or special representation, neither N. nor his executors would be estopped from denying liability, notwithstanding that N. himself might have benefited by the promise having been made.

COLEMAN v. NORTH, (1898) 47 W. R. 57—  
[Romer, J.]

**VI. ILLEGALITY.**

And see BASTARDY, 7; LIBEL AND SLANDER, 6.

**69. Immoral Consideration—Past Cohabitation—Contemplation of Future Cohabitation—Validity]**—A testator, who had for two years cohabited with a lady, executed a deed whereby he covenanted to pay her an annuity during her life, subject to a proviso that, if he should cease to be on terms of intimacy with her and after such cesser she should molest or annoy him by any act or proceeding whatever, the annuity should be forfeited and cease to be payable. Cohabitation continued until his death two years later.

**HELD**—that the deed was valid as given in consideration of past cohabitation, the contemplation of future cohabitation not being sufficient to invalidate it.

IN RE ISAACSON; SANDERS v. SMILES, (1905) 21 T. L. R. 89—Kekewich, J.

**70. Marriage Brokage—Contract to Procure Introductions to Several Persons—Payment of Money to be Repaid if no Engagement or Marriage—Right to Recover Money before Happening of Event—Stakeholder—Part Performance.]**—A marriage brokerage contract is not limited to a contract to procure for another for reward a particular person as husband or wife, but includes a contract generally to procure a husband or wife by means of introductions to others.

Such a contract is illegal, and money paid under it can be recovered by the payer before complete execution of the contract, although the other party has incurred expense in bringing about introductions.

A lady agreed to pay to the proprietor of a matrimonial newspaper, in which matrimonial advertisements appeared, £250 if a marriage resulted through his exertions, and she paid him a further sum of £52 in order that he should introduce her to different persons with a view to matrimony, £47 of which sum was to be returned in

**Illegality—Continued.**

nine months if no engagement or marriage took place within that period. After the defendant had given her certain introductions, but before any engagement or marriage took place, the lady, before the expiration of the nine months, sued to recover the £52 so paid upon the ground that the contract was a marriage brokerage contract, and was, therefore, illegal, and that she was entitled to recover the money paid under it.

HELD—that the contract was a marriage brokerage contract, and that the plaintiff was entitled to recover.

Decision of the Divisional Court ([1905] 1 K. B. 24; 74 L. J. K. B. 25, 92 L. T. 85; 21 T. L. R. 65) reversed.

HERMANN v. CHARLESWORTH, [1905] 2 K. B. [123; 74 L. J. K. B. 620; 54 W. R. 22; 93 L. T. 284; 21 T. L. R. 368—C. A.

71. *Public Policy—Bail in Criminal Case—Indemnity to Surety—Deposit of Shares.*—An indemnity given to his bail, whether by the prisoner or by some third person, is illegal, as being contrary to public policy.

CONSOLIDATED EXPLORATION AND FINANCE Co. v. [MUSGRAVE, [1900] 1 Ch. 37, 69 L. J. Ch. 11, 64 J. P. 89; 48 W. R. 298, 81 L. T. 747, 16 T. L. R. 13—North, J

72. *Public Policy—Clerk of Irish Petty Sessions—Assignment of Salary by.*—A Petty Sessions clerk in Ireland covenanted to assign his official salary to the plaintiff to secure an annuity. The plaintiff, having recovered judgment for arrears of the annuity, obtained an order for the appointment of a receiver by way of equitable execution over the future salary of the Petty Sessions clerk.

HELD—that the order should be discharged.

Per Kenny, J.—A clerk of Petty Sessions is a public and judicial officer, and the assignment of his salary would be contrary to public policy and unenforceable *Ib.*

M'CREEERY v. BENNETT, [1904] 2 Ir. R. 69—[K. B. D.

73. *Public Policy—Contract Tending to Affect Administration of Justice—Made on Behalf of Infant—Costs of Probate Action—Agreement to Pay Costs out of Estate—Refusal of Judge to Sanction—Infant Beneficiary—Liability upon Agreement.*—During the course of proceedings in the Probate Division to establish the validity of one or other of two wills, an agreement was made between the plaintiff, who claimed under the later will as residuary legatee, and the defendant, who claimed under the earlier will as executor and trustee for an infant beneficiary, whose guardian was a party to the agreement, providing that whichever will was upheld the costs, as between solicitor and client, of the plaintiff and the defendant and

the infant should be paid out of the estate of the deceased, whether the Court so ordered or not. The Court pronounced in favour of the earlier will, but on behalf of the infant beneficiary refused to sanction the agreement to pay costs out of the estate.

In an action by the plaintiff upon the agreement to recover his costs in the proceedings,

HELD—that the agreement was not void as tending to affect the administration of justice; that if the parties had been *suu juris* they could have entered into such an agreement, which would have been valid, and that the fact that the defendant could not perform his contract to pay the plaintiff's costs out of the estate owing to the beneficiary thereto being an infant, and therefore not bound by the contract, did not absolve the defendant from his obligation under the agreement, and that the defendant was therefore liable for the plaintiff's costs.

PRINCE v. HAWORTH, [1905] 2 K. B. 768; 92 [L. T. 773, 21 T. L. R. 402; 75 L. J. K. B. 92, 54 W. R. 249—Lawrance, J.

74. *Public Policy—Licence for Beerhouse—Brewers' support in obtaining—Tied house—Payment of Costs—Champerty.*—A contract between the tenant of a beerhouse and a firm of brewers—one of whom was a magistrate—that, in consideration of their paying all the costs of his application to the licensing magistrates for a licence (which involved that the brewers should give the support of their name and business reputation to such application), he would tie the beer trade of the premises when licensed to them and their successors in business, for a specified term of years, was held not to be equivalent to the purchase of a recommendation, and therefore not illegal and void as being contrary to public policy, nor as savouring of champerty.

Decision of Romer, J., affirmed.

SAVILL BROTHERS, LD. v. LANGMAN, 79 L. T. 44; [14 T. L. R. 504—C. A.

75. *Public Policy—Promise to Marry after Obtaining Divorce—Cohabitation Pending Divorce Suit—Divorce Obtained by Concealment thereof—Action for Breach of Contract—Not Maintainable.*—A married woman commenced divorce proceedings against her husband. Pending the hearing she cohabited with W., relying (as she alleged) upon his promise to marry her if she obtained a decree.

Upon the hearing she concealed her misconduct with W., and obtained a decree *nisi*, which was subsequently made absolute.

She now sued W. for breach of his alleged promise to marry her.

HELD—that, even assuming the promise to have been made, as a divorce was necessary for performance of the contract and was only obtained by deceiving the Court, the action was founded upon deceit and immorality, and it would be against public policy to permit it to be maintained.

**Illegality—Continued.**

PREVOST v. WOOD, (1905) 21 T. L. R. 684—  
[Darling, J.]

**76. Public Policy—Promise of Marriage—Promise to Marry on Death of Wife.**—A promise by a married man to a woman to marry her on the death of his wife, the woman knowing at the time that he is married, is not void as being contrary to public policy.

WILSON v. CARNLEY, (1907) 23 T. L. R. 757 (see [also 23 T. L. R. 578])—Lord Coleridge, Comm.

**77. Public Policy—Promise of Marriage—Promise to Marry on Death of Wife—Knowledge of Promise.**—A promise by a married man to a woman, who knows that he is married, to marry her on his wife's death, is against public policy, and affords no cause of action if not fulfilled.

SPIERS v. HUNT, (1907) 24 T. L. R. 183—  
[Phillimore, J.]

**78 Restraint of Trade—Agreement not to carry on Milkman's Business within Two Miles nor to solicit Employer's Customers—Penalty by way of Liquidated Damages—Validity.**—An infant entered into a contract with his employers, milk sellers, not to carry on a milkman's business within a distance of two miles nor to solicit his employer's customers, "under a penalty of £200, to be recovered as and by way of liquidated damages and not by way of penalty." In an action for an injunction to restrain the infant from carrying on a milkman's business within the specified distance,

HELD—that the contract was binding on the infant, the clause as to the payment of the £200 only binding him to pay the damage actually caused by his breach of contract, and not being a penalty clause in the ordinary sense.

MORRISON, FLEET & Co, LD. v. FLETCHER, (1901)  
[17 T. L. R. 95—Jeune, P.]

**79. Undue Pressure—Setting Aside Deed—Threat of Criminal Proceedings and Imprisonment—Resignation—Wrongful Dismissal.**—In an action for salary due and damages for wrongful dismissal the defendants pleaded, *inter alia*, that by an agreement entered into by the plaintiff and the defendants, which agreement was embodied in a deed, the plaintiff had tendered his resignation, which had been accepted by the defendants, and that the plaintiff had accepted a certain sum of money in complete satisfaction and discharge of all his claims against the defendants. In his reply, the plaintiff pleaded that he was induced to execute the deed by the defendants threatening unlawfully to imprison him unless he executed the same, and that he executed the deed in fear that the threat would be carried out, and that he had given no real or free consent to such execution. At the trial of the action two questions were left to the

jury: (1) Was the plaintiff induced to make the agreement by threats of the defendants of criminal proceedings or imprisonment? To which the jury returned the answer, "No." (2) Was the plaintiff induced to make the agreement by undue pressure exercised by the defendants to force the plaintiff to enter into the agreement? To which the jury returned the answer, "Yes."

HELD, on further consideration—that the answer of the jury to the second question was not sufficient to entitle the plaintiff to get rid of the deed and to fall back upon his original claims, and that judgment must be entered for the defendants; and also that the plaintiff resigned and was not dismissed.

BARNES v. RICHARDS AND OTHERS, (1902) 71  
[L. J. K. B. 341; 50 W. R. 363; 86 L. T. 231; 18 T. L. R. 328—Lord Alverstone, C. J.]

**VII. IMPOSSIBILITY OF PERFORMANCE.**

See also Sect. IV, CONSTRUCTION.

**80 Coronation Naval Review—Charter of Ship for Review and Cruise—Liability to Pay Agreed Price.**—The defendant hired a vessel for June 28th, 1902, "for the purposes of viewing the naval review and for a day's cruise round the fleet; also on June 29th for similar purposes. . . Price £250, payable £50 down, balance before ship leaves Herne Bay." On the review being cancelled, the plaintiffs wired to the defendant to ask his intentions, and, receiving no reply, they employed the vessel on her ordinary trips. They now sued for the balance of £200, less £90 earned by the vessel on the days in question.

HELD—that the vessel was by the contract placed at the defendant's disposal for the two days, that, under the circumstances, it could not be said that the happening of the review was regarded by both parties as the foundation of the contract; and that therefore the plaintiffs could recover.

Decision of Grantham, J. (88 L. T. 269; 9 Asp. M. C. 394), reversed.

HERNE BAY SIEAMBOAT CO., LD. v. HUTTON,  
[1903] 2 K. B. 683; 72 L. J. K. B. 879; 89  
L. T. 422; 19 T. L. R. 680; 52 W. R. 183, 9  
Asp. M. C. 472—C. A.]

**81. Impossibility of Performance Ascertained at Time of Contract, but Not Known to Either Party—Coronation Procession—Money Paid for Seats to View—Recovery of Money Paid.**—One hour after the decision of the King's doctors, which rendered the Coronation procession impossible, the plaintiff paid £100 to defendant for a window from which to see it, both parties being in ignorance of what had occurred.

HELD—that the plaintiff could recover his £100, on the ground that both parties made the agreement upon the supposition that nothing had already occurred to prevent it being carried out.

Clark v. Lindsay (*infra*) followed.

**Impossibility of Performance—Continued.**

(GRIFFITH v. BREYNER, (1903) 19 T. L. R. 434—  
[Wright, J.]

**82. Impossibility of Performance Ascertained at Time of Contract, but Not Known to Either Party—Coronation Procession—Money Paid for Seats—Substituted Agreement for Postponed Procession—No Postponed Procession—Right to Recover Money Paid.**—The plaintiff paid to the defendant £50 for a window for the purpose of viewing the Coronation procession on June 27th, the contract containing no provision governing the rights of the parties in the event of a postponement or abandonment. At the time when the contract was made, the King's doctors had already discovered that the procession could not take place on the 27th.

**HELD**—that, on the construction of the contract, the procession was not merely the object or motive inducing the plaintiff to make the agreement, but was the actual substance of the contract; and that, therefore, the plaintiff could have recovered his money back as being money paid in ignorance, or under a mistake of fact, had he not entered into a fresh agreement with the defendant.

Upon hearing of the King's illness, the plaintiff, instead of demanding the return of his money, left it with the defendant upon the terms (added to the original agreement) that he should have the use of the same window on the same conditions "if the Coronation procession should be postponed." No postponed procession took place before the plaintiff brought his action.

**HELD**—that he could not recover. There was an amended contract, which subsequently became impossible of performance without the default of either party, and, therefore, each must remain *in statu quo*.

*Blakeley v. Muller & Co.* (No. 84, *infra*) applied.

*CLARK v. LINDSAY*, (1903) 88 L. T. 198; 19 [T. L. R. 202—Div. Ct.]

**83. Subsequent Impossibility of Performance Not Due to Act of Either Party—Coronation Procession—Contract to Let Rooms on the Route of Procession—Implied Condition that Procession would Take Place.**—It is not essential to the application of the principle of *Taylor v. Caldwell* (3 B. & S. 826) that the direct subject-matter of the contract should perish or fail to be in existence at the date of the performance of the contract.

The plaintiff agreed to let to the defendant for £75 a flat overlooking Pall Mall on June 26th and 27th, 1902, on which days it was announced that the Coronation processions were to take place and would pass along Pall Mall. The procession did not take place on either of those days owing to the illness of the King. In an action to recover the money agreed to be paid,

**HELD**—that the Coronation procession was

the foundation of the contract, that as it was not within the contemplation of the parties at the time when the contract was made that the Coronation procession would not take place, it was an implied condition in the contract that the procession would take place, and that therefore the parties must remain *in statu quo*, and defendant was not liable.

Decision of *Darling, J.* (18 T. L. R. 823), affirmed.

*KRELL v. HENRY*, [1903] 2 K. B. 740; 72 [L. J. K. B. 794; 89 L. T. 328, 19 T. L. R. 711; 52 W. R. 246—C. A.]

**84. Subsequent Impossibility of Performance Not Due to Act of Either Party—Coronation Procession—Money Paid for Seats to View—Right to Recover Back—No Special Provision in Contract.**—Where performance of a contract subsequently becomes impossible owing to circumstances beyond the control of either party, the contract is not rescinded *ab initio*; but each party rests in the same position in which he was when the impossibility arose, unless the contract contains special terms to the contrary.

The plaintiffs, in May, 1902, took seats from the defendants for the Coronation procession on June 27th, paying for all the seats except one at the time. Neither the contract nor the tickets contained any provision regulating the rights of the parties in the event of the procession not taking place on the appointed day.

**HELD**—that, in the events which happened, the plaintiffs need not pay for the one seat; but could not recover back the money they had already paid.

*Taylor v. Caldwell* ((1863) 3 B. & S. 826; 32 L. J. Q. B. 164, 27 J. P. 710) and *Appleby v. Myers* ((1877) L. R. 2 C. P. 651; 36 L. J. C. P. 331; 16 L. T. 669—Ex. Ch.) explained and followed.

That part of *Darling, J.*'s, decision in *Krell v. Henry* (18 T. L. R. 823, see *supra*) which was abandoned before the C. A., disapproved.

*BLAKELEY v. MULLER & Co.*; *HOBSON v. PATTEN-DEN & Co.*, (1903) 67 J. P. 51; 88 L. T. 90; 19 T. L. R. 186; [1903] 2 K. B. 760 N.—Div. Ct.]

**85. Subsequent Impossibility of Performance not due to Act of Either Party—Coronation Review—Charter of Ship—Price Paid by Charterer—Money Spent by Owners in Preparing Ship—Rights of Parties.**—The plaintiffs chartered of the defendants a ship to attend the Coronation Review; after the plaintiffs had paid the agreed price (£1,500), and the defendants had spent £500 in fitting up the ship, the review was cancelled. The charter party contained the usual exceptions.

**HELD**—that the parties must remain *in statu quo*, and that the plaintiffs could not recover the £1,500.

*Blakeley v. Muller and Hobson v. Patten-den* ((1903) 67 J. P. 51; 88 L. T. 90; 19



**Impossibility of Performance—Continued.**

T. L. R. 186—Div. Ct., *supra*) approved and followed.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. [GENERAL STEAM NAVIGATION Co., [1903] 2 K. B. 756; 72 L. J. K. B. 933; 52 W. R. 181; 89 L. T. 429; 20 T. L. R. 10; 9 Asp. M. C. 477—C. A.

• 86. *Subsequent Impossibility of Performance not due to Act of Either Party—Rights Already Accrued—Money Already Paid—Money Due, but not Paid—Rights of Parties—Failure of Consideration.*—Where there is an agreement based on the assumption by both parties that a certain event will in the future take place, such event being the foundation of, or essential to the fulfilment of, the contract, and through no default of either party, and owing to circumstances not previously contemplated by them, it is ascertained before the time fixed for the event that it cannot take place, then (in the absence of any provision to the contrary) rights previously accrued to either party are unaffected, but both parties are free from any obligation to be subsequently performed under the agreement. In such a case the doctrine of failure of consideration has no application.

The plaintiff took a room from the defendant to view the Coronation Procession, and agreed to pay therefor at once the sum of £141 10s. He paid £100 on account, and the balance was unpaid and due when it was ascertained that the procession could not take place.

HELD—that the plaintiff not only could not recover the £100, but must pay the £41 10s. which he ought to have paid before the King's illness was announced.

CHANDLER v. WEBSTER, [1904] 1 K. B. 493; 73 [L. J. K. B. 401; 52 W. R. 290; 90 L. T. 217; 20 T. L. R. 222—C. A.

**VIII. RECTIFICATION.**

87. *Delay in Delivering Goods—Damages.*—The plaintiffs owned a fleet of fishing boats, and the defendants were ship-builders. By an agreement the defendants agreed to build for the plaintiffs four keel steam drifters, which contained, *inter alia*, the following condition:—"The said boats to be ready to be launched from the defendants' yard, three by May 1 and one by June 1, 1900." The plaintiffs, in anticipation of the completion of the boats, engaged crews of fishermen to take charge of them during the coming fishing season. The boats were launched, one on April 2nd, one on April 16th, one on April 20th, and one on June 2nd, 1900. The boats were then engined and delivered to the plaintiffs between May 29th and July 6th. The parties had acted differently before the agreement was drawn up. Extras were also ordered. The parties intended that the contract should be for delivery on or before May 1st.

HELD—that rectification was necessary because the parties had acted differently before the agreement was drawn up, which did not carry out the real agreement of the parties; that May 1st should be made the date of delivery subject to an extension for the alterations ordered; and that the plaintiffs were entitled to the loss of profits they would have made and the loss they incurred in settling with the fishermen.

STEAM HERRING FLEET, LD. v. V. S. RICHARDS & Co., LD., (1901) 17 T. L. R. 731—Kennedy, J.

88. *Mistake of One Party as to Price—Rectification Refused.*—The defendants, being desirous of having some plates fashioned and drilled for the purpose of a malting drum, approached the plaintiffs with a view to their undertaking the work. The plaintiffs were supplied with a specification, and they wrote to the defendants offering to do the work "at the rate of 30s. per cwt.," the plates to be supplied by the defendants. The defendants answered by letter referring to the plaintiffs' quotation of 30s. per cwt., and accepting the offer. The plaintiffs commenced the work, and when they had completed rather more than half they sent in their bill. On receipt of the bill the defendants said that there had been a mistake, that they never intended to agree to pay 30s. per cwt. The plaintiffs brought an action to recover the price of the work done. Evidence showed that a reasonable price to charge for the work would have been from £6 to £8. The plaintiffs had acted in good faith in making their offer; they knew they were asking a high price, but they thought that they would have to cut it down.

HELD—that the only contract was that contained in the plaintiffs' letter and in the defendants' acceptance of the plaintiffs' offer, and that the plaintiffs were entitled to recover on the basis of the contract price.

*Smith v. Hughes* ((1871) L. R. 6 Q. B. 597, 40 L. J. Q. B. 221; 19 W. R. 1059; 25 L. T. (N.S.) 329) applied.

EWING AND LAWSON v. HANBURY & Co., (1900) [16 T. L. R. 140—Mathew, J.

**IX. STATUTE OF FRAUDS.**

And see AUCTIONS AND AUCTIONEERS, 2, 5, 7.

89. *Contract Required to be in Writing—Parol Variation—Parol Rescission—Admissibility of Evidence—Statute of Frauds.*—Parol evidence is admissible to prove the rescission of a written contract, required by law to be in writing.

*Robinson v. Page* ((1826) 3 Russ., 114; 27 R. R. 26) followed.

But it is not admissible to prove a subsequent variation of the contract.

VEZEY v. RASHLEIGH, [1904] 1 Ch. 834; 73 L. J. [Ch. 422, 52 W. R. 442, 90 L. T. 663—[Byrne, J.

90. *Signature by Agent "thereunto Law-*

**Statute of Frauds—Continued.**

*fully Authorised*”—*Statute of Frauds* (29 Chas. 2, c. 3), s. 4.]—Where reliance is placed on the signature of an agent as satisfying the fourth section of the Statute of Frauds, it must, whether the document signed be a record of the terms or a document referring to and recognising the document containing the record of the terms, be shown that the agent signing was an agent “thereunto lawfully authorised”; that is all that is necessary.

*Jones v. Victoria Dock Co.* ((1877) 2 Q. B. D. 314, 46 L. J. Q. B. 219, 25 W. R. 501, 36 L. T. 347) approved.

*Smith v. Webster* ((1876) 3 Ch. D. 49; 45 L. J. Ch. 528, 24 W. R. 894; 35 L. T. 44) discussed.

*JOHN GRIFFITHS CYCLE CORPORATION, LD. v. HUMBER & CO, LD.*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 958; 81 L. T. 310—C. A.

91 *Signature by Agent “thereunto Lawfully Authorised” — Solicitors — Statute of Frauds* (29 Chas. 2, c. 3).—Solicitors employed to put a contract into shape and get it stamped are not agents whose signature is sufficient within the Statute of Frauds.

*BOWEN v. DUC D’ORLEANS*, (1900) 16 T. L. R. [226—C. A.

92 *Not to be Performed within a Year—Agreement for Fined Time subject to Earlier Termination—Statute of Frauds* (29 Car. 2, c. 3), s. 4.]—By an oral agreement between the plaintiff and the defendants, the former, who carried on business abroad, agreed to sell to the defendants certain patented goods for re-sale in the United Kingdom until the plaintiff should sell his patent to a company, the effect of the contract being that the defendants were to be the sole vendors in the United Kingdom of the plaintiff’s patented goods until the patent expired, subject to the condition that the contract was to be determined if the plaintiff sold his patent to a company. At the time of the agreement the patent had eleven years to run.

Held—that this was an agreement not to be performed within one year from the making thereof within sect. 4 of the Statute of Frauds, and, not being in writing, was not enforceable.

*McGregor v. McGregor* ((1888) 21 Q. B. D. 424; 57 L. J. Q. B. 591; 58 L. T. 227; 37 W. R. 45—C. A.) distinguished.

*LAVALETTE v. RICHES & Co.*, (1907) 24 T. L. R. 3 [—Walton, J.

93. *Not to be Performed within a Year—Agreement for One Year to Commence on Following Day—Statute of Frauds* (29 Chas. 2, c. 3), s. 4.]—The defendant verbally agreed to hire a pair of horses from the plaintiff for one year, the hiring to begin on the following day.

Held—that this was a contract for a year and a day, and, therefore, one “not to be

performed within the space of one year from the making thereof” within sect. 4 of the Statute of Frauds, and could not be enforced. *Bracegirdle v. Heald* ((1818) 1 B. & Ald. 722) followed.

*DOLLAR v. PARKINGTON*, (1901) 84 L. T. 470, 17 [T. L. R. 331—Darling, J.

94. *Not to be Performed within a Year—Contract of Service—Employment for One Year “from” following day* (29 Car. 2, c. 3), s. 4.]—If a man be employed on December 6th to serve for one year, the service beginning on December 7th, the contract is not one within sect. 4 of the Statute of Frauds.

Decision of the Common Serjeant reversed.

*Dicta in Cawthorne v. Cordrey* ((1863) 13 C. B. (N.S.) 406; 32 L. J. C. P. 152) and in *Britain v. Rossiter* ((1879) 11 Q. B. D. 123, 48 L. J. Q. B. 362; 27 W. R. 482; 40 L. T. 240—C. A.) approved and followed.

*SMITH v. GOLD COAST AND ASHANTI EXPLORERS, [LD.]*, [1903] 1 K. B. 235; 72 L. J. K. B. 235; 88 L. T. 202; 19 T. L. R. 152—Div. Ct.

“*From December 7th.*”—On appeal it was suggested that the Divisional Court wrongly assumed that the service was to commence on the 7th, and not 8th. Appeal dismissed, on the ground that there was clearly evidence entitling the plaintiff to have his case left to the jury.

[1903] 1 K. B. 338; 72 L. J. K. B. 235; 51 W. R. [373; 88 L. T. 204, 442; 19 T. L. R. 268—C. A.

95. *Not to be Performed within a Year—Hire of Goods for Three Years—Statute of Frauds* (29 Chas. 2, c. 3), s. 4.]—Where a person agrees to let, and another agrees to hire, certain improved gas plant for a term of three years, the agreement “is not one which is to be performed within the space of one year from the making thereof” by either party, and falls within the Statute of Frauds.

*MILSOM v. STAFFORD*, (1899) 80 L. T. 590; 15 [T. L. R. 357—C. A.

96. *Part Performance—Damages an Adequate Remedy—Specific Performance—Verbal Agreement for a Three Years’ Partnership—Statute of Frauds* (29 Car. 2, c. 3), s. 4.]—The doctrine of part performance has not been extended beyond its former application in the old days of the Court of Chancery. It applies where that Court would have decreed specific performance, if there had been a written contract.

The plaintiff and defendant entered into an agreement for a three years’ partnership; and certain small acts were done by the parties *quâ* partners, an office being taken and decorated, and stationery ordered. The agreement was, however, not signed when the defendant repudiated it, and there was no memorandum in writing sufficient to satisfy the Statute of Frauds. The plaintiff claimed damages for breach of the agreement, relying on the doctrine of part performance.

**Statute of Frauds—Continued**

HELD—that he could not recover. The agreement having been repudiated almost before it had been acted upon, and damages being an adequate and appropriate remedy for such a breach, the Court of Chancery would not have decreed specific performance; and therefore the doctrine of part performance did not apply.

*McManus v Cook* ((1887) 35 Ch. D. 697; 56 L. J. Ch. 662, 51 J. P. 708; 35 W. R. 754, 56 L. T. 900—Kay, J.) applied.

*TURNER v. MELLADREW*, (1903) 19 T. L. R. 273—[Walton, J.]

97 *Promise to Answer for the Debt of Another after Debt Incurred—Statute of Frauds* (29 Chas 2, c. 3), s. 4.—The defendant's husband having incurred a debt to the plaintiff in respect of dealings in stocks and shares, the defendant verbally promised the plaintiff to pay the amount in consideration that legal proceedings were not taken against her husband

HELD—that this was a promise to answer for the debt of another within sect. 4 of the Statute of Frauds, and not being in writing could not be sued upon

Decision of Lawrance, J. ((1901) 17 T. L. R. 396), affirmed.

*BEARD AND ANOTHER v. HARDY*, (1901) 17 T. L. R. [633—C. A.]

**CONTRACTOR.**

See BUILDERS, &C.

**CONVERSION.**

See TROVER AND CONVERSION.

**CONVERSION AND RECONVERSION IN EQUITY.**

See TRUSTS AND TRUSTEES.

**CONVEYANCES.**

See FRAUDULENT AND VOLUNTARY CONVEYANCES; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

**CONVICTIONS.**

See CRIMINAL LAW AND PROCEDURE.

**CONVICT'S PROPERTY.**

See CRIMINAL LAW, 228, 229

**COPYHOLDS.**

I. COURT ROLLS . . . . .	702
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And see COMPULSORY PURCHASE, 11, 50.

**I. COURT ROLLS.**

1. *Custody of—Rights of Lord—Rights of Steward.*—The lord of a manor has a qualified right to the custody of the court rolls, but he is not entitled to them for himself solely. He is a trustee and guardian of them as evidence of the tenants' rights. The steward is in a sense the servant of the lord, but he is not a mere servant; he holds a judicial office, and he also has a similar qualified right to the custody of the court rolls in order to do his duty as steward. In a certain sense the lord's rights are paramount rights, but they are subject to the steward's claim to the use of them. Both are trustees in respect of them.

Where a steward who has been appointed for life is properly exercising his duties as steward, the lord cannot as a matter of right demand delivery up of the court rolls to him.

The dictum of Shadwell, V.-C., in *Rawes v. Rawes* (7 Sim. 624 at p. 626) that "the lord has, as of right, the custody of the court rolls" is too wide, and not justified by the authorities there cited; it must be restricted to cases of misconduct on the part of the steward.

*RE JENNINGS*, [1903] 1 Ch. 906; 72 L. J. Ch. 454; [67 J. P. 367, 51 W. R. 425, 88 L. T. 387—Buckley, J.]

**II. GENERALLY.**

2. *Devolution—Equitable Estate—Land Transfer Act, 1897* (60 & 61 Vict. c. 65), s. 1.]—Under sect. 1 of the Land Transfer Act, 1897, an equitable estate in copyholds devolves upon the legal personal representative of the deceased owner, and not upon the customary heir.

*IN RE SOMERVILLE AND TURNER'S CONTRACT*. [1903] 2 Ch. 583; 72 L. J. Ch. 727; 89 L. T. 405; 52 W. R. 101—Kekewich, J.]

3. *No Copyholders—Long Continued Possession of a Piece of Land—Variations of Rent—Additions to the Holding—Quit Rent or Yearly Tenancy—Statute Quia Emptores* (18 Edw. 1, c. 1).—In a manor with no copyhold tenants a piece of land had been held by tenants since 1709 at a rent which had been increased at intervals from 1s. to 5s. 1d. There was no trace of the holding prior to 1709. Some of the increases of rent were traceable to additions to the holding, but not all.

## Generally—Continued.

Held—that upon the facts the occupants must be regarded as yearly tenants, and not as freehold tenants subject to a quit rent.

FOLJAMBE v. SMITH'S TADCASTER BREWERY CO.,  
[1904] 73 L. J. Ch. 722; 91 L. T. 312—  
Kekewich, J.

## III. MANORIAL CUSTOMS AND TENURES.

4. *Admittance—Several Trustees of a Will—Custom to Admit one Joint Tenant—Fine—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 3.]—A custom in a certain manor whereby joint tenancies are excluded from the court rolls of the manor is not overruled by sect. 3 of the Wills Act, 1837, and, therefore, where only one trustee of the will of a testator who had devised copyholds to several trustees was admitted to hold according to the tenor of the will and died, the lord of the manor was held entitled to call upon another trustee to be admitted and pay a fine.

HOWARD v. GWYNN, (1901) 65 J. P. 327; 84 L. T. [505; 17 T. L. R. 455—Div. Ct.

5. *Ancient Demesne Tenure—Title as Lord—Presumption of Lost Grant—Ambit of Manor—Freehold in Tenants—Custom to Pay Fine on Alienation—"Foreigner"—Statute Quia Emptores Terrarum* (18 Edw. 1, c. 1)]—An action was brought to try the right of the plaintiff as lord of the manor and soke of Rothley, in the county of Leicester, to a fine of 1s. in the £ on the purchase-money paid by the defendant for certain property situate at Grimston, known as "The Wongs," alleged to be within the manor.

Held—(1) that the plaintiff had sufficiently established his title as lord of the ancient manor of Rothley, and if necessary a lost grant from the Crown must be presumed; (2) that, in the absence of any proof as to the boundaries of the manor, "The Wongs" was within the ambit of the manor; (3) that the freehold was in the Grimston tenants, and not in the lord, as it is only the freeholders of the manor who are truly tenants in ancient demesne; (4) that the custom of the manor that all the Grimston tenants of the manor were bound to pay a fine of 1s. in the £ on alienation by way of sale to "a foreigner," or, alternatively, that the "foreigner" was bound to pay such a fine on entry, was not proved; (5) that the defendant was not "a foreigner" within the meaning of the alleged custom; (6) that the custom was bad as inconsistent with the nature of the estate, and as a restraint upon alienation; (7) that the action failed, and judgment must be given for the defendant with costs.

MERTTENS v. HILL, [1901] 1 Ch. 842; 70 [L. J. Ch. 489; 65 J. P. 312; 49 W. R. 408; 84 L. T. 260; 17 T. L. R. 289—  
Cozens-Hardy, J.

6. *Court Leet—Jury—Commoners—Byelaws.*]—The jury in a Court leet of a manor made a bye-law regulating the rights of the commoners in respect of a fishery in the manor. The jury were not composed exclusively of commoners, though the majority were commoners

Held—that the bye-law was bad.

PLATT AND OTHERS v. JESSETT, (1901) 17 [T. L. R. 105—Div. Ct.

7. *Customary Obligation to Repair—Forfeiture—Damages—Evidence of Customary Obligation.*]—A lord of a manor sued the executors of a copyholder for damages for non-repair, alleging a customary obligation to maintain copyhold premises in tenantable repair.

In support of the alleged custom he produced,

(1) A customary of the manor showing copyholders to be entitled to housebote for use on their holdings;

(2) Presentments for disrepair, and subsequent forfeitures for non-repairs after such presentments;

(3) Licences to sublet, provided all due repairs had been done; and

(4) Oral evidence of repairs done at the lord's request without formal presentment.

Held—that such evidence was all referable to the ordinary law of forfeiture in case of non-repair of copyholds, and was no evidence of the alleged custom.

BLACKMORE v. WHITE ([1899] 1 Q. B. 293; 68 L. J. Q. B. 180; 47 W. R. 448; 80 L. T. 79—Lord Russell, C.J., *infra*) distinguished.

GALBRAITH v. POYNTON, [1905] 2 K. B. 258; 74 [L. J. K. B. 649—Bigham, J.

8. *Customary Obligation to Repair—Remedy of Lord for Breach—Liability of Executors of Tenant.*]—An action was brought by the lord of a manor against the executors of a deceased tenant of a copyhold tenement for not keeping the tenement in proper repair. It was proved that by the custom of the manor the tenant was bound to keep the tenement in repair, and that the ordinary mode by which that obligation had been enforced against the tenant was by presentment, fine, and forfeiture. Upon the death of the tenant the premises were found to be dilapidated and out of repair, but there had been no presentment by the lord in respect of such dilapidations.

Held—that, although there had been no presentment, the lord could have maintained an action in respect of the dilapidations against the tenant in her lifetime upon the implied contract by the tenant to keep the premises in repair arising from her admittance, and that this right of action being founded on contract, survived against the executors of the tenant.

BLACKMORE v. WHITE, [1899] 1 Q. B. 293, 68 [L. J. Q. B. 180; 47 W. R. 448; 80 L. T. 79—Lord Russell of Killowen, C.J.

**Manorial Customs and Tenures—Continued.**

9. *Customary Right to Dig Stone—Record of Court of Survey.*—The defendant, who was a copyhold and freehold tenant of a manor, claimed, by immemorial custom, that all the copyhold tenants had a right to dig and carry away stone and sand from a quarry, which was parcel of the waste of the manor, for use upon their respective tenements, but not elsewhere. In support of this custom an entry in the court rolls of the manor, made in 1695, was produced, of a presentment which stated that the copyholders and the freeholders of the manor had a right of getting stone in the waste of the manor to be spent on their respective tenements, but not elsewhere, and that certain tenants got stone to be used in another manor, and they were amerced in various sums.

HELD—that this was admissible evidence in the existence of the right claimed, and that the right claimed was proved, and was not unreasonable.

HEATH v. DEANE, [1905] 2 Ch. 86; 74 L. J. Ch. 466, 92 L. T. 643; 21 T. L. R. 404—Joyce, J.

10. *Custom for Copyholders to Kill Rabbits on Waste—Reasonableness—Lease of Right to Train and Gallop Horses on Waste—Injury to Rights of Commoners—Lord of Manor's Liability.*—A custom for the copyholders of a manor to be entitled to kill rabbits on the waste of a manor is not necessarily void for unreasonableness. Such a custom, however, held on the evidence not to be proved. The lord of the manor leased to a person by deed the right to train and gallop horses on the waste of the manor for a period of seven years.

HELD, on the evidence—that it was not made out that the lessee had done any substantial damage to the common of pasture enjoyed by the copyholders.

HELD FURTHER—that even if there were substantial injury done by the acts of the lessee to the rights of the commoners, the lord was, in the circumstances, not liable for those acts.

COOTE v. FORD AND OTHERS, (1901) 83 L. T. 482; [17 T. L. R. 58—Kennedy, J.

11. *Custom for Tenants to Work and Sell Coal, not thereby Hindering the Lord's Sale—Meaning of Hindrance.*—In an action by the lord of the manor to restrain copyhold tenants from working and selling coal under their tenements the defendants set up a special custom for the tenants of the manor to work and sell the coal so long as the sale thereof in no way hindered the lord's sale.

HELD—that the custom was proved, and that the defendants' sales, being comparatively small, were not in the circumstances a hindrance within the meaning of the restriction.

SITWELL v. WORRELL, (1898) 79 L. T. 86—[Byrne, J.

12. *Freeholders of a Manor—Right to Take Fish for Sale*—The freeholders within a manor may have by grant, and therefore by prescription, as appurtenant to their lands, a right of fishing in a non-tidal river, and of taking fish therefrom for the purposes of sale.

LORD CHESTERFIELD v. HARRIS, (1907) 24 T. L. R. [105—Neville, J.

**IV. RIGHTS OF LORD OF THE MANOR.**

13. *Arbitrary Fine—Smaller in Case of a Tenant than a Stranger—Colourable Purchase of Small Holding in Anticipation of large Purchase—Reasonable Fine.*—By the custom of a manor a tenant who bought further copyhold land paid only a small fine for admittance; a stranger had to pay a substantial arbitrary fine.

A person, not already a tenant, who was about to buy large copyholds of the manor, in order to avoid a heavy fine, agreed with a copyholder for the immediate sale of a small copyhold cottage on the terms that the vendor should repurchase it in three months, and should in the meantime continue to receive the rent and pay outgoing. The landlord claimed the full fine as from a stranger for admission to the larger purchase on the ground that the first purchase was only colourable.

HELD—that he was entitled to demand the larger fine: although possibly the mere agreement to repurchase was not sufficient to render the purchase merely colourable, the other stipulations were sufficient to do so.

HELD ALSO—that under such a custom as this the arbitrary fine is not limited to two years' improved value of the tenement: something may be added on account of the possibility of future purchases by the tenant in respect of which he will avoid the full fine.

ATTORNEY-GENERAL v. SANDOVER, [1904] 1 K. B. [689; 73 L. J. K. B. 478; 52 W. R. 573; 90 L. T. 480; 20 T. L. R. 351—Channell, J.

14. *Fine on Admittance—Assessment and Demand of Arbitrary Fine—Cause of Action—Limitation of Action—Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.*—The defendant was admitted tenant of copyholds on April 5, 1892. The lord of the manor took no steps to assess the arbitrary fine until February, 1893, and made no demand for it till September, 1898. On April 13, 1899, a writ was issued for the fine. The defence was that the claim was barred by the Civil Procedure Act, 1833, s. 3.

HELD—that the very day on which the admittance took place the lord could have completed the cause of action by assessing and demanding the fine; that the cause of action was the admittance, and the statute at once began to operate, and consequently the lord's right was barred.

**Rights of Lord of the Manor—Continued.**

MONCKTON v. PAYNE, [1899] 2 Q. B. 603; 68 [L. J. Q. B. 951; 48 W. R. 44; 81 L. T. 204; 15 T. L. R. 531—A. L. Smith, L.J.]

15. *Leases for Lives—Fines on Renewal—Capital—Income.*—M. was, under a will, tenant for life, without impeachment of waste, of two manors, and had power to grant leases for twenty-one years.

M., as lord of the manors, and according to the custom of the manors, granted leases for lives to copyholders at nominal rents, on their paying fines for renewal, the lord fixing the amount of the fines.

There was no legal obligation on the lord of either manor to renew the grants, but it was customary to do so.

**HELD**—that the tenant for life was, as lord of the manors, and according to the custom of the manors respectively, entitled to the fines on renewal of the leases as income and not as capital.

RE MEDOWS, NORIE v BENNETT, [1898] 1 Ch [300; 67 L. J. Ch. 145, 78 L. T. 13; 46 W. R. 297—Kekewich, J.]

16. *Heriot—Mortgage of Freehold Tenement—Death of Mortgagor—"Dying Seized"—Right to Claim Heriot.*—A mortgagor of manorial freeholds in respect of which a heriot may by custom be exacted upon a death is, notwithstanding the mortgage, so "seized" of the land in question, that upon his death a heriot may be claimed by the lord.

COPESTAKE v. HOPER, [1907] 1 Ch 366; 77 L. J. [Ch. 232; 96 L. T. 322, 23 T. L. R. 310—Kekewich, J.]

## COPYRIGHT AND LITERARY PROPERTY.

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See also DEPENDENCIES AND COLONIES.

### I. ASSIGNMENT.

1. *Agreement by Author giving Publisher Sole and Exclusive Right of Printing and*

*Publishing—Author and Publisher Agreement—Assignment in Writing—Assignment by Entry—Mortgage of Copyright—Power of Sale—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 13, 15.*—The plaintiff, J., was the author of a series of hymn tunes known as "Music and the Higher Life," of which the defendants were the publishers, J. paying for the printing, and the plates used being his property. On April 2nd, 1897, J. was registered as the proprietor of the copyright, the defendants' names being entered as the publishers.

By an agreement of July 27th, 1900, between J. and N., the defendants' managing director, in consideration of J. giving N. "the sole and exclusive right of printing and publishing" "Music and the Higher Life" the parties agreed to conditions—viz., that N should bear the cost of printing and pay J. 6d. on every copy sold, supplying copies to J. as required at a specified price. The volume was afterwards published.

J. commenced two other series of hymns, published by the defendants, and also compiled an abridged edition of "Music and the Higher Life," which contained, in addition, certain tunes from the latter series. On July 7th, 1903, J. and N. agreed to terms, prices, and conditions for the abridged edition—viz., that the work should be issued by the defendants, and the agreement remain in force until rescinded by mutual consent.

The defendants registered themselves as proprietors of the two later series and of the abridged edition, and claimed the copyright in all the works. On November 27th, 1905, J. determined the contracts.

On J's application to expunge the entries of the defendants on the register at Stationers' Hall as proprietors of the copyrights,

**HELD**—by Kekewich, J.—following *Stephens v. Benning* (24 L. T. Rep. (o.s.) 154, 235; 1 K. & J. 168; 6 De G. M. & G. 223), that the words "sole and exclusive right of printing and publishing" in the agreement of July 27th, 1900, were not equivalent to the copyright in "Music and the Higher Life," the description of "copyright" in sect. 2 of the Copyright Act, 1842, to which these words approximated, not being an exhaustive definition, and that the plaintiff was entitled to an order expunging the entries. "Copyright" implies a right for all time, and not a right which may be defeated by conditions.

**HELD**—as to the two later series and the abridged edition, that, on the facts proved, there was not evidence of an arrangement for registration in the defendants' names.

**HELD**—further, that an original entry could not operate as an assignment by entry under sect. 13 of the Copyright Act, 1842.

R. had advanced £100 on a charge on J.'s rights and interests in "Music and the Higher Life," which charge contained a power of sale. J. being in default, R. assigned to N. his rights under the charge.

**Assignment—Continued.**

**HELD**—that R. had not assigned the property the subject of the charge, but had only assigned his mortgage.

On appeal,

**HELD**—(1) that an appeal lay from his decision, but (2) that it was right; since there was nothing in the agreements amounting to an assignment of the copyright in the individual compositions.

Decision of Kekewich, J. ([1906] 2 Ch. 595; 95 L. T. 282; 22 T. L. R. 749) affirmed.

**IN RE JUDE'S MUSICAL COMPOSITIONS**, [1907] 1 [Ch. 651; 76 L. J. Ch. 542; 96 L. T. 766, 23 T. L. R. 461—C. A.

2. *Agreement for "Complete Copyright"—Book to be Written—"Employ" Person to Write—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss 2, 18.*—The plaintiffs, who were publishers, offered to an author £200 for the "complete copyright" in a story which he was about to write, the story to contain not less than 80,000 words. This offer was accepted, and £160 was paid by the plaintiffs to the author. The words of the story when written amounted to about 70,000 words, and the plaintiffs refused to pay the remaining £40. The author thereupon treated the agreement with the plaintiffs as at an end, and sold the rights in the story to the defendant, another publisher, who did not know of the agreement with the plaintiffs, for £75, and this sum was paid to the author. The plaintiffs published the story and registered themselves as the proprietors of the copyright. In an action to restrain the defendant from publishing and selling the story,

**HELD**—that there was a valid assignment of the copyright in the story to the plaintiffs within the meaning of sect. 2 of the Copyright Act, 1842, and that they were entitled to an injunction.

Under sect. 18 of the Act the plaintiffs could not have succeeded, since they had not paid for the book in full as required by that section. Meaning of the words "any book whatsoever" in sect. 18 discussed.

**WARD, LOCK & Co., Ld. v. LONG**, [1906] 2 Ch. [550; 75 L. J. Ch. 732, 95 L. T. 345, 22 T. L. R. 798—Kekewich, J.

**II. BOOKS**

3. *Author and Publisher—Agreement to Share Profits—Sole Right of Publishing Book—Bankruptcy of Publisher*—The plaintiff agreed to act as reader and literary adviser to the defendant, who was a publisher. Subsequently the plaintiff wrote a book which was to be published by the defendant, it being agreed that the profits should be shared equally between them. After several editions of the book had been published the defendant became bankrupt.

**HELD**—that the agreement as to sharing profits did not vest the copyright in the

book in the defendant; and that the contract was a personal one, and that, therefore, the defendant's trustee in bankruptcy had not the right of reprinting and publishing the book.

**LUCAS v. MONCRIEFF**, (1905) 21 T. L. R. 683— [Warrington, J.

4. *Biographical Notes—"Author"—Assignment by Defendant of Copyright before Action.*—The plaintiffs sent out questions to a number of golf players, and from the answers they compiled biographical notes in their golf annual. The golf annual was registered under the Copyright Acts.

**HELD**—that the plaintiffs were the "authors" of the biographical notes.

The defendants, before an action was brought to restrain them from publishing or selling a golf annual containing biographical notes taken from the plaintiffs' annual, assigned their annual and the copyright therein to third persons. They, however, admitted on the pleadings that they had sold and intended to sell the book.

**HELD**—that the plaintiffs were entitled to an injunction

**JAMES NISBET & Co., Ld. v. THE GOLF AGENCY**, [1907], 23 T. L. R. 370—Kekewich, J.

5. *Expunging Entry in Register—Authorised Version of the Bible—Monopoly—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 14.*—The Court, on the application of the Queen's printers, expunged from the register of copyrights an entry whereby a foreigner was registered as the proprietor of the copyright in a book entitled "The Red Letter New Testament (Authorised Version)."

**IN RE "THE RED LETTER NEW TESTAMENT (AUTHORISED VERSION)"**, (1901) 17 T. L. R. 1 —Kekewich, J.

6. *Infringement—"Print or Cause to be Printed"—Allowing Name on Title-Page—Agents—Partners or Joint Adventurers—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 15.*—The defendant, G., having determined to publish a Diary of Merchants, Shippers, and Foreign Buyers, negotiated with the other defendants, a corporation known as Lloyds, in order that the book might be published in connection with them. There was an agreement between them for the printing and publishing of the work, whereby Lloyds were to receive certain profits, and they were to allow the use of their name as a sort of authority for the book—that is, they allowed it to be stated that it was published under their supervision, and to go forth to the world with the title-page stating it was printed at Lloyds', Royal Exchange, London. At G.'s request he was allowed, in order to accelerate the publication, to get a portion of the book which could not be printed in time by Lloyds printed by other printers—Messrs. S. The sheets so printed contained the pirated matter. It was not suggested that the committee of Lloyds or any of their officials knew of the fraud.

## Books—Continued.

**HELD**—that on the evidence Messrs. S. were agents of G. only, and no such connection between Lloyds and G. had been proved as would make them either partners or joint adventurers; and that it was impossible to say that Lloyds printed the pirated part of the book or "caused" it to be printed within the meaning of sect. 15 of the Copyright Act, 1842.

*Russell v. Briant* ((1849) 8 C. B. 836; 19 L. J. C. P. 33; 14 Jur. 201) and *Lyon v. Knowles* ((1863) 3 B. & S. 556, 32 L. J. Q. B. 71; 11 W. R. 266; 7 L. T. (n.s.) 670) followed. Decision of *Byrne, J.* ([1901] 1 Ch. 374; 70 L. J. Ch. 237; 49 W. R. 313; 84 L. T. 581), affirmed.

*KELLY'S DIRECTORIES, LD. v. GAVIN AND LLOYDS*, [1902] 1 Ch. 631, 71 L. J. Ch. 405; 50 W. R. 385, 86 L. T. 393, 18 T. L. R. 346—C. A.

**7. Use of Author's Work — Common Sources of Information—Annotated Edition of Shakespeare—Infringement—Injunction**—An author may avail himself of common sources of information on a subject, but he is not entitled to save himself pains and labour by adopting a predecessor's work with but colourable variations, even though such predecessor's work is based on materials which are common property. Thus an author is not at liberty to avail himself of the taste and judgment of a predecessor in illustrating his work by quotations, nor can he justify taking such quotations on the ground that he has simply followed the references given by his predecessor and copied the quotations from the original works.

Decision of *Kekewich, J.* ((1901) 49 W. R. 438, 84 L. T. 452; 17 T. L. R. 414), reversed.

*MOFFAT AND PAIGE, LD. v. GILL & SONS, LD.*, [AND *MARSHALL*, (1902) 50 W. R. 528; 86 L. T. 465; 18 T. L. R. 547—C. A.

## III. CATALOGUES.

**8. Illustrated Catalogues—Action for Infringement—Misleading Statements in Catalogue—Relief Refused.**—The plaintiff published an illustrated catalogue of trucks, trolleys, and barrows sold by him. Many of the odd pages were headed, "Inventor, Patentee, and Sole Maker," and many of the even pages were headed, "Slingsby's Patent." The plaintiff had no English patent for the various articles represented, though he had certain foreign patents. The catalogue also contained pictures of buildings on which the plaintiff's name was written in large letters, although he did not occupy the whole of them. The catalogue was registered at Stationers' Hall.

**HELD**—in an action for infringement (which was admitted), that inasmuch as the statements as to his being patentee, etc., were calculated to mislead the public, this was an attempt to get trade regardless of the way in which it was obtained, and that the plaintiff was entitled to no protection.

*SLINGSBY v. BRADFORD PATENT TRUCK AND [TROLLEY CO., [1905] W. N. 122—Warrington, J.*

**9. Illustrated Catalogue**—"Sheet of Letterpress"—Copyright Act, 1842 (5 & 6 Vict. c. 42), s. 2.—The plaintiff was the proprietor of a trade catalogue in the form of a large sheet of paper on which were illustrations of chairs, sofas, and other articles of furniture, there being a few formal words in addition. The catalogue was registered as a book under the Copyright Act, 1842. The defendant published a similar catalogue, copying some of the illustrations from the plaintiff's catalogue.

**HELD**—that the plaintiff's catalogue was a "sheet of letterpress," and therefore a "book" within sect. 2 of the Copyright Act, 1842, and that he was entitled to an injunction restraining the defendant from publishing any catalogue containing illustrations copied from the plaintiff's catalogue.

*DAVIS v. BENJAMIN*, [1906] 2 Ch. 491; 75 L. J. [Ch. 800, 22 T. L. R. 702, 95 L. T. 671—Eady, J.

**10. List of Articles for Sale—Injunction.**—A chemist and druggist carrying on business in a provincial town prepared and registered a catalogue of articles, medicines, and drugs sold by him, arranged under various headings and sub-headings, which contained under the heading "Drugs and Chemicals, including Veterinary Medicines and Photographic Chemicals," an alphabetical list, fifteen pages long, of such articles with their prices, and under the heading "Patent Medicines and Proprietary Preparations. Any preparation not in stock will be procured with as little delay as possible," an alphabetical list, twelve pages long, of such remedies with their prices. A limited company carrying on several businesses in the same town added a drug and dispensing department, and inserted in their catalogue copies of the above-mentioned headings and lists from the chemist's catalogue, omitting two preparations only. They also copied from his catalogue several other entries. The copying was admitted.

On a motion for an injunction to restrain the company from infringing the chemist's copyright in his catalogue it was contended that mere dry lists of articles for sale with their prices could not be the subjects of copyright.

**HELD**—that the lists were subjects of copyright, and an injunction was granted accordingly.

*COLLIS v. CATER, STOFFEL AND FORTT, LD.*, (1898) [78 L. T. 613—North, J.

## IV. DESIGNS.

**11. Sale of Blocks to Customer for Personal Use—User of Blocks by Purchaser from Customer—Copyright Act, 1842 (5 & 6**



*Designs—Continued.*

Vict. c. 45)—*Fine Arts Copyright Act, 1862* (25 & 26 Vict. c. 68).]—The plaintiffs, who were the owners of a catalogue containing illustrations of designs for articles of clothing, supplied certain electro blocks of the illustrations to a customer, for a money consideration, on the terms that he should use them for the purpose of his own catalogue only. One of the defendants, who had reproduced the illustrations for the customer, purchased the stereos or blocks from him without any restrictions or conditions and produced a catalogue containing the illustrations in question for the other defendant. The plaintiffs registered their catalogue as a book under the Copyright Act, 1842, but did not register it under the Fine Arts Copyright Act, 1862.

HELD—that the plaintiffs were entitled to an injunction restraining the defendants from using the blocks for the reproduction and sale of the illustrations, because the defendants as purchasers of the stereos or blocks from the customer could have no higher right of publication than the persons from whom they bought.

*Cooper v Stephens* ([1895] 1 Ch. 567; 64 L. J. Ch. 403; 43 W. R. 444; 72 L. T. 390; 13 R. 444—Romer, J.) approved.

Decision of Byrne, J. ((1900) 16 T. L. R. 501), affirmed.

W. MARSHALL & Co, LD. v A. H. BULL, LD., [AND OTHERS, (1901) 85 L. T. 77; 17 T. L. R. 684—C. A.]

12. *Infringement — Damages — Penalties — Absence of Bad Faith or Negligence—Copyright Act, 1862* (25 & 26 Vict. c. 68), ss. 1, 6, 11.]—Plaintiff, as the owner of a design under the Copyright Act, 1862, brought an action for damages and penalties against T. & Co., a firm who had inserted, without authority, the plaintiff's design as an advertisement in the two newspapers owned by the defendants in the present actions respectively, and also separate actions against these defendants claiming damages and penalties in respect of each copy of the newspapers which contained the advertisement, as being an infringement of his copyright. The Master of the Rolls held the plaintiff entitled to damages, but not to penalties against T. & Co.; but finding as a fact that the owners of the newspapers had acted without bad faith or negligence, he dismissed the actions against them. No appeal was lodged against the judgment in the action against T. & Co.; but the plaintiff having appealed in the actions against the owners of the newspapers:

HELD (FitzGibbon, L.J., dissenting), reversing the decision of Porter, M.R.)—that the plaintiff was entitled to a penalty in respect of each copy of the newspapers containing the reproduction of the design, though the publication took place without

bad faith or negligence. The penalty of one farthing was awarded in respect of each copy published.

*Semble*, the plaintiff would have been entitled to penalties as well as damages against T. & Co.

GREEN v. IRISH INDEPENDENT CO.; SAME v. [FREEMAN'S JOURNAL CO., [1899] 1 I. R. 386—App.]

## V. DRAMATIC PIECES.

13. *Mimetic Sketch—Copyright Acts, 1833* (3 & 4 Will. 4, c. 15) and 1842 (5 & 6 Vict. c. 45), s. 2.]—A “dramatic piece” within the meaning of sect. 2 of the Copyright Act, 1842, may exist without any words, and be entitled to protection. An idea or plot *plus* the manual and physical actions may be such a “dramatic piece.”

TATE v. FULLBROOK, (1907) 23 T. L. R. 715—[Phillimore, J.]

Reversed, [1908] 1 K. B. 821, 24 T. L. R. 347—C. A.]

14. *Registration—Mistake in Time and Place of First Representation—Dramatic Copyright Act, 1833* (3 & 4 Will. IV. c. 85)—*Copyright Act, 1842* (5 & 6 Vict. c. 45), ss. 11, 13, 20, 21, 24.]—The effect of an incorrect entry in the register at Stationers' Hall as to the place and date of the first representation of a dramatic piece is merely to vitiate the registration so as to deprive the plaintiff of the advantage conferred by sect. 11 of the Copyright Act, 1842, of being able to rely upon the entry as *prima facie* evidence of title; it does not take away his title, but leaves him at liberty to prove it in other ways, and leaves him the remedies provided by the Dramatic Copyright Act, 1833.

HARDACRE AND ANOTHER v. ARMSTRONG, (1905) [21 T. L. R. 189—Wills, J.]

## VI. ENCYCLOPÆDIA.

15. *Articles in Encyclopædia—by General Editor—by Ordinary Contributor—Ownership of Copyright in such Articles—Copyright Act, 1842* (5 & 6 Vict. c. 45), ss. 2, 3, 18.]—Where a person produces a literary composition for which another person pays him money, and the latter expends money in publishing it, and takes the risk of the publication, it may reasonably be inferred that the author intended to part with the copyright in his composition; at any rate, it may be so inferred in the case of an article written for an encyclopædia.

The defendants, who are publishers, employed the plaintiffs, the one to act as general editor of, and also to contribute articles to, an encyclopædia on sport, and the other merely to contribute articles. The plaintiffs accordingly contributed signed articles, and were registered as the owners of the copyright therein; and they now sought to restrain the defendants from republishing such articles in a book, other than the encyclopædia. The written agreements, under which the plaintiffs were employed, contained no stipulation as to the copyright of the articles.

**Encyclopædia—Continued.**

**HELD**—that, upon the facts of the case, the irresistible inference was that the copyright in the articles was intended to be the property of the defendants, and that the action must fail.

*Sweet v. Benning* ((1855) 16 C. B. 459, 24 L. J. C. P. 175, 3 W. R. 519) and *Lamb v. Evans* ([1893] 1 Ch. 218; 62 L. J. Ch. 404; 41 W. R. 405; 68 L. T. 131—C. A.) followed and approved.

*Decision of Joyce, J.* ([1902] 1 Ch. 264; 70 L. J. Ch. 797; 50 W. R. 24; 85 L. T. 342; 17 T. L. R. 729), and of the C. A. ([1903] 1 Ch. 318, 72 L. J. Ch. 107; 51 W. R. 360; 87 L. T. 605, 19 T. L. R. 133) reversed.

**LAWRENCE AND BULLEN, LD. V. AFLALO**, [1904] [A. C. 17, 73 L. J. Ch. 85; 52 W. R. 369, 89 L. T. 569; 20 T. L. R. 42—II. L. (E.).

**VII. LETTERS.**

**16. Property in—Right of Writer to Restrain Publication.**—The defendant H., who was the proprietor of a newspaper, published on the 2nd Oct., 1897, a violent attack upon the plaintiff's conduct in certain Stock Exchange transactions some years ago, founded upon letters written by the plaintiff to B. The same supplement contained a threat to publish on the 1st Jan., 1898, proofs which the defendant had in his possession that the plaintiff had carried on similar transactions in later years.

The plaintiff, who was also the proprietor and editor of a newspaper, published on the 7th Oct., 1897, an article dealing with and denying the defendant's charges, in which he wrote: "You may publish and republish my letters to B. as often as you please," adding that he could restrain their publication by injunction if he chose, but that he had no intention of doing so.

The plaintiff afterwards published a letter, alleged to have been written by the defendant to a third person, as proof that the defendant was a person wholly unworthy of confidence.

The plaintiff afterwards discovered that the proofs referred to in the defendant's threat consisted wholly or partly of letters written by the plaintiff to S., and obtained by the defendant H. from S.'s widow.

The plaintiff now moved to restrain the defendants H. and S.'s widow from publishing any letters written by the plaintiff to S., and from informing anyone of the contents thereof.

**HELD**—that the Court will restrain any person in the possession of letters from publishing them against the will of the writer, except under special circumstances: e.g., where the publication is necessary for the purpose of clearing the defendant's character; that there was nothing in the plaintiff's conduct to disentitle him to this relief, and the defendant had not shown that his purpose in publishing the letters was to clear his own character.

The injunction was granted against publication of the letters from the plaintiff to S., but not against informing anyone of the contents thereof.

S.'s widow was not proved to have given the letters to H. for the purpose of publication, or to have colluded with him, and the action was dismissed against her with costs.

**LABOUCHERE v. HESS**, (1898) 97 L. T. 559; 14 [T. L. R. 75—North, J.

**17. Property in—Use of—Right of Possession to Use for Biographical Purposes.**—The possessor of the letters and other original documents written by a deceased person is not entitled to publish them or extracts from them or paraphrases thereof without the consent of the deceased's personal representative, and if they were written in confidence is not entitled to communicate their contents to another; but he may use them for the purpose of getting information therefrom for a biography of the deceased.

*Semble*—a lawful possession of letters is not affected by the fact that the original recipient committed a breach of confidence in parting with them

**PHILIP v. PENNELL**, [1907] 2 Ch. 577; 76 L. J. [Ch. 663; 97 L. T. 386; 23 T. L. R. 718—

Kekewich, J.

**18. Property in—Unauthorised Disclosure of Contents of Private Documents to Inland Revenue.**—A firm of law agents employed an accountant to wind up its affairs. In the course of his work, the accountant obtained possession of certain documents which were the property of one of the firm's clients, and sent copies of them to Inland Revenue authorities, for the purpose of showing that the profits in the client's income tax returns had been understated. The Inland Revenue demanded an explanation from the client, who, however, was able to satisfy them that his return was accurate. He thereupon brought an action against the accountant, and it was held that the pursuer had a right of property in the papers; that the defender was not justified in making the disclosure he did, and that he was liable for damages.

**BROWN'S TRUSTEES v. HAY**, (1898) 28 R. 1112, [ & 35 Sc. L. R. 877, 25 R. 1112—Ct. of Sess.

**19. Publication after Death of Author—"Proprietor of the Author's Manuscript"**—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 3.]—By sect. 3 of the Copyright Act, 1842, "the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published and his assigns."

The writer of certain letters died before 1845. These letters had not been published when, in 1895, the persons into whose pos-

*Letters—Continued.*

session they had come assigned all the copyright which they possessed in the letters and the exclusive right of publishing them to the plaintiffs for £250, and the plaintiffs agreed to return the manuscripts when copied, which they did. In 1898 the plaintiffs published the letters. The defendant subsequently bought the manuscripts, and claimed to have acquired the copyright from the author's personal representative

HELD—that the words in sect. 3 of the Copyright Act, 1842, "the proprietor of the author's manuscript," meant the proprietor of the paper with the words written on it, and not the proprietor of the composition independent of its inscription, that, therefore, the owner of the letters was entitled to assign to the plaintiffs the right to publish the letters, and so to enable the plaintiffs to acquire copyright in them; and that the true effect of the agreement of 1905 was to vest in the plaintiffs the copyright as soon as there was actual publication from the manuscripts.

Decision of Kekewich, J. ([1906] 1 Ch. 101; 75 L. J. Ch. 99; 54 W. R. 262, 94 L. T. 84; 22 T. L. R. 117), affirmed.

MACMILLAN & Co. v. DENT, [1907] 1 Ch. 107; 76 [L. J. Ch. 136, 95 L. T. 730; 23 T. L. R. 45—C. A.

20. *Publication of Letter by Stranger—Wrongful Act—Claim by Receiver of Letter for Damages for Conversion—Measure of Libel—Privileged Occasion.*—The defendant wrongfully communicated to another person a letter which had been written by a third person to the plaintiff, and which had got into the defendant's possession, and the plaintiff brought an action to recover damages for the detention and conversion of the letter.

HELD—that the plaintiff could recover substantial damages, and not merely the value of the thing converted.

The plaintiff also claimed damages for libel, alleging that the letter contained statements defamatory of her. The Judge at the trial ruled that the occasion was privileged, and the jury found that there was no malice.

HELD—that the privilege was not destroyed by reason of the publication of the letter being a wrongful act.

THURSTON v. CHARLES, (1905) 21 T. L. R. 659—[Walton, J.

## VIII MUSIC.

21. *Musical Copyright Act—Pirated Copies Seized by Constable—Order for their Destruction—Necessity for a Summons—Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), s. 1; and 1879 (42 & 43 Vict. c. 51), ss. 34, 51 (3)—Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15), ss. 1, 2.]—*Ex parte* proceedings against property must be authorised by a statute, either expressly or by the plainest possible implication.*

A Court of summary jurisdiction has no power under sect. 2 of the Musical Copyright Act, 1902, to make an order for the destruction of pirated copies of music, seized by a constable whilst being offered for sale, unless a summons has been issued against the person from whom they were seized.

*Semble*, also, sect. 51 (3) of the Summary Jurisdiction Act, 1879, applies the Summary Jurisdiction Acts to such proceedings; and probably, therefore, a summons is necessary under sect. 1 of the Summary Jurisdiction Act, 1848.

EX PARTE FRANCIS AND OTHERS, [1903] 1 K. B. [275; 72 L. J. K. B. 120; 67 J. P. 153; 51 W. R. 267; 88 L. T. 176; 19 T. L. R. 146; 20 Cox C. C., 381—Div. Ct.

22. *Musical Copyright Act—Summary Jurisdiction—Order to Seize Pirated Copies in Private House—No Power to Grant Search Warrant—Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15), s. 1.]—The words "sold or offered for sale" in sect. 1 of the Musical Copyright Act, 1902, are not confined to a sale by a hawkers. therefore, if a Court of summary jurisdiction is "satisfied by evidence that there is reasonable ground for believing that pirated copies are being . . . sold" in a private house, the Court should issue to a constable an order in the terms of the section authorising the seizure of such copies, but the Court has no power to grant a search warrant.*

IN RE FRANCIS AND OTHERS, FRANCIS v. FISHER, [(1903) 67 J. P. 301; 51 W. R. 698, 88 L. T. 806; 19 T. L. R. 507—Div. Ct.

23. *Musical Copyright Act—Criminal Proceedings—Conspiracy—Pirated Music—Evidence of Ownership of Copyright—Copyright Act, 1842 (5 & 6 Vict. c. 45)—Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15)]—If two or more persons combine together to make pirated music for sale, and so to get the profits out of that music to which they have no right, that is a conspiracy to deprive the owner of the copyright of his property, and is punishable as a criminal conspiracy.*

Certified copies of the book of registry of the proprietorship of copyright are admissible in a criminal prosecution as *prima facie* proof of the proprietorship of copyright, and are not rebutted by evidence that the original assignments of the copyright are in writing but not produced.

R. v. WILLETTTS, (1906) 70 J. P. 127—Common [Serjeant, C. C. Ct.

24. *"Sheet of Music"—Perforated Music Sheet for Mechanical Instrument—Directions for Working Instrument—"Copy"—Infringement—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 15.]—A copy is that which comes so near the original as to give every person seeing it the idea of the original. Things, therefore, which are used for purposes*

**Music—Continued.**

wholly and fundamentally distinct from those of their originals are not copies of such originals within the meaning of the Copyright Act, 1842. Nor do they become copies within the Act because they might possibly be used for the purposes of their originals, so long as no such use is either intended or made.

The plaintiffs were proprietors of the copyright of certain sheets of music. The defendants sold certain perforated sheets to be used as part of a mechanical instrument for the production of musical sounds. It was possible to read the notes of the perforated sheets. Certain words indicating time and expression, which were taken from the plaintiffs' sheets of music, were printed on the perforated sheets.

**Held**—(1) that the perforated sheets, being part of a mechanical instrument, were not copies of the plaintiffs' sheets of music within the Copyright Act, 1842; and (2) that the plaintiffs' copyright was not infringed by the printed words on the perforated sheets, as these were only of use as directions for working the mechanical instrument.

Judgment of Stirling, J. ([1899] 1 Ch. 836; 68 L. J. Ch. 379; 47 W. R. 554, 80 L. T. 561; 15 L. T. R. 322), affirmed.

**BOOSEY v. WHIGHAM**, [1900] 1 Ch. 122; 69 [L. J. Ch. 66; 48 W. R. 228; 81 L. T. 571; 16 T. L. R. 82—C. A.]

25. "*Sheet of Music*" — *Phonographic Record*—"Book"—*Copyright Act*, 1842 (5 & 6 Vict. c. 45), s. 2.—A phonographic record of a song is not a "sheet of music," and therefore not a "book" within sect. 2 of the Copyright Act, 1842.

**NEWARK v. THE NATIONAL PHONOGRAPH CO., [LD., AND THE EDISON MANUFACTURING CO., LD.]**, (1907) 23 T. L. R. 439—Sutton, J.

**IX. PHOTOGRAPHS.**

26. *Infringement—Reproduction of Photograph on Posters.*—The plaintiff, who was a photographic artist, brought an action against the defendants for an injunction and damages, alleging that they had infringed his copyright in a photograph of a lion called "Prince" by reproducing it on the posters of the Earl's Court Exhibition.

The Court held that there had been a reproduction of the photograph within the meaning of 25 & 26 Vict. c. 68, sect. 6, and awarded as penalty the sum of £50, with costs, against the defendants, Weiners, but gave judgment, without costs, for the London Exhibitions, Ltd., on the ground that they did not authorise the reproduction, though they should have been more careful in the matter.

**BOLTON v. LONDON EXHIBITIONS, LD.**, (1898) 14 [T. L. R. 550—Mathew, J.]

27. *Multiplying Copies in Newspaper—Damages—Penalties—Penalty for each Copy of Newspaper Printed—Fine Arts Copyright Act*, 1862 (25 & 26 Vict. c. 68), s. 6.—A newspaper proprietor who reproduces in his newspaper a photograph without the leave of the registered proprietor of the copyright therein is liable to a penalty for each copy of the newspaper as well as damages.

**Hildesheimer v. W. & F. Faulkner, Ltd.**, ([1901] 2 Ch. 552; 70 L. J. Ch. 800; 49 W. R. 708; 85 L. T. 322; 17 T. L. R. 737—C. A., No. 33, *infra*), followed.

Decision of Wright, J. ((1901) 17 T. L. R. 482), reversed.

**NICHOLLS v. PARKER AND ANOTHER**, (1902) 18 [T. L. R. 459—C. A.]

28. *Photograph made "for or on behalf of" a Person "for a Good or a Valuable Consideration"*—*Photograph taken at Request of Customer—Negative Remaining Property of Photographer—Fine Arts Copyright Act*, 1862 (25 & 26 Vict. c. 68), s. 1.—Where a person has a photograph of himself taken at his own request by a photographer in circumstances which raise an implied promise on his part to pay for it, the photograph is "made or executed for or on behalf of" that person "for a good or a valuable consideration" within the meaning of sect. 1 of the Fine Arts Copyright Act, 1862, and the copyright in the photograph belongs to him, though he has not bought the negative. A popular "preacher" went to the plaintiff's studio and asked to be photographed, saying that, if the negative proved to be a good one, he might buy it. Subsequently the parties could not agree as to the price to be paid for a large number of prints, which the preacher required for advertising purposes, and the plaintiff declined to accept payment for the eighteen prints supplied by him in the first instance. The preacher thereupon took one of these prints to another photographer and employed him to reproduce it, and print a number of copies. The plaintiff brought an action for infringement of copyright, and for an injunction.

**Held**—that though the negative was and remained the property of the plaintiff, he had not the copyright in the photograph.

**Pollard v. Photographic Co.** ((1888) 40 Ch. D. 345; 58 L. J. Ch. 251; 37 W. R. 266; 60 L. T. 418; 5 T. L. R. 157—North, J.) approved.

**Melville v. Mirror of Life Co.** ([1895] 2 Ch. 531; 65 L. J. Ch. 41; 73 L. T. 334; 11 T. L. R. 477—Kekewich, J.) commented on.

**BOUCAS v. COOKE AND OTHERS**, [1903] 2 K. B. [227; 72 L. J. K. B. 741; 88 L. T. 760; 19 T. L. R. 475; 52 W. R. 99—C. A.]

29. *Photographs of Private Schools—Taken at Photographer's Risk—"Good or Valuable Consideration"—Fine Arts Copy-*

**Photographs—Continued.**

*right Act, 1862 (25 & 26 Vict. c. 68), s. 1.*—The plaintiffs, a firm of photographers, offered to take photographs of private schools entirely at their "own risk." B. allowed them to photograph his school and pupils, and purchased some copies. He had some of these reproduced as an advertisement in the defendants' "list of schools." The plaintiffs, having registered the copyright of the photographs in their own names as authors, brought an action against the defendants for infringing the copyright by reproducing these photographs in the "list" referred to.

**HELD**—that B's permission to the plaintiffs to enter his school and take photographs on the chance of his buying copies was "good consideration" for the taking of such photographs, and that the copyright belonged to him and not to the plaintiffs.

**STACKEMANN v. PATON**, [1906] 1 Ch. 774; 75 [L. J. Ch 590; 54 W. R. 466—Farwell, J.]

**30. Wife acting as Husband's Agent—Implied Contract by Photographer not to use Negative for Exhibition—Injunction.**—Where the true inference to be drawn from the facts is that a wife was acting as the agent of her husband in such a matter as getting a photograph of herself and children taken, and if the money spent on the object was reasonable, and the object was a reasonable one for persons in the station of life the parties held, the principle of *Pollard v. Photographic Co* ((1888) 40 Ch. D. 345; 58 L. J. Ch. 251, 37 W. R. 266; 60 L. T. 418; 5 T. L. R. 157—North, J.) applies, and a contract by the photographer not to use the negative for the purpose of exhibition is implied, and it is a breach of confidence to exhibit the prints, and the husband is therefore entitled to an injunction to prevent the photographer from exhibiting the photograph in public.

**STEDALL v. HOUGHTON**, (1902) 18 T. L. R. 126—[Eady, J.]

**X. PICTURES.**

*See DEPENDENCIES AND COLONIES, 88.*

**31. Foreign Copyright—International Copyright Act, 1886 (49 & 50 Vict. c. 33)—Assignment Qualified by Undertaking not to Reproduce without Consent of the Assignor.**—M. & S. assigned the British copyright in two pictures to the plaintiffs upon the plaintiffs undertaking not to reproduce the pictures without the consent of M. and S. The plaintiffs obtained the said assignment for the purposes of proceedings against the defendants for infringement of the copyright in these pictures:—

**HELD**—that an assignment in writing of the copyright in a picture which is qualified by a contemporaneous undertaking not to reproduce without the consent of the as-

signor, is not a valid assignment so as to enable the assignee to sue for infringement without joining the assignor as co-plaintiff, and also that the assignment in this case was not *bonâ fide* to transfer the copyright. The right of an owner of the British copyright in a picture is not identical with the right of the owner of a patented invention of an article.

**LANDEKER AND BROWN v. LOUIS WOLFF & Co.**, [Ld., (1907) 52 Sol. Jo. 45—Joyce, J.]

**32 Foreign Copyright—Infringement—Printers—Penalties—Costs—Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 6—International Copyright Act, 1886 (49 & 50 Vict. c. 33), s. 2, sub-s. (3)—Berne Convention, 1887, art. 2.**—Printers who infringe artistic copyright, though only as mere agents, are equally liable with their principals to penalties under sect. 6 of the Fine Arts Copyright Act, 1862. An owner of international copyright is not restricted under sect. 2, sub-sect. 3, of the International Copyright Act, 1886, in case of infringement in a foreign country, to the remedies available for infringement in the country of origin. A farthing is the minimum penalty that will be inflicted in a court of justice. Where in an action of infringement of copyright the defendant is guilty of infringement, but the plaintiff is held not to be entitled to any remedy in a court of equity because of his own misconduct, the action will be dismissed without costs.

*Ex parte Beal* ((1868) L. R. 3 Q. B. 387; 37 L. J. Q. B. 161; 16 W. R. 852; 18 L. T. (N.S.) 285) and *Ellis v. Marshall & Son* ((1895) 64 L. J. Q. B. 757; 15 R. 561—Charles, J.) followed.

**BASCHET v. LONDON ILLUSTRATED STANDARD CO.**, [1900] 1 Ch. 73; 69 L. J. Ch. 35, 48 W. R. 56; 81 L. T. 509—Kekewich, J.]

**33 Infringement—Separate Offences—Penalties**—*"A Sum not Exceeding £10"*—*Minimum Penalty—Smallest Coin of the Realm—Aggregate Sum—Divisibility by Number of Offences—Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 6.*—The appellants had technically brought themselves within sect. 6 of the Fine Arts Copyright Act, 1862, and had become liable to a million penalties in respect of the distribution of a million copies of the pictures the copyright of which belonged to the plaintiffs, and by sect. 6 the appellants for every such offence forfeited to the plaintiffs "a sum not exceeding £10." A summons was taken out to determine the amount of the penalties.

**HELD**—that though each copy constituted a separate offence yet there was nothing in the terms of the statute or in common sense which prevented the Court from taking the view that they were not limited by the coinage of the realm as regards a minimum penalty, e.g., a farthing, and that they were not dependent on the fluctuating standard

### Pictures—Continued.

of the coinage as to the sum which they must assess, but that they were bound to exercise their discretion in giving that which they thought right in the particular case, and that it was not necessary to award for each offence that which would be the proper sum if there were only one offence, but they might award an aggregate sum in respect of all the offences provided execution could issue for such sum, such a sum need not be divisible by the number of offences.

*Ex parte Beal* ((1868) 9 B. & S. 395; L. R. 3 Q. B. 387, 37 L. J. Q. B. 161; 16 W. R. 852, 18 L. T. (N.S.) 285) followed.

*Green v. Irish Independent Co.* ([1899] 1 Ir. R. 386) disapproved.

*Decision of Kekewich, J.* ((1900) 48 W. R. 682; 83 L. T. 144), reversed.

*HILDESHIMER v. W. AND F. FAULKNER, LD.* [1901] 2 Ch. 552; 70 L. J. Ch. 800; 49 W. R. 708, 85 L. T. 322; 17 T. L. R. 737—C. A.

**34. Infringement—"Copy"—*Rough Copy for Advertisement—Fine Arts Copyright Act, 1862*** (25 & 26 Vict. c. 68), s. 1.]—A "copy" may perhaps be described as that which comes so near to the original as to suggest that original to the mind of every person seeing it. The plaintiff was the proprietor of the copyright in an oil painting of considerable size, called "Nature's Mirror," which portrayed the draped figure of a "Psyche," with wings, kneeling on a rock, and looking into a pool of water, there being a suitable background to the picture. In an advertisement in a magazine a number of photographic reproductions of pictures used in well-known advertisements appeared, one such reproduction being a rude copy of the figure in "Nature's Mirror" without the wings and without the background. The reproduction was about the size of a halfpenny.

**HELD**—that this was a copy or reproduction of the painting within sect. 1 of the Fine Arts Copyright Act, 1862, and that the plaintiff's copyright had been infringed.

*HANFSTAENGL v. W. H. SMITH & SON*, [1905] 1 [Ch. 519, 74 L. J. Ch. 304; 92 L. T. 351; 21 T. L. R. 291—Kekewich, J.

### XI. REPORTS IN NEWSPAPERS.

**35. Paragraph Contributed to Newspaper—"Author"—*Altered by Editor—Ownership of Copyright—Copyright Act, 1842*** (5 & 6 Vict. c. 45).]—The plaintiff wrote a short article on a doctor's "escape from drowning," and sent printed copies of it to a number of papers including the *M.*, the *S.*, and the *Evening S.* The *S.* made no use of it, but the *M.* paid for it, and published a version abbreviated and touched up by one of their staff: subsequently the *Evening S.* reprinted the *M.*'s version of the story with but few alterations. In an action by the plaintiff against the *Evening S.*, for infringement of copyright,

**HELD**—that the member of the *M.*'s staff, and not the plaintiff, was the author of the paragraph as it appeared; and that, if there had been any infringement, the plaintiff had no cause of action.

There is no copyright in news itself, but only in the form in which it is conveyed; and *semble*, in the present case the paragraph complained of would have been no infringement of the plaintiff's version, had it been published as originally written.

*SPRINGFIELD v. THAME*, (1903) 89 L. T. 242; 19 [T. L. R. 650—Joyce, J.

**36. Public Speech—"Author"—*Copyright Act, 1842*** (5 & 6 Vict. c. 45), ss. 2, 3, 18.]—Copyright has nothing to do with the originality or literary merits of the author or composer.

A reporter is the author of his own report if it was he who brought into existence, in the form of a writing, a piece of letterpress, and if he, and he alone, composed his report, the materials for his composition being his notes, which are his own property, added to some extent by his memory and trained judgment. The question whether the composer has copyright in his report does not vary inversely with, or depend on, his skill in stenography, nor does the fact that the subject-matter of the report has been made public property, or that no originality or literary skill was demanded for the composition of the report, have anything to do with the matter.

The respondent published a book called "Appreciations and Addresses. Lord Rosebery." The speeches were preceded by short notes explaining the occasion. It was admitted that these reports were taken verbatim from the reports in the *Times*. The proofs were said to have been corrected by comparing them with an album containing Lord Rosebery's speeches kept and revised by himself. Lord Rosebery made no claim. The *Times* reporters formally assigned the copyright in the speeches, articles, and reports prepared by them and published in the *Times* to the appellants. The appellants brought an action against the respondent claiming an injunction from publishing, &c., copies of his book.

**HELD** (Lord Robertson dissenting)—that the labour of reproducing spoken words into print, and first publishing it as a book, makes the person who has so acted an "author" within the meaning of the Copyright Act, 1842, and that the injunction must be made perpetual.

The decision of the Court of Appeal ([1899] 2 Ch. 749; 68 L. J. Ch. 760; 48 W. R. 218, 81 L. T. 395; 16 T. L. R. 27) reversed.

*WALTER v. LANE*, [1900] A. C. 539; 69 L. J. Ch. [699; 49 W. R. 95; 83 L. T. 289, 16 T. L. R. 551—H. L. (E.)

### XII. SCULPTURE.

**37. Artistic Production — *Toy Soldiers — Stamping Name of Proprietor and Date on***

**Sculpture—Continued.**

*Sculpture—Sculpture Copyright Act, 1814* (54 Geo. 3, c. 56).]—W. B., jun., was a designer and modeller of the metal models of soldiers sold by W. B. & Sons, in which firm he was a partner. In 1900 he designed a model of a yeoman and horse, which was stamped with his name, W. B., jun. The plaster cast was put into the show-room a few days after the date cut upon it.

HELD—that the model was such an artistic production as would come within the Sculpture Copyright Act, 1814, that it differed from the ordinary metal toy, and it had sufficient merit to be protected by the Act, that W. B., jun., the person who made the model, was entitled to put his name on the article, and that the fact that he had partners in the venture of selling the article did not necessitate their names also being put on, that the fact that the plaster cast was put into the show-room a few days after the date cut upon it did not vitiate the owner's right under the statute.

BRITAIN AND OTHERS *v* HANES BROTHERS & Co.,  
[1902] 86 L. T. 765; 18 T. L. R. 525—  
Wright, J.

38 *Infringement—“Exposing for Sale”—Showing Model of Bust and Asking for Orders—Sculpture Copyright Act, 1814* (54 Geo. 3, c. 56), ss. 1, 3.]—In an action for infringement of the plaintiff's copyright in certain model busts of the Queen, the only evidence of infringement was that the defendant brought a sample pirated bust to K. and asked for orders, whereupon K. refused to give an order, and warned the defendant that his sample was an infringement.

HELD—that the defendant had not brought himself within the words of sect. 3 of the Sculpture Copyright Act, 1814, “make, or cause to be made, . . . or exposed to sale, or otherwise disposed of”; and that therefore an injunction must be refused, and that, as no knowledge of the infringement was brought home to the defendant, he was entitled to his costs.

BRITAIN AND OTHERS *v* KENNEDY, (1903) 19  
[T. L. R. 122—Wright, J.]

**XIII. VARIOUS.**

See BANKRUPTCY AND INSOLVENCY, 156—LIBEL AND SLANDER, 11.

39. *News Agency—Cricket Scores—Copying by Rival Agency—Injunction*]—In an action by one news agency against another for common law piracy of news matter,

HELD—that the piracy had been proved, and that an injunction should be granted restraining the defendants, their servants and agents, and each and every of them, from surreptitiously obtaining or copying any cricket or other news collected by the plaintiffs for the purpose of transmission to

their subscribers, and from transmitting, communicating, or delivering to any person or persons by messenger, telegraph, telephone, or otherwise any cricket or other news so obtained by the defendants

*Exchange Telegraph Co. v. Central News* ([1897] 2 Ch. 48, 66 L. J. Ch. 672; 45 W. R. 595, 76 L. T. 591, 13 T. L. R. 408—Stirling, J.) followed.

THE EXCHANGE TELEGRAPH CO., LD. *v* HOWARD  
[AND THE LONDON AND MANCHESTER PRESS  
AGENCY, LD., (1906) 22 T. L. R. 374—  
Buckley, J.]

4) *Practice—Action on the Case—Detinue—Trover—Alternative Remedies—Costs—Copyright Act, 1842* (5 & 6 Vict. c. 45), ss. 15 and 23.]—Though the proprietor of a copyright can bring a special action on the case against a wrong-doer under sect. 15 of the Copyright Act, 1842, he can also sue the wrong-doer under sect. 23 of the Act; under sect. 23 he can sue in detinue in respect of copies the defendant has detained, and can sue in trover in respect of the copies the defendant has sold and converted to his own use.

MUDDOCK *v* BLACKWOOD, [1898] 1 Ch. 58; 67  
[L. J. Ch. 6; 77 L. T. 493, 14 T. L. R. 43;  
46 W. R. 166—Kekewich, J.]

41. *Sheet of Letterpress—Advertisement—Placed on Money-box—Copyright Act, 1842* (5 & 6 Vict. c. 45), s. 2.]—A sheet of letterpress placed on money-box and explaining the advantage which a person would get who used the box in a certain way is not a sheet of letterpress “separately published,” and is not therefore the subject of copyright

WARREN *v* FOSTER BROS. CLOTHING CO., (1907)  
[51 Sol. Jo. 145—Warrington, J.]

42. *Song—Assignment—Necessity for Registration—Copyright Act, 1842* (5 & 6 Vict. c. 45), s. 22.]—The author of a song, which is subsequently embodied in a play, and the person for whom he wrote the play, may between them restrain the unauthorised performance of such song, although it was sung in public before it was registered as part of the play.

*Russell v. Smith* ((1848) 12 Q. B. 217; 17 L. J. Q. B. 225; 12 Jur. 723) followed.

A pencil note, “Herewith the MS. of your song ‘Men,’” is not sufficient to give a person a permanent and irrevocable licence to sing the song.

EDWARDES *v* COTTON, (1905) 19 T. L. R. 84—  
[Byrne, J.]

**CORONERS.**

1. *Coroner's Duties—Death of Prisoner—Inquest—Verdict that Injury Received before Admission to Gaol—No Finding as to How Deceased came by Injury—Coroners*

**Coroners—Continued.**

*Act*, 1887 (50 & 51 Vict. c. 71), ss. 4, 6.]—A man died in prison nearly a month after admission, and the verdict at the inquest was that the deceased "died from paralysis following upon some injury to the skull, which had set up a large abscess in the brain, such injury having been occasioned before his admission to the said prison," but there was no finding as to how the deceased came by this injury. It appeared that at the time of the inquest there was a suggestion, known to the coroner, that the injury might have been received in chance medley during the assaults in respect of which the deceased was convicted and sent to prison. It subsequently transpired that the deceased had brought a cross-summons for assault against K., which was dismissed by the justices, and that certain persons accused K. of inflicting the said injury with a door knocker. A rule *nisi* was obtained under sect. 6 of the Coroners Act, 1887, for a *mandamus* to the coroner to hold a fresh inquest, and for a *certiorari* to remove and quash the inquisition of the inquest already held.

**HELD**—that the facts of the case that the deceased had died in prison, and that the justices had held an inquiry into the alleged assault by K., did not exonerate the coroner from inquiring "how, when and where the deceased met his death," and that there having been a suggestion that the injury was received in an affray, a fresh inquest must be held.

*Semble*—per Lord Alverstone, C.J., (1) in such a case as this notice should be given to the coroner before a rule is obtained, and (2) the Director of Public Prosecutions has no right to an inquest in order to decide whether a prosecution for murder or manslaughter should be instituted.

**REX v. GRAHAM**, (1905) 69 J. P. 324; 93 L. T. [371; 21 T. L. R. 576—Div. Ct.

**2. Death in Hospital—Post-mortem Examination and Attendance at Inquest by Medical Officer—Right to Recover Fees—Coroners Act**, 1887 (50 & 51 Vict. c. 71), s. 22.]—A hospital chiefly intended for children was founded to meet the requirements of a large population in a particular district, and was free for the admission of poor patients from that district. It had a committee of management, governors (who were the subscribers), medical men, committees, and all the apparatus of an ordinary hospital. The plaintiff was honorary medical officer of the hospital, receiving no remuneration for his services, and as such medical officer he attended a patient who died in the hospital, and by order of the coroner he made a post-mortem examination of the deceased and attended at the inquest to give evidence. In an action by the plaintiff to recover his fees from the coroner,

**HELD**—that the hospital was a "public hospital," and that the plaintiff, though he

received no remuneration for his services, was the medical officer "whose duty it was to attend the deceased person as a medical officer of the institution," within the proviso in sect. 22 of the Coroners Act, 1887, and that he was therefore not entitled to recover his fees from the coroner under that section.

**HORNER v. LEWIS**, 62 J. P. 345; 67 L. J. Q. B. [524; 78 L. T. 792; 14 T. L. R. 354—Div. Ct.

**CORPORATIONS.**

*And see* EXECUTORS, 2; LOCAL GOVERNMENT; PUBLIC AUTHORITIES.

**1 Contract by—Seal—Architect Employed by School Board—Claim for Services Rendered—Contract not under Seal.**—The plaintiff, an architect, had been requested by the defendant school board to prepare plans for the enlargement of the school, and to act as clerk of the works and superintend the construction of the building. The plaintiff prepared plans, but the lowest tender was for a larger sum than was estimated. Another architect was engaged, who carried out the work. The plaintiff sued the school board for professional services rendered, and the jury found in his favour, awarding him a sum of £150.

**HELD** by Wills, J., on further consideration—that, as the agreement was not under seal, the plaintiff was not entitled to recover.

**START v. WEST MERSEA SCHOOL BOARD**, (1899) [63 J. P. 440; 15 T. L. R. 442—Wills, J.

**2 Contract under Seal—Alterations and Variations not under Seal—Agreement to Compromise Disputes not under Seal—Public Health Act**, 1875 (38 & 39 Vict. c. 55), ss. 173, 174.]—Where an urban authority enters into a contract in writing, sealed with the common seal of such authority, pursuant to sects. 173 and 174 of the Public Health Act, 1875, with a contractor, for the construction by him, *e.g.*, of sewerage works, and the contract contains the usual power for the engineer, who has the control and supervision of the works, to vary, alter, enlarge, or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the urban authority.

An agreement between an urban authority and a contractor employed to construct works for them, as a compromise and in full settlement of all claims by him against the urban authority, is not a contract within sect. 173 of the Public Health Act, 1875, necessary for carrying that Act into execution, so as to be required to be sealed with the common seal of the urban authority under sect. 174; and, therefore, such agreement, though not under seal, is capable of being enforced against the urban authority.



**Corporations—Continued.**

Decision of Lawrance and Collins, JJ., affirmed.

**WILLIAMS v. BARMOUTH URBAN DISTRICT COUNCIL**, (1897) 77 L. T. 383—C. A.

3. *Contract of Rural District Council—Seal—Employment of Engineer to Prepare Plans for Sewerage Scheme.*—A rural district council, by an agreement under their seal, employed the plaintiff as an engineer to prepare plans and do other work in connection with a sewerage scheme for a certain area. Subsequently the council instructed the plaintiff, though not under their seal, to prepare plans and do other work as engineer in respect of an extension of the sewerage scheme to another area. The plaintiff duly did the work. In an action to recover remuneration for his services in connection with these latter works, the council pleaded the want of a sealed contract. The Court of Appeal reviewed the conflicting decisions upon the point, and

HELD—that the plaintiff could recover. The requirements of sect. 174 of the Public Health Act, 1875, do not apply to rural district councils, and, though at common law any corporation must contract under seal, yet there are three recognised exceptions to the rule; (1) where the work done is of a trivial nature; (2) matters of frequent occurrence; (3) where work done, or goods supplied, are accepted by a corporation, and the whole consideration is executed. The present case came within the last exception.

*Clarke v. Cuckfield Union* ((1852) 21 L. J. Q. B. 349; 16 J. P. 257; 16 Jur 686) and *Nicholson v. Bradfield Union* ((1866) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; 30 J. P. 549, 13 W. R. 731; 14 L. T. 830) approved.

Judgment of Darling, J. (88 L. T. 317; 18 T. L. R. 507), reversed.

**LAWFORD v. BILLERICAY RURAL DISTRICT COUNCIL**, [1903] 1 K. B. 772; 72 L. J. K. B. 554; 67 J. P. 245; 51 W. R. 630; 88 L. T. 317; 19 T. L. R. 322—C. A.

4. *Drainage Board—Successful Action for Negligence Against—Power to Levy Rates to Pay Damages and Costs—Mandamus.*—Mandamus may issue against a drainage board to compel such board to levy a rate to enable them to pay the amount of damages and costs awarded against them in an action for injuries sustained by reason of their negligence in the construction of their authorised works.

*Gallsworthy v. Selby Dam Drainage Commissioners* ([1892] 1 Q. B. 348; 61 L. J. Q. B. 372; 56 J. P. 356; 66 L. T. 17—C. A.) followed.

**PARKER v. CARRIGROHANE DRAINAGE BOARD**, [1902] 2 Ir. R. 138—Q. B. Div.

5. *Harbour Commissioners—Election—Right of Corporation to Vote—"Person"—Commissioners' Clauses Act, 1847 (10 & 11*

*Vict. c. 16), s. 3—Teignmouth Harbour Act, 1853 (16 & 17 Vict. c. xxxvi.), s. 36.]—By the Teignmouth Harbour Act, 1853, the Commissioners, who were appointed to regulate the harbour and the navigation of the river Teign, were to be in part elected by the shipowners and the harbour ratepayers. The Act incorporated the Commissioners' Clauses Act, 1847, which provided that in that and the special Act the word "person" included a corporation, unless there was something in the subject or the context repugnant to such construction. By sect. 36 of the Act of 1853 the Commissioners "shall be elected by a majority of the votes of the persons present and entitled to vote at the respective meeting for the election, such votes to be given in writing under the hands of the respective voters, but a proxy not to be in any case admitted."*

HELD—that the word "persons" in sect. 36 did not include a corporation, who could not, therefore, vote at the election of the Commissioners.

**WILLS v. TOZER AND OTHERS**, (1904) 53 W. R. [74; 20 T. L. R. 700—Farwell, J.

**CORRUPT PRACTICES.**

See ELECTIONS.

**COSTS.**

See ARBITRATION; BANKRUPTCY AND INSOLVENCY, BILLS OF EXCHANGE; CONTEMPT AND ATTACHMENT, COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; EXECUTION; PRACTICE AND PROCEDURE, SOLICITORS, ETC.

**COUNTERCLAIM.**

See SET-OFF AND COUNTERCLAIM.

**COUNTY COURTS.**

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See also ADMIRALTY; BANKRUPTCY AND INSOLVENCY; INTERPLEADER.

## I. COURTS, JUDGES, AND OFFICERS.

1. *Deputy Judge—Different Courts in same District—Appointment of Two Deputies—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 18-21.*—A County Court Judge can, with the approval of the Lord Chancellor, appoint a deputy to act for him in one only of the District Courts of which he is judge.

Decision of Div. Ct. ([1906] 1 K. B. 22; 75 L. J. K. B. 126; 54 W. R. 410; 93 L. T. 805; 22 T. L. R. 37) affirmed.  
 REX v. LLOYD, [1906] 1 K. B. 552, 75 L. J. K. B. 1406; 54 W. R. 461; 94 L. T. 498; 22 T. L. R. 390—C. A.

2. *Bailiff—Liability of—Committal Order on Judgment Summons—Judgment Summons not Served—Limitation of Time—"Act, neglect or default"—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a)*—An action will not lie for damages in respect of an arrest under a committal order of a County Court judge upon a judgment summons so long as the committal order stands.

In May, 1904, a judgment summons, which was issued from a County Court against the plaintiff, but which was not served upon him, came on for hearing, and a committal order was made thereon. In January, 1905, the plaintiff was arrested under the committal order. In an action against the high bailiff of the County Court to recover damages for negligence in not having served the judgment summons upon the plaintiff,

HELD—(1) that the action would not lie so long as the committal order stood; and (2) that the action was barred by sect. 1 (a) of the Public Authorities Protection Act, 1893, as the "act, neglect, or default" complained of—namely, the erroneous return to the County Court that the judgment summons had been served—occurred more than six months before action brought.

TURLEY v. DAW, (1906) 94 L. T. 216; 22 T. L. R. [231]—Bray, J.

## II. JURISDICTION AND LAW.

### (a) General Jurisdiction.

And see AGRICULTURE, 2; BANKRUPTCY, 56—63; TRADE MARKS, 216.

3. *Bankruptcy—Judge Exercising Jurisdiction—Certiorari—Absconded or Absconding Debtor—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 25 (1) (a)—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 7.*—The effect of sect. 25 (1) (a) of the Bankruptcy Act, 1883, as amended by sect. 7 of the Bankruptcy Act, 1890, is that an order may be made for the arrest of a debtor if, after a bankruptcy notice or a bankruptcy petition, it appears to the Court that there is probable cause for believing that the debtor has absconded before, or has absconded, or is about to abscond after, the notice or petition for any of the purposes mentioned in the section.

Decision of the Court of Appeal ([1898] 2 Q. B. 680; 68 L. J. Q. B. 21, 47 W. R. 68; 79 L. T. 327; 15 T. L. R. 9; 5 Manson, 300) affirmed.

*Certiorari* does not lie to bring up an order of a County Court Judge made when exercising bankruptcy jurisdiction.

SKINNER v. NORTHALLERTON COUNTY COURT [JUDGE, [1899] A. C. 439, 68 L. J. Q. B. 896; 63 J. P. 756, 80 L. T. 814; 15 T. L. R. 433; 6 Manson, 274—H. L. (E.)

4. *City of London Court—Leave to Issue Process—Defendant Residing and Carrying on Business Outside Jurisdiction—Cause of Action Arising Either Wholly or in Part Within the Jurisdiction—London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxxvii), s. 39 (Local)—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 74, 185.*—The jurisdiction of the City of London Court stands unimpaired by the County Courts Act, 1888, and unaffected except so far as equitable jurisdiction is added.

When the defendant resides and carries on business outside the jurisdiction of the City of London Court, and is not and never has been employed within the City, but where the cause of action has arisen either wholly or in part within the City, it is not necessary that leave should be given to issue the summons.

FELTON v. BOWER & Co. [1900] 1 Q. B. 598, 69 [L. J. Q. B. 351, 48 W. R. 349, 82 L. T. 419 Div. Ct.

5. *Foreclosure Action—Mortgage reduced from over to under £500.*—Where a mortgage had been given to secure £675, but only £475 of this sum was actually advanced, and the amount owing was afterwards reduced to £451.

HELD—that the County Court Judge had jurisdiction in an action for foreclosure inasmuch as the mortgage did not exceed £500.

SHIELDS, WHITLEY AND DISTRICT AMALGAMATED [MODEL BUILDING SOCIETY v. RICHARDS, [1901] W. N. 106; 36 L. J. N. C. 253; 111 L. T. Jour. 85—Cozens-Hardy, J.

6. *Injunction—Breach of Covenant in Restraint of Trade—Damages assessed by Parties at £40—Damages not Claimed.*—A County Court Judge has jurisdiction to grant an injunction, although the plaintiff does not ask for damages or further relief in a case where the damages (if asked for) must, by agreement between the parties, have been under £50.

STILES v. ECCLESTONE, [1903] 1 K. B. 544, 72 [L. J. K. B. 256; 51 W. R. 411; 88 L. T. 294 Div. Ct.

7. *New Trial—Application for—Jurisdiction to alter Judgment and enter Judgment—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93.*—A County Court Judge has no

**Jurisdiction and Law—Continued.**

jurisdiction, on an application to him for a new trial, to alter the judgment which he has given for the plaintiff and enter judgment for the defendants

ROBINSON *v.* FAWCETT AND FIRTH, [1901] 2 [K. B. 325; 70 L. J. K. B. 639; 84 L. T. 629—Div. Ct.]

8. *Orders—Subsequent Alteration of Order—Functus Officio—Appeal—Prohibition.*—Where a County Court Judge has made an order he is *functus officio* and has no jurisdiction to vary such order afterwards.

Where an order has been made in circumstances that would give a Divisional Court jurisdiction to issue a prohibition, the party aggrieved is not thereby deprived of his right to appeal against such an order to the Divisional Court in the ordinary way instead of applying for a prohibition

*Barker v. Palmer* ((1881), 8 Q. B. D. 9, 30 W. R. 59; 45 L. T. 480) followed

SWEETLAND *v.* THE TURKISH CIGARETTE Co., [(1899) 47 W. R. 511; 80 L. T. 472—Div. Ct.]

9. *Prohibition—Inferior Court—Companies (Winding-up) Act 1890* (53 & 54 Vict. c. 63), s. 1, sub-ss. (1) and (6)]—By sect. 1 of the Companies (Winding-up) Act, 1890, a County Court, having jurisdiction under the Act to wind-up a company, has for the purposes of that jurisdiction all the powers of the High Court.

Therefore, where a County Court Judge, in the course of winding-up a company under that Act, made an order of committal for contempt of court

HELD—that for this purpose the County Court Judge was not in the position of an inferior court, and that, therefore, prohibition would not lie in respect of the order complained of.

RE NEW PAR CONSOLS, LD. (No 2), [1898] 1 [Q. B. 669; 67 L. J. Q. B. 598; 78 L. T. 312; 46 W. R. 369, 5 Manson 277—C. A.]

10. *Service out of the Jurisdiction—Irish County Courts Act, 1877* (40 & 41 Vict. c. 56).]

—Where an Irish County Court has jurisdiction to deal with a case so far as its subject-matter is concerned, it has all the powers of the High Court necessary for bringing all proper parties before it, including the powers of service out of the jurisdiction.

SEXTON *v.* O'HALLORAN, [1904] 1 Ir. R. 123—[C. A.]

11. *Service of Summons out of Jurisdiction—Scotch Defendant—Wrongful Service—Prohibition—Alternative Remedy—Discretion of Court—County Court Rules, 1903, Order VII., rr. 41, 49*—In a County Court action for alleged breach of a contract within the district of the Court, the County Court Judge improperly made an order for service of the summons upon the defendants in Scotland, where they resided and had their

only place of business, such service being contrary to the provisions of the County Court Rules, Order VII., r. 41

HELD—that the High Court should grant a prohibition, although the defendant might, if he had seen fit, have applied to the County Court Judge under Order VII., r. 49, to set aside the service.

CHANNEL COALING Co *v.* ROSS AND ANOTHER, [1907] 1 K. B. 145; 76 L. J. K. B. 145; 95 L. T. 728—Div. Ct.]

12. *Specific Performance—Sale of Equity of Redemption—Purchase-money not exceeding £500—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 67].—An action was brought in a County Court for specific performance of an agreement to sell property for £75. The property, but for an existing charge, was worth more than £500.

HELD—that the amount of the actual purchase-money formed the test of jurisdiction, and that the Judge had jurisdiction to hear the case, as the purchase-money did not exceed £500.

R. *v.* JUDGE WHITEHORNE, [1904] 1 K. B. 827; [73 L. J. K. B. 344; 52 W. R. 524; 90 L. T. 514; 20 T. L. R. 311—Div. Ct.]

13. *Sufficiency of Stamp—New Trial—High Court rule Applicable—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 164].—In the absence of any rule under the County Courts Act, 1888, making provision as to appeals from the ruling of any County Court Judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

Order XXXIX., r. 8, applies by virtue of sect. 164 of the County Courts Act, and no appeal lies.

MANDER *v.* RIDGWAY, [1898] 1 Q. B. 501; 67 [L. J. Q. B. 335; 78 L. T. 118; 14 T. L. R. 230, 46 W. R. 366—Div. Ct.]

14. *Admission of Unstamped Document.*—A County Court Judge has no right to admit in evidence an unstamped document and to remit the penalty payable in respect thereof; but, if he does so, no appeal lies against his act.

LOWE *v.* DORLING, (1905) 74 L. J. K. B. 794—[Div. Ct.]

15. *Title to Land—Incidentally coming in Question—Remitted Action—Effect of Order—County Courts Acts, 1888* (51 & 52 Vict. c. 43), ss. 60, 61, and 1903 (3 Edw. 7, c. 42), s. 3.] *Semble*, where an action in the High Court has been remitted to the County Court, and when in the County Court it is ascertained that the title to land will incidentally come in question, the County Court Judge has no jurisdiction to entertain the action in the absence of a written consent of the parties or their solicitors.

TOON *v.* STANBURY EARDLEY, (1906) 22 T. L. R. [536—Div. Ct.]

## Jurisdiction and Law—Continued.

## (b) Remitted Actions.

16. *Action Wrongly Remitted—Order not Appealed from—Objection to County Court Judge's Jurisdiction—Prohibition—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65—County Court Rules, Ord. 33, r. 1.*—In an action of contract, in which a sum exceeding £100 was claimed, the claim was limited to £100 after action brought, and the Master, upon the plaintiff's application, made an order that the action should be tried in the County Court. The defendant did not appeal against this order. The County Court Judge tried the case and gave judgment for the plaintiff. The defendant thereupon applied for a writ of prohibition.

Held—that the Master ought not to have made the order remitting the action to the County Court, upon the ground that the reduction must be so made that the reduced claim appears upon the writ in the High Court, that it was too late for the defendant, who had not appealed, to take the objection in the County Court; and that there was no excess of jurisdiction when the matter was before the County Court Judge for he was not compelled to decide whether or not he should obey an appealable order against which no appeal had been brought.

DIERKEN v. PHILPOT, [1901] 2 K. B. 380; 70 [L. J. K. B. 675; 49 W. R. 703; 85 L. T. 246; 17 T. L. R. 491—Div. Ct.

17 *Bankruptcy of Plaintiff—Joinder of Trustee as Co-Plaintiff—Power to Order Trustee to give Security for Costs—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 94.*—Where an action of contract, brought in the High Court, is ordered to be remitted to a County Court, under sect. 65 of the County Courts Act, 1888, and the plaintiff in the action becomes bankrupt, and his trustee in bankruptcy is added as a co-plaintiff under the Rules of the Supreme Court, and while the action still remains in the High Court, the County Court has no jurisdiction when the action becomes a County Court Action, by lodging the original writ and order with the registrar, to order the trustee in the bankruptcy to give security for costs under sect. 94 of the County Courts Act.

HEMMING v. DAVIES [1898], 1 Q. B. 660; 67 [L. J. Q. B. 458; 78 L. T. 500; 5 Manson, 73; 14 T. L. R. 309—Div. Ct.

18 *Claim originally above £100—Reduced by amendment of Writ—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65.*—Where in an action of contract commenced in the High Court the claim originally indorsed on the writ exceeded £100, but subsequently the plaintiff obtained leave to amend his writ by reducing the claim to £34.

Held—that, as the amendment (when in

fact made) would have the effect of substituting the amended writ as the commencement of proceedings, the Master had power, when granting leave to amend, to remit the action to the County Court.

DIERKEN v. PHILPOT ([1901] 2 K. B. 380, 70 L. J. K. B. 675; 49 W. R. 703, 85 L. T. 246—Div. Ct., No. 16, *supra*), distinguished.

SNEADE v. WOTHERTON BARYTES AND LEAD MINING CO., LD., [1904] 1 K. B. 295; 73 L. J. K. B. 170; 52 W. R. 225; 90 L. T. 53; 20 T. L. R. 183—C. A.

19. *Claim for Liquidated Damages—Amendment by claiming Unliquidated Damages—Jurisdiction—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 87.*—Although only a claim for liquidated damages can be remitted to the County Court under sect. 65 of the County Courts Act, 1888, yet, when such an action has been remitted for trial to the County Court, the latter Court has the same powers of amendment as if the action had been originally brought in the County Court.

Therefore, where the claim in a remitted action is to recover a liquidated sum for, e.g., demurrage, the County Court has power to amend the claim by altering it to one for unliquidated damages for detention of the waggons in question.

SPENCER, WHATLEY, AND UNDERHILL v. FORSTER [AND Co. [1905] 1 K. B. 434; 74 L. J. K. B. 288; 92 L. T. 163; 21 T. L. R. 224—Div. Ct.

20. *Costs—Action on Contract for over £20—Payment by Defendant to Plaintiff outside Court—Less than £20 recovered in County Court—More than £20 recovered in Action—Particulars of Claim—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116.*—The plaintiffs originally brought their action in the High Court for the balance due on a promissory note, viz. £27 odd. After they brought that action they received from the defendants, as a payment made outside the Court between the parties, the sum of £8 odd, thus reducing the sum due to the plaintiffs, after giving credit for that payment, to £19 odd. The action was remitted to the County Court, and the plaintiffs in their particulars, included in the sum for which they gave credit this sum of £8, and they claimed the balance of £19 only. The only date put against the sum of £8 in the particulars was "1901," which did not show that the £8 had been paid since the action brought. Upon the trial of the action in the County Court, judgment was entered for the plaintiffs, £19 odd.

Held, by Lord Alverstone, C.J., and Channell, J. (Darling, J., dissenting)—that looking at the substance the plaintiffs had recovered in the action a sum not less than £20; and that they were therefore entitled to their costs, and sect. 116 of the County Courts Act, 1888, did not apply.

PEARCE v. BOLTON, [1902] 2 K. B. 111; 71 [L. J. K. B. 558; 86 L. T. 530; 18 T. L. R. 516—Div. Ct.

**Jurisdiction and Law—Continued.**

21. *Costs of Application under Order XIV.—Action remitted to County Court—Order made for “costs in cause”*—*Jurisdiction—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65 & 116—Rules of the Supreme Court, Order XIV., r. 9.*—Upon an application for judgment under Order XIV., in an action of contract to recover £22, the defendant obtained leave to defend. Upon a subsequent application by the plaintiff at chambers it was ordered that the action should be remitted to the County Court, and that the costs of the application under Order XIV. should be “costs in the cause.”

**HELD**—that there was no jurisdiction to make the order as to costs..

*DUNN v. APPLETON*, [1898] 1 Q. B. 564; 67 [L. J. Q. B. 428; 78 L. T. 246; 14 T. L. R. 264—C. A.

22. *Costs—Judgment for Plaintiff in High Court under Ord. 14 for Part of Claim—Judgment for Defendant in County Court as to Balance—Costs to Abide Event—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 113.*—The plaintiffs claimed £20 2s. for goods sold and delivered. The defendant sent the plaintiffs a cheque for £8 14s., saying that was all he owed. The plaintiffs returned the cheque, and brought an action in the High Court, and under Ord. 14 signed judgment for £8 14s. The defendant, with leave, defended as to the balance, and the action was remitted to the County Court, where the defendant got judgment, and the judge declined to make any special order as to costs.

**HELD**—that in the absence of any special direction the costs abided the event—viz., the recovery of the £8 14s.—and the defendant did not get any costs, the action being one action, which could not be split in two by the order of remittal.

*WRIGHT & SON v. BULL*, [1900] 2 Q. B. 124; 69 [L. J. Q. B. 529; 82 L. T. 568—Div. Ct.

23. *Costs—Payment into Court under Ord. 14 of Part of Claim—Judgment for Defendants for Balance—County Court Rules, 1903, Ord. 53, r. 18—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 113.*—In an action in the High Court to recover £71 for goods sold and delivered, an order was made under Order 14 that as regards £23 of the amount claimed judgment should be entered for the plaintiffs, unless that sum were paid into Court. The defendants paid that sum into Court, and the action was remitted for trial to the County Court. The defendants gave notice that they did not intend to defend the action so far as related to the amount paid into Court. At the trial the defendants succeeded on the balance of the plaintiffs' claim, and judgment was entered for them, with costs.

**HELD**—that the judge had power to award costs to the defendants; and that such costs should be taxed on the scale applicable where the amount claimed exceeded £50.

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*Dicta in Wright v. Bull* ([1900] 2 Q. B. 124; 69 L. J. Q. B. 529; 82 L. T. 568—Div. Ct., *supra*), disapproved.

*ASTON TUBE WORKS, LD., v. DUMBELL AND AN- [OTHER]*, [1904] 1 K. B. 535; 73 L. J. K. B. 208; 52 W. R. 444; 90 L. T. 815; 20 T. L. R. 165—Div. Ct.

24. *Costs—Costs in County Court—Discretion of Judge as to—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 113.*—Where an action is remitted to a County Court under sect. 65 of the County Courts Act, 1888, the County Court Judge has the same discretion under sect. 113 as to the costs in the County Court as if the action had been commenced in that Court.

**Decision of Div. Ct.** ([1905] 2 K. B. 196; 74 L. J. K. B. 708; 53 W. R. 664; 93 L. T. 199; 21 T. L. R. 538) affirmed.

*EVERALL v. BROWN*, [1906] 2 K. B. 884; 75 [L. J. K. B. 960; 95 L. T. 231; 22 T. L. R. 767—C. A.

25. *Costs—Judgment in High Court—Judgment in County Court for Balance—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65 and 116.*—Where in an action brought in the High Court an order remitting the action is made after judgment with costs has been given for part of the claim, the costs to be given in the County Court are the costs taxed according to the scale applicable to the balance actually recovered in the County Court.

A. sued B. in the High Court for £29 18s. 11d.

Judgment for £27 18s. 5d. with costs was given under Order XIV., and the case was remitted.

In the County Court the plaintiff recovered the balance of £2 0s. 6d.

**HELD**—that the scale of costs applicable was the £2 to £5, not the £20 to £50 scale.

*Keeble v. Bennett* ((1894) 2 Q. B. 329) distinguished.

*BAILEY v. WATSON & CO.*, [1898] 2 Q. B. 270; [67 L. J. Q. B. 802; 78 L. T. 720; 14 T. L. R. 263—Div. Ct., overruled, *see* No. 29, *infra*.

26. *Costs—Judgment under Order 14 for Part of Claim—Judgment in County Court for Balance—Successful Counter-claim in County Court Exceeding Balance of Claim—Duty of Judge to Make Special Order as to Costs—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 113.*—In an action for £70 the plaintiff recovered £50 under Order 14, and his claim for the balance and a counter-claim were remitted to the County Court, where he recovered £20, but the defendant recovered £30 on the counterclaim. Thereupon the County Court Judge made a special order giving the plaintiff the general costs of the action down to the date of the order for remission, and giving the defendant the general costs subsequent to such order.

**Jurisdiction and Law—Continued.**

HELD—that the decisions were in so unsatisfactory a state that the Judge in such cases not only has power, but ought, to make a special order as to the apportionment of the costs.

*M'EACHEN v. SALLYCO MINERAL WATER CO.*,  
[1903] 19 T. L. R. 208—Div. Ct.

**27. Costs—Less than £50 Claimed—County Courts Act, 1888, s. 116**—S. 116 of the County Courts Act, 1888, applies to all actions brought in the High Court which might have been brought in the County Court whether tried in the High Court or ordered to be tried in the County Court under s. 65.

*Rule in White v. Cohen* ([1893] 1 Q. B. 580) approved.

*SIMPSON v. PARSONS*, [1904] 48 Sol. J. 622—  
[Div. Ct.]

**28. Costs—Payment into Court—Recovery of Sum not Exceeding Amount Paid in—Costs before Payment in—Discretion—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 107, 113.**—Sect. 107 of the County Courts Act, 1888, applies to a remitted action as well as to an action commenced in a County Court.

An action in the High Court to recover a sum of £46 was remitted to the County Court, and the defendant paid £16 into Court without denying liability. The plaintiff did not accept this sum, and at the trial the Judge found for the plaintiff for £16, and gave judgment for the defendant with costs. The registrar, upon taxation, allowed the defendant the costs of the proceedings in the High Court, and the County Court Judge refused to order a review of taxation.

HELD—that under sect. 107 of the County Courts Act, 1888, these costs, having been incurred before the payment into Court, were not dealt with, and were therefore in the discretion of the Judge under s. 113, and the Judge having given judgment for the defendant with costs the registrar had rightly allowed them to the defendant.

*BENNETT v. DRAKE*, (1907) 97 L. T. 132, 23  
[T. L. R. 533—Div. Ct.]

**29. Costs—Recovery of a Sum Exceeding £50—Scale—County Courts Act, 1883 (51 & 52 Vict. c. 43), s. 65.**—An action was commenced in the High Court for £73 odd. On an application under Ord. 14 an order was made by a Master giving the plaintiff leave to sign judgment for £53 odd, and giving the defendants leave to defend as to the residue, and directing the action to be tried in a County Court. In the County Court the plaintiff recovered judgment for £20, the residue of the claim.

HELD—that the plaintiff, having recovered in the action a sum exceeding £50, was entitled to have his costs in the County Court taxed upon scale C.

*Keeble v. Bennett* ([1894] 2 Q. B. 329; 63 L. J. Q. B. 694, 42 W. R. 539; 71 L. T. 247) followed.

*Bailey v. Watson & Co.* ([1898] 2 Q. B. 270; 67 L. J. Q. B. 802; 78 L. T. 720, No. 25, *supra*), overruled.

*WHITE v. HEADLAND'S PATENT ELECTRIC STORAGE BATTERY CO.*, [1899] 1 Q. B. 507, 68 L. J. Q. B. 354; 47 W. R. 273, 80 L. T. 442; 15 T. L. R. 189—C. A.

**29A. Costs—Recovery of Sum Exceeding £20—Scale—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65.**—In an action to recover the sum of £23 14s. 0d., which was brought in the High Court, the defendant, by an order under Ord. 14, was directed to pay £14 8s. 8d., with leave to defend in the County Court as to the balance. The sum of £14 8s. 8d. was promptly paid, and the claim for the balance having been heard in the County Court, the judge decided that the payment of £14 8s. 8d. was sufficient to satisfy the whole claim and gave judgment accordingly, awarding the defendant costs (since payment) on the B. Scale—applicable to claims over £20.

HELD, on appeal as to costs, that, having regard to *White v. Headlands Electric Co.*, [1899] the B. Scale was applicable, and that the appeal should be dismissed.

*BRADSHAW v. THACKRAY*, [1899] 106 L. T. Jo.  
[334—Div. Ct.]

**III. PROCEDURE.****(a) General.**

**30. Counter-Claim—Action by Two Joint Plaintiffs—No Evidence Against One Plaintiff—Effect of Against the Other Plaintiff—County Court Rules, 1889, Ord. 10, r. 8.**—In a County Court action by two joint plaintiffs against a defendant, the plaintiffs' claim was admitted subject to the defendant's counter-claim. Evidence was produced by the defendant in support of the counter-claim and the judge held that, inasmuch as there was no evidence against one of the plaintiffs, the counter-claim also failed against the other.

HELD—that the County Court Judge ought to have dealt with the counter-claim.

QUERY—Whether Order 10, r. 8, of the County Court Rules is necessary.

*HALL AND ANOTHER v. FAIRWEATHER*, (1902) 18  
[T. L. R. 58—Div. Ct.]

**31. Interpleader—Claim of Goods Taken in Execution—Value of Goods Paid into Court—Goods Claimed by Third Person—Claim Admitted—Claim of Original Claimants Barred—Right to Money in Court—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 156, 157.**—The plaintiff and the claimants each recovered judgment in different County Courts against the defendant, and obtained warrants of execution, which were sent to the high bailiff of the Carmarthenshire County Court. The claimants proceeded to

*Procedure—Continued.*

levy execution, but withdrew the execution upon the defendant giving them a bill of sale over his goods. Subsequently the plaintiff levied execution on the defendant's goods, which were claimed by the claimants under their bill of sale. The plaintiff disputed the claim, and the claimants had the goods valued, and deposited the sum at which they were valued with the high bailiff under sect. 156 of the County Courts Act, 1888. The high bailiff thereupon withdrew from possession of the goods, and issued an interpleader summons. Some of the goods were then claimed by a third person who had let them to the defendant on the hire-purchase system, and the original claimants acquiesced in this claim and filed a notice of withdrawal of their claims so far as that portion of the goods was concerned. The high bailiff issued another interpleader summons making the new claimants parties as claimants as well as the original claimants. The plaintiff gave notice that he also admitted the claim of the new claimants. Upon the hearing of the interpleader summons the new claimants did not appear, and the County Court Judge held that the bill of sale was void; but he held that the plaintiff was only entitled to be paid the sum in Court after deducting the value of the goods claimed by the new claimants, and that the original claimants were entitled to have this latter sum paid to them out of the money in Court. The Divisional Court affirmed this decision.

HELD—that the plaintiff was entitled to the whole sum in Court towards satisfaction of his debt.

WELLS v. HUGHES (DISTRICT LOAN CO., [CLAIMANTS]), [1907] 2 K. B. 845; 76 L. J. K. B. 1125; 97 L. T. 469; 23 T. L. R. 733—C. A.

32. *Nonsuit—Withdrawal of Case from Jury—New Trial.*—A County Court Judge should not stand on the ancient rule of nonsuit, as it is a liberty now rarely taken in the Court above. It is better that the jury should deal with the case. A County Court Judge is in a stronger position than a Judge of the Queen's Bench Division at Nisi Prius, because the former can grant a new trial and the latter cannot, and the former can give a much stronger summing-up than the latter. Counsel or whoever represents the plaintiff can insist upon the case being left to the jury.

GODDARD v. MIDLAND RAILWAY CO., (1899) 80 [L. T. 624—Div. Ct.]

33 *Payment out of Court—Proceeds of Execution in Court—Plaintiff applying for Payment out—Defendant's Trustee in Bankruptcy opposing—County Court Rules, Ords. II., r. 10, IX., r. 21.*—A plaintiff in a County Court obtained judgment on September 26th, after the defendant had committed an act of bankruptcy. On November

11th, the bailiff sold goods and received the money; on the same day a bankruptcy petition based on a second act of bankruptcy was presented against the defendant, and he was subsequently adjudicated bankrupt.

HELD—that the trustee in bankruptcy could not prevent the plaintiff taking the money out of Court upon the usual application, though possibly he might be able to recover it from the plaintiff in other proceedings.

LONDON FANCY BOX CO., LD v. BERKELEY, (1907) [95 L. T. 727—Div. Ct.]

34 *Right of Reply where Defendant calls Witnesses—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 72, 164.*—When in a County Court the defendant calls witnesses or puts in evidence, the plaintiff has a right of reply.

CLACK v. CLACK, [1906] 1 K. B. 483; 72 [L. J. K. B. 274, 54 W. R. 375, 94 L. T. 516; 22 T. L. R. 313—Div. Ct.]

35. *Transferred Action—Foreclosure Action—Mortgage Debt over £500 reduced by Payments below £500—Transfer to High Court—Retransfer to County Court—County Court Act, 1888 (51 & 52 Vict. c. 43), ss. 67 (3), 68.*—An action was commenced in a County Court for payment of the amount due on a mortgage of freehold property, and in default foreclosure and possession of the property. The mortgage debt, nominally of £575, had by various payments been reduced to £461 before action brought. The County Court Judge ordered the action to be transferred to the High Court, as the amount of the advance exceeded £500.

HELD—that the Court might order the action to be retransferred to the County Court.

SHIELDS, WHITLEY, AND DISTRICT AMALGAMATED [MODEL BUILDING SOCIETY v. RICHARDS, (1901) 84 L. T. 587—Cozens-Hardy, J.]

(b) *Statutory Defences.*

36. *Statutory Defence—Notice—"Sufficiently indicate the Nature of the Defence"—County Court Rules, 1903, Ord. 10, r. 18.*—A notice of a statutory defence to an action in a County Court to recover a sum of money paid by the plaintiff on account and at the request of the defendant stated that the contract was null and void, and the defendant relied on the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18.

HELD—to be a sufficient indication of the nature of a defence under the Gaming Act, 1892, inasmuch as the two statutes were in *pari materia*.

RENTON v. KING, (1905) 93 L. T. 10; 21 T. L. R. [577—Div. Ct.]

37. *Statutory Defence—Action by Solicitor on Bill of Costs—No signed Bill—Solicitors*  
24—2

**Procedure—Continued.**

*Act, 1843 (6 & 7 Vict. c. 73), s. 37—County Court Rules, 1889, Order X., rr. 10, 18.]—The defence to an action brought by a solicitor to recover a bill of costs, that the solicitor had not delivered a signed bill of costs one month before action brought, as required by sect. 37 of the Solicitors Act, 1843, is a statutory defence within the meaning of Order X., rr. 10 and 18 of the County Court Rules, 1889; and when the action is brought in a County Court notice of such defence ought to be given in pursuance of those rules.*

*LEWIS v. BURRELL, (1898) 77 L. T. 626; 14 [T. L. R. 148—Div. Ct.]*

**38 Statutory Defence—Notice—Actions on Contracts—Statute of Frauds—County Court Rules, Order X., r. 18 (a).]**—A defence in an action for goods sold of no note or memorandum of the contract of sale within sect. 17 of the Statute of Frauds (repealed and re-enacted by sect. 4 of the Sale of Goods Act, 1893) is a statutory defence within Order X., r. 18 (a) of the County Court Rules, and notice of it must be filed five clear days before the return day.

*BRUTTON v. BRANSON, [1898] 2 Q. B. 219, 67 [L. J. Q. B. 827; 79 L. T. 247; 14 T. L. R. 457—Div. Ct.]*

**39. Statutory Defence—Notice—Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1—County Court Rules, 1889, Ord. 10, rr. 10, 18A.]**—A defence which arises under the Gaming Act, 1892, is a statutory defence of which notice ought to be given under Ord. 10, rr. 10 and 18A, of the County Court Rules of 1889, because otherwise neither the Court nor the plaintiff could know until the trial that this defence was to be raised.

*WILLIS v. LOVICK, [1901] 2 K. B. 195; 70 [L. J. K. B. 656; 49 W. R. 540; 84 L. T. 713—Div. Ct.]*

**40. Statutory Defence—Gaming Transaction—Agreement to Withdraw Defence—Validity—County Court Rules, 1903, Order 10, rr. 10, 18; Order 35.]**—In an action in a County Court on a cheque given for bets lost by the defendant to the plaintiff, the defendant gave notice of a defence under the Gaming Acts. Before the hearing the parties entered into "terms of settlement," whereby the defendant agreed to give to the plaintiff two bills payable at a future date, and the hearing of the action was adjourned, and the defendant also agreed to withdraw his plea of the Gaming Act, and not to set up such plea in respect of either of the two bills. The defendant accordingly withdrew the notice of defence. He did not pay the first bill, and he gave notice withdrawing his notice of withdrawal of the defence. At the adjourned hearing the County Court judge gave judgment for the plaintiff for the amount of the cheque upon the ground that the defendant could not, by reason of the agreement, avail himself of the statutory defence.

**HELD**—that the agreement not to set up the statutory defence was unsupported by any consideration, and as the defendant had withdrawn his notice of withdrawal of that defence, the defence was before the Court, and the County Court judge ought to have given effect to it.

*COOPER v. WILLIS, (1906) 22 T. L. R. 582—[Div. Ct.]*

**41. Statutory Defence—Notice—Statute of Limitations—County Court Rules, 1889, 1895, Ord. 10, rr. 10, 14A, 18A—Form 95A.]**—In a County Court action a notice of a defence under a Statute of Limitation, filed under Ord. 10, r. 10, is sufficient if it complies with Ord. 10, r. 14A and Form 95A, and need not set forth the particular statute relied on nor the date from which it began to run. Ord. 10, r. 18A, does not apply to defences under Statutes of Limitations.

*EATON v. TAPLEY, [1899] 1 Q. B. 953; 68 L. J. [Q. B. 638; 47 W. R. 463—Div. Ct.]*

**IV. COSTS.**

**42. Action for Damages, Claiming Perpetual Injunction with Alternative Claim for Damages—Failure of Claim for Damages and Injunction—£3 Recovered on Alternative Claim—Scale of Costs—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 119—County Court Rules, 1903 and 1904, Ord. LIII., rr. 1, 11.]**—The plaintiff brought an action in the County Court for trespass, alternatively for disturbance of his tenancy, against his landlord, claiming an injunction. In the alternative he claimed for compensation in respect of improvements under his agreement for a lease. The defendant counter-claimed for a declaration that the tenancy had ceased by his re-entry. Judgment was given for the plaintiff on the second part of his claim for £3, and for the defendant on the counterclaim. Costs on each judgment. Subsequently the County Court Judge, on a review of taxation, gave the plaintiff his costs under column B of the County Court scales of costs, holding that he was bound to do so by Ord. LIII., r. 11, of the County Court Rules, 1903.

**HELD**—that this decision was wrong, and that the plaintiff's costs must be taxed on the lower scale.

*CLINTON v. BENNETT, (1907) 52 Sol. Jo. 46—[Div. Ct.]*

**43. Action on Contract—Separate Causes of Action Against Two Defendants—Judgment for £50 Against Both—Judgment for Over £50 Against One—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116—Rules of Supreme Court, 1883, Ord. 65, r. 12.]**—The plaintiffs, who were trustees of a friendly society, brought an action in the High Court against two defendants claiming, as against the first defendant, the treasurer of the society, a sum of £90 as money had and



**Costs—Continued.**

received by him for the society, and as against both defendants the sum of £50 upon a joint and several bond for that amount in favour of the society for the due performance by the first defendant of his duties as treasurer. At the trial the plaintiffs recovered judgment against the first defendant for £90, and against the two defendants on the bond for £50.

**HELD**—that, under Ord. 65, r. 12, the plaintiffs were not entitled, as against the second defendant, to costs on the High Court scale.

**DUXBURY v. BARLOW**, [1901] 2 K. B. 23; 70 [L. J. K. B. 478; 49 W. R. 450; 84 L. T. 518; 17 T. L. R. 420—C. A.]

**44. Action Founded on Tort—Agistment of Horse—Negligence of Bailee—Action in High Court—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116.**—An action to recover damages for injuries caused to a horse by the negligence of the defendant while it was in his custody under a contract of agistment with the owner is founded on tort within the meaning of sect. 116 of the County Courts Act 1888.

**TURNER v. STALLIBRASS**, [1898] 1 Q. B. 56; 67 [L. J. Q. B. 52; 77 L. T. 482; 46 W. R. 81—C. A.]

**45. Action Founded on Tort—Breach of Duty arising out of Contract—Agreement for Lease with Option of Purchase—Wrongful Removal of Fixtures by Vendor—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116.**—Where it is only necessary to refer to a contract to establish a relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort.

The plaintiff made an agreement with the defendant in October of one year for a lease from the latter to commence in the following March, and under that agreement the plaintiff had an option to purchase if he gave a certain notice. After the plaintiff had taken possession under the lease he found, as alleged in the statement of claim, that certain fixtures, which were on the premises at the time of the agreement, had been taken away.

**HELD**—that there was a clear duty on the vendor not to take away without the knowledge of the purchaser, any of the things which made the subject-matter valuable, and that in substance an action founded on that breach of duty was an action founded on tort within the meaning of sect. 116 of the County Courts Act, 1888.

**Turner v. Stallibrass** ([1898] 1 Q. B. 56; 67 L. J. Q. B. 52; 46 W. R. 81; 77 L. T. 482—C. A., No. 44, *supra*), followed.

**SACHS v. HENDERSON**, [1902] 1 K. B. 612; 71 [L. J. K. B. 392; 50 W. R. 418; 86 L. T. 437; 18 T. L. R. 382—C. A.]

**46. Action Founded on Tort—Detinue—Value of Goods Less than £10—Recovery**

*of Goods in Specie—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, sub-s. 2.*—The plaintiff in an action of detinue recovered judgment for the return of the goods claimed or £6 10s, their value; and the goods were returned to him.

**HELD**—that sect. 116, sub-sect. 2, of the County Courts Act, 1888, did not apply, and the plaintiff was entitled to costs.

**Du Pasquier v. Cadbury, Jones & Co.** ([1903] 1 K. B. 104; 72 L. J. K. B. 78; 87 L. T. 519; 19 T. L. R. 41—C. A., No. 53, *infra*), followed.

**TROTTER v. WINDHAM & Co.**, (1907) 23 T. L. R. [676—C. A.]

**47. Action “which could have been commenced in a County Court”—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116.**—Section 116 of the County Courts Act, 1888, enacts that “with respect to any action brought in the High Court which could have been commenced in a County Court,” certain provisions therein set out should apply.

**HELD**—that the words “which could have been commenced in a County Court” mean “which could ‘properly’ have been commenced in a County Court,” both as regards the character of the action and the amount really involved. The time at which it is to be ascertained whether the action is, as regards amount, properly within the jurisdiction of the County Court is the time when the amount recoverable is adjudicated on by the proper tribunal or otherwise ascertained by the result. It does not depend on the amount which the plaintiff chooses to claim by his writ.

**Goldhill v. Clarke** ((1899) 68 L. T. 414; 5 R. 75—Charles, J.) disapproved of.

**Lovejoy v. Cole** ([1894] 2 Q. B. 861; 64 L. J. Q. B. 120; 43 W. R. 48; 71 L. T. 374; 10 R. 482—Div. Ct.) followed.

**SOLOMON v. MULLINER**, [1901] 1 Q. B. 76; 70 [L. J. Q. B. 165; 49 W. R. 364; 83 L. T. 493; 17 T. L. R. 87—C. A.]

**48. Costs—Action Struck out for Want of Jurisdiction—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 88, 89, 113, 114.**—The power to give costs by sects. 88 and 89 of the County Courts Act, 1888, does not exclude the power given by sect. 113 of the same Act. The three sections must be read together.

Where an action commenced in a county court is struck out for want of jurisdiction under sect. 14 of the County Courts Act, 1888, the county court judge has power to award costs against the defendant.

**WATSON v. PETTS**, [1899] 1 Q. B. 430; 68 L. J. [Q. B. 249; 80 L. T. 21; 15 T. L. R. 174—Div. Ct.]

**49. Amending Defence by putting in New Plea—Discontinuance by Plaintiff—Costs “of and Occasioned by the Amendment”—Costs**

**Costs—Continued.**

*Between Original Defence and Discontinuance*—After a defence had been delivered in an action and shortly before the trial, the defendants obtained leave to amend the defence by inserting a new plea, the plaintiff to have the costs "of and occasioned by the amendment." The plaintiff thereupon, being advised that the new plea was fatal to his claim, discontinued the action, and was ordered to pay the defendants' costs. Upon taxation the master gave the defendants the general costs of the action, but gave the plaintiff the costs after the original defence down to the date of the amended defence. The judge at chambers reversed this order, giving the defendants the costs in question.

**HELD**—that these were not costs "of and occasioned by the amendment," and the defendants were entitled to them.

*SIDEBOTTOM v. HOOTON PARK CLUB, LD.*, (1902) [18 T. L. R. 453—C. A.]

50 "*Contract*" or "*Tort*" — *Action Against Architect for Negligence—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 116.]—For the purposes of sect. 116 of the County Courts Act, 1888, claims for breach of duty arising out of the employment of a professional man are claims in contract, and not in tort.

The plaintiff recovered £20 damages in a High Court action against an architect for not using due care in supervising the erection of a building, which he had undertaken to supervise.

**HELD**—that the action was "founded on contract," and that the plaintiff was only entitled to County Court costs.

*Bryant v Herbert* ((1878) 3 C. P. D. 390, 47 L. J. C. P. 670, 26 W. R. 898, 39 L. T. 17—C. A.) and *Fleming v M., S., & L. Ry. Co.* ((1878) 4 Q. B. D. 81, 27 W. R. 481; 39 L. T. 555—C. A.) applied.

*STELJES v. INGRAM*, (1903) 19 T. L. R. 534—[Phillimore J.]

51. *Counsel's Fee—"Good Cause"—Application not made at or immediately after Trial—County Court Rules, 1903, Order 53, r. 7.*—Upon the trial of an action in the County Court the successful party forgot to apply to the judge at or immediately after the trial for a certificate for counsel's fees. Subsequently an application was made for a certificate, which the judge refused to give, upon the ground that he had no jurisdiction to do so.

**HELD**—that the mere omission to apply for a certificate was not "good cause" within the meaning of Order 53, rule 7, of the County Court Rules, 1903, and that the judge had no jurisdiction to give a certificate.

*MORLEY v. BEVINGTON*, (1905) 22 T. L. R. 28; [93 L. T. 768—Div. Ct.]

52. *Detinue—Recovery of Specific Goods—Sum not exceeding £5.*—The provisions

limiting a plaintiff's right to costs where he recovers as damages a sum not exceeding £5 in actions of tort, do not apply to an action of detinue in which the goods are recovered in specie. (*See County Courts Act, 1888, s. 116*)

*BRADLEY v. ARCHIBALD*, [1899] 2 Ir. R. 108—[Q. B.]

53. *Detinue—Recovery of Goods in specie—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 116.]—Section 116 of the County Courts Act, 1888, does not apply to an action of detinue in which the goods claimed are recovered in specie.

*DU PASQUIER v. CADBURY, JONES & Co.*, (1902) [51 W. R. 113, 19 T. L. R. 41, [1903] 1 K. B. 104, 72 L. J. K. B. 78; 87 L. T. 519—C. A.]

54. *Depriving Successful Defendant of Costs—Discretion of Judge—Good Cause—Pleading Statute of Limitations—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 113.]—The discretion conferred upon a County Court judge by sect. 113 of the County Courts Act, 1888, as to the costs of an action is substantially the same as that conferred upon a judge of the High Court by Order 65, rule 1, of the Rules of the Supreme Court, 1883. This discretion, though a wide one, must be exercised judicially, and the mere fact that the defendant has successfully set up the defence of the Statute of Limitations is not a good ground for depriving him of his costs.

*ELMS v. HEDGES*, (1906) 94 L. T. 145; 22 T. L. R. [574—Div. Ct.]

55. *Depriving Defendant of Costs—Appeal—County Courts Act, 1888* (51 & 52 Vict. c. 43), ss. 88, 93, 113, 120.]—Where a County Court Judge has, without proper materials before him, deprived a party of costs or has directed the wrong party to pay the costs, an appeal lies to the High Court under sect. 120 of the County Courts Act, 1888.

A County Court Judge non-suited the plaintiff in an action of tort, the plaintiff's evidence having shown that the defendants were not the persons liable, and he deprived the defendants of their costs on the ground that they had not given every assistance and information to the plaintiff to enable her to determine who was the proper person to be sued.

**HELD**—that, as the evidence showed that the defendants were not the persons liable, judgment ought to have been entered for them, and, as the non-suit could not stand, the Court must give the judgment which the County Court Judge ought to have given, and the Court was entitled to attach to that judgment the proper consequences—namely, that the defendants should have their costs.

*WESTGATE v. CROWE AND OTHERS*, (1907) 24 [T. L. R. 14—Div. Ct.]

56. *Judgment for £10 Damages—Plaintiff's Claim for Injunction Satisfied during Pro-*

**Costs—Continued.**

*gress of Action—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 116.]—A plaintiff claimed damages and an injunction. He recovered £10 with costs to be taxed, but did not ask for an injunction as the defendant had since writ issued done all that the plaintiff claimed to compel him to do.

**HELD**—that sect. 116 of the County Courts Act, 1888, did not apply, and that the plaintiff was entitled to costs upon the High Court scale.

**DOHERTY v. THOMPSON**, (1906) 94 L. T. 626—  
[C. A.]

**57. Jurisdiction to Order Successful Defendant to Pay Plaintiff's Costs—County Courts Act, 1888** (51 & 52 Vict. c. 43), s. 113.]—Sect. 113 of the County Courts Act, 1888, does not give the County Court judge power to order a successful defendant to pay the plaintiff's costs generally. To enable the County Court judge to award costs in the exercise of a judicial discretion under sect. 113 there must be some right established by the plaintiff.

**ANDREW v. GROVE**, [1902] 1 K. B. 625; 71 [L. J. K. B. 439; 50 W. R. 524; 86 L. T. 720; 18 T. L. R. 455—Div. Ct.]

**58. Payment into Court—Amount Claimed Paid \*in—Nothing Paid in for Costs—Recovery of Exact Amount Paid in—Order as to Costs—Plaintiff to Pay Defendant's Costs after Payment in—Discretion of Judge—County Courts Act, 1888** (51 & 52 Vict. c. 43), s. 113—*County Court Rules, Ord. IX., r. 12* (4).]—A defendant in the County Court paid money into Court with a denial of liability, but paid in nothing in respect of costs. The plaintiff was found to be entitled to the amount paid in, and no more.

**HELD**—that the Judge, who gave judgment for the defendant, had power to order the plaintiff to pay the costs incurred after the payment in, while giving him the costs up to that time.

**SYKES v. WESLEYAN AND GENERAL ASSURANCE SOCIETY**, (1907) 76 L. J. K. B. 626; 96 L. T. 782—Div. Ct.]

**59. Payment into Court with Denial of Liability—Second Trial—"Costs of First Trial to Abide Event"—Verdict for Plaintiff for Amount Paid in—Costs of Issue of Liability—Discretion of Judge.]**—Where defendants with a denial of liability pay into the County Court a sum not less than the amount ultimately awarded, a Judge of a County Court has the same discretion as a Judge of the High Court to nevertheless give the plaintiff his costs of the issue of liability on which he has succeeded.

And, when a new trial has been ordered, such discretion is not excluded by the order for the new trial including a direction that the costs of the first trial shall "abide the event."

*Wagstaffe v. Bentley* ([1902] 1 K. B. 124; 71 L. J. K. B. 55; 85 L. T. 744—C. A., see title PRACTICE, 83), followed.

**DUNN v. SOUTH EASTERN & CHATHAM RY. Co.**, [1903] 1 K. B. 358; 72 L. J. K. B. 127; 51 W. R. 427; 88 L. T. 60, 19 T. L. R. 161—  
Div. Ct.]

**60. Taxation—Public Authority—Solicitor and Client Costs—County Courts Act, 1888** (51 & 52 Vict. c. 43), s. 118—*Public Authorities Protection Act, 1893* (56 & 57 Vict. c. 61), ss. 1, 2.]—In an unsuccessful County Court action against a public authority the solicitor and client costs, given by the Public Authorities Protection Act, 1893, must be taxed on the scale then in force in the County Court in accordance with sect. 118 of the County Courts Act, 1888.

**TORY v. DORCHESTER CORPORATION**, [1907] 1 [K. B. 393; 76 L. J. K. B. 273; 71 J. P. 88; 96 L. T. 121; 5 L. G. R. 132—Div. Ct.]

**61. Trespass—Action commenced in High Court—Claim for Damages and Injunction—Judgment for Nominal Damages and an Injunction—"Action founded on Tort"—County Courts Act, 1888** (51 & 52 Vict. c. 43), s. 116, sub-s. 2.]—An action was commenced in the Chancery Division of the High Court in which damages for a trespass to land were claimed, and also an injunction against a repetition of the trespass. The case was transferred to the County Court, and the jury found that the claim to a right of way set up by the defendant was well founded. There was an appeal to the Divisional Court, and the judgment given in the County Court was reversed on the ground that there was no evidence of a right of way, and the plaintiff obtained nominal damages and an order for an injunction.

**HELD**—that the case ought to be dealt with as if the judgment in the County Court had been that which the Divisional Court decided it should have been, namely, judgment for nominal damages for the trespass and an injunction; that the real basis of the action was the claim of a right in respect of which an injunction was sought; that the case was outside sect. 116, sub-s. 2, of the County Courts Acts, 1888; and that the plaintiff was entitled to costs.

*St. John's College, Cambridge v. Pierrepont* ((1891) 69 L. J. Q. B. 19; 66 L. T. 88—Div. Ct.) overruled.

**Bradley v. Archibald** ([1899] 2 Ir. R. 108, No. 52, *supra*), followed.

**KEATES v. WOODWARD**, [1902] 1 K. B. 532; 71 [L. J. K. B. 325; 50 W. R. 258; 86 L. T. 369; 18 T. L. R. 288—C. A.]

**V. EXECUTION.**

See also title, EXECUTION.

And see ADMIRALTY, 23; TROYER, 2.

**62. Claim to Goods—Deposit of Amount of Value—Withdrawal of Bailiff—Order for Sale—Retaking Possession—"Dispute"**

**Execution—Continued.**

*County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156—County Court Rules, 1903, Ord. 27, r. 13.*—In sect. 156 of the County Courts Act, 1888, the word "dispute" means a dispute between the execution creditor and the claimant.

A bill of sale holder claimed goods which had been seized under a County Court judgment. The execution creditor not admitting the claim, the claimant, under sect. 156, deposited the amount of the judgment debt and costs as being the value of the goods. The money was paid into Court by the bailiffs, who then withdrew from possession and applied for an interpleader summons. On the same day that the summons was issued the execution creditor gave notice of his intention to apply for an order for the sale of the goods under Order 27, rule 13, of the County Court Rules, 1903. On the hearing of the application the execution creditor (who had been given no opportunity of being heard as to the value of the goods before the bailiff withdrew) admitted the claimant's title, but alleged, and was prepared with evidence to prove, that the value of the goods was sufficient to satisfy the amount due on the bill of sale, the judgment debt and costs. The County Court Judge, without hearing the evidence, held that, the bailiff having withdrawn from possession, he had no power to order a sale.

**HELD**—that if the amount deposited with the bailiff was not the value of the goods, his withdrawal from possession was wrong, and the County Court Judge had power in that case to order him to retake possession; and that the case must go back to the County Court Judge for him to determine after hearing the evidence whether the circumstances were such that an order for sale ought to be made.

*MILLER & Co. v. SOLOMON, ALLEN CLAIMANT, [1906] 2 K. B. 91; 75 L. J. K. B. 671—*  
Div. Ct.

**63. "Costs of Execution"—High Bailiff executing several Warrants against one Debtor—Number of Possession Fees—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 146, 154—Treasury Order, February 22, 1901, r. 35—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11.**—Where a County Court high bailiff executes several warrants against a debtor, he is entitled to charge possession money in respect of each warrant, if he seizes and appropriates different goods to satisfy each warrant; and this is so, even though all the goods are on the same premises, and one man holds possession of them all.

*Secus*, if he seizes goods *en masse* to satisfy the total amount due under all the warrants together.

*IN RE MORGAN, EX PARTE BOARD OF TRADE, [1904] 1 K. B. 68; 72 L. J. K. B. 948; 52 W. R. 79; 89 L. T. 452; 20 T. L. R. 2; 10 Manson, 358—Wright, J.*

**64. Cross Judgments—Judgment Debt paid into Court—Solicitor's lien for Costs—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 150.**—In one of two actions brought by A. against B. in a County Court there was judgment for A. for £21, which B. thereupon paid into Court; in the other there was judgment for B. with £5 taxed costs.

**HELD**—that only £16 ought to be paid out to A., and the remainder to B., although A.'s solicitor had a bill of costs in respect of the first action exceeding £21, for which he would in the High Court have a lien upon the whole sum recovered.

Section 150 of the County Courts Act as to execution and satisfaction where there are cross-judgments applies,

(1) Even where the cross-judgments are in different actions; and

(2) Where no execution issues, because the amount of the larger judgment debt is paid into Court.

*WARD v. HADRILL, [1904] 1 K. B. 399; 73 L. J. K. B. 277; 52 W. R. 398; 90 L. T. 232—*  
Div. Ct.

**65. Detinue—Judgment for Return of Chattel—Enforcement of Judgment—Warrant of Delivery—Committal—County Court Rules, 1903, Ord. 25, rr. 57, 69, 70—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89—Rules of Supreme Court, 1883, Ord. 42, rr. 6, 7; Ord. 48, r. 1.**—In an action in a County Court for detinue of a dog the plaintiff recovered judgment against the defendant for the return of the dog within seven days, and, in default, that a warrant of delivery should issue. The value of the dog was not assessed. The defendant did not return the dog, and a warrant of delivery was issued. The warrant required the bailiff to seize the dog and deliver it to the plaintiff, and if the dog could not be found within the district of the Court, it ordered the bailiff to distrain all the lands and chattels of the defendant within the district and hold them until the defendant delivered up the dog. The defendant did not deliver up the dog, but the bailiff did not distrain upon his goods. The plaintiff thereupon applied to the County Court judge for an order of committal, and the judge made the order, being satisfied that the defendant could have obeyed the judgment, and had wilfully refused to do so. The Divisional Court held that the judge had jurisdiction to make the order.

**HELD**—that as the High Court would have jurisdiction, under Order 42, rules 6 and 7, to enforce a judgment for the delivery up of a chattel by attachment or committal, the County Court judge had jurisdiction, under sect. 89 of the Judicature Act, 1873, and Order 25, rule 57, of the County Court Rules, 1903, to enforce the judgment by an order of committal; that the plaintiff by obtaining the warrant of delivery had not precluded himself from applying for an order of com-

**Execution—Continued.**

mittal; and that it was not a condition precedent to an order for delivery up of a chattel that the value of it should have been assessed.

Decision of the Divisional Court (21 T. L. R. 16) affirmed.

**HYMAS v. OGDEN**, [1905] 1 K. B. 246, 74 [L. J. K. B. 101; 53 W. R. 209; 91 L. T. 832; 21 T. L. R. 85—C. A.

**66. Warrant—When Binds Goods—Delivery of Præcipe to Registrar—Delivery of Warrant to High Bailiff—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 146—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26.]—A præcipe for a warrant of execution on a judgment in a County Court was delivered by the judgment creditor to the registrar of the County Court (who was also the High Bailiff) at 2.45 in the afternoon. The judgment debtor executed a bill of sale over his goods between 5 and 6 on the same afternoon. The warrant of execution was sealed as having been delivered to the bailiff on the following day. Upon an issue to determine whether the execution creditor or the bill of sale holder had priority in title to the goods,**

**HELD**—that, as the warrant ought to have been issued by the registrar and delivered to the high bailiff immediately after the receipt of the præcipe, any delay in the office ought not to prejudice the title of the execution creditor, and that therefore the latter had priority under sect. 26 of the Sale of Goods Act, 1893, unless the claimant could prove that he acquired his title to the goods in good faith and for value at a time when he had no notice that there was a warrant under which the goods might have been seized.

*Semble*—the same rule would apply if the registrar and high bailiff had been different persons.

**MURGATROYD v. WRIGHT (BANNISTER, claimant)**, [1907] 2 K. B. 333; 76 L. J. K. B. 747; 97 L. T. 108; 23 T. L. R. 517; 14 Manson, 201—Div. Ct.

**VI. ATTACHMENT OF DEBTS.**

*See also title, EXECUTION.*

**67. Garnishee Summons—Attachment of all Debts in Hands of Garnishee—Amount Exceeding Judgment Debt—Assignment of Balance in Hands of Garnishee—Notice of Assignment—Subsequent Garnishee Order.]—A garnishee order was served on the defendant attaching all debts due from him to H., to answer the judgment that had been obtained in the County Court against H. H. assigned to the plaintiff the balance of the amount in the hands of the defendant and the assignee gave notice of the assignment to the defendant. After the assignment and notice a second garnishee order was served on the defendant, in respect of another judgment obtained against H. in the same County**

Court. The defendant appropriated a sufficient sum to meet the judgment on which the first garnishee order was founded, and this sum he paid into Court. He also appropriated the balance in his hands towards satisfaction of the judgment on which the second garnishee order was founded, and he paid it into Court in the action in which that judgment was obtained. The plaintiff sued the defendant to recover the amount of the balance.

**HELD**—that the defendant was affected with notice of the assignment to the plaintiff, and, as that exhausted the fund in his hands, he was under no liability under the second garnishee order; and that he remained under liability to pay the money to the plaintiff who was, therefore, entitled to judgment.

Decision of Divisional Court ([1901] 1 Q. B. 102; 70 L. J. Q. B. 24; 49 W. R. 112; 83 L. T. 415) reversed.

**YATES v. TERRY**, [1902] 1 K. B. 527; 71 [L. J. K. B. 282; 50 W. R. 293; 86 L. T. 133; 18 T. L. R. 262—C. A.

**70. Judgment in High Court against Judgment Creditor in Proceedings in County Court—Right of Judgment Creditor in High Court Proceedings to Money in Hands of County Court Registrar—"Judgment or Order"—County Court Rules, 1903, Ord. XXVI. r. 16, Ord. LV.]—The words "judgment or order" in Ord. XXVI, r. 16, of the County Court Rules, 1903, mean a judgment or order obtained in the County Court.**

Therefore, where A. has obtained judgment in the High Court against B. he is not entitled to an order to have paid out to him, in satisfaction of that judgment, money in the hands of the Registrar of a County Court as the result of proceedings in that Court by B. against C.

*Quære*, whether the words "judgment or order" in Ord. XXVI, r. 16, do not refer to a judgment or order in the same County Court.

**LLFWELLYN v. ROWLAND, Ex parte C. WRIGHT & SON**, (1907) 97 L. T. 433; 23 T. L. R. 533—Div. Ct.

**VII. JUDGMENT SUMMONS.**

**71. Against Joint Debtors—Service of Judgment Summons against One only of the Joint-Debtors—Subsequent Judgment Summons against Another of the Joint-Debtors Jurisdiction to Issue—County Court Rules, 1889, Ord. 25.]—In a County Court action judgment was recovered against three defendants jointly on their joint and several promissory note. A single judgment summons was issued against all the three defendants. The summons was served on one only of the defendants, and a committal order was made against him; but the issue of the warrant was suspended on payment of certain monthly instalments. The plaintiff then applied for leave to issue a judgment summons against one of the other two defendants, which was refused on the ground of want of jurisdiction to grant the leave.**

## Judgment Summons—Continued.

HELD—that there was no such want of jurisdiction; that the plaintiff was entitled to have his application for leave to issue the judgment summons considered on the merits; and that upon the hearing of the application the County Court Judge could require such information to be supplied as he might think proper.

REX v. BIRMINGHAM COUNTY COURT JUDGE, [1902] 2 K. B. 283; 71 L. J. K. B. 881; 51 W. R. 75; 87 L. T. 296; 18 T. L. R. 698—Div. Ct.

72. *Against Partner—Affidavit*—“*State the Sources of Information and Grounds of Belief*”—*Materiality—County Court Rules, 1889, Ord. 25, r. 14b, Appendix H., Form 52c.*—The County Court Rules, Ord. 25, r. 14b, says that the person seeking to enforce a judgment against an alleged partner shall file an affidavit in the form in the Appendix H.—Form 52c—and according to that form he is to “state the sources of information and grounds of belief” that the person against whom the summons is sought was a partner in the firm.

HELD—that such statement is a material essential part of the form, the object being that the person alleged to be a partner shall be given notice of the case that he has to meet and have an opportunity of producing witnesses to rebut it; and that the omission of such statement renders the issue of a judgment summons an irregularity.

LUMLEY v. OSBORNE, [1901] 1 K. B. 532; 70 [L. J. K. B. 416; 49 W. R. 374; 84 L. T. 461—Div. Ct.

73. *Committal Order—Minute in Book “H”—“Month”—Lunar or Calendar—Formal Order.*—Upon a judgment summons in a County Court the Registrar made in Book “H” a note, “10s. in twenty-eight days or fourteen days, then 10s. a month, present ability.”

HELD—that the note meant “a lunar month,” and that the formal order was properly drawn up accordingly.

SAUNDERS v. SWANSEA FINANCE CO., LD., AND [ANOTHER], (1905) 21 T. L. R. 317—C. A.

74. *Condition Precedent—Defective Affidavit in Support—Waiver—Jurisdiction—Prohibition—County Court Rules, 1889, Ord. 25, rr. 13, 14A, Form 52A.*—The plaintiff in a County Court action applied for leave to issue and obtained a judgment summons. The affidavit in support filed by the plaintiff omitted several particulars set out in the Form 52A of the County Court Rules, 1889. The Divisional Court refused a writ of prohibition on the ground that the defect in the jurisdiction of the County Court Judge had been waived.

HELD—that the statutory condition precedent to the jurisdiction was wanting, and

the defect appeared on the face of the proceedings; and that there could be no waiver on the part of the judgment debtor, as the parties could not by agreement confer upon the Court or Judge a coercive jurisdiction which the Court or Judge did not by law possess.

Decision of Div. Ct. ((1901) 17 T. L. R. 626) reversed.

ALDERSON v. PALLISER, [1901] 2 K. B. 833; 70 [L. J. K. B. 935; 49 W. R. 706; 85 L. T. 210; 17 T. L. R. 742—C. A.

75. *Defendant outside District—Application for Leave to Issue—Means to Pay—Form of Affidavit—Essentials—Prohibition—County Court Rules, 1889, Ord. 25, rr. 13, 14A, Appendix H., Form 52A.*—Where a judgment debtor does not dwell or carry on business, and is not employed, within the district of the County Court in which the judgment was obtained, the affidavit, on the application under Ord. 25, r. 14A of the County Court Rules, 1889, for leave to issue a judgment summons against the debtor, must contain all the material averments set out in Appendix H., Form 52A.

Where the affidavit stated that the defendant lived in a house of the apparent value of £60 a year and that his business was that of a builder, but did not contain any other of the particulars mentioned in the form in the schedule,

HELD—that the plaintiff had not made such an affidavit as was essential to give the County Court Judge jurisdiction to give leave to issue the judgment summons.

Judgment of Divisional Court ((1900) 17 T. L. R. 11) reversed.

McINTOSH v. SIMPKINS, [1901] 1 Q. B. 487; 70 [L. J. Q. B. 268; 49 W. R. 241; 84 L. T. 21; 17 T. L. R. 195—C. A.

## VIII. APPEALS.

And see ADMIRALTY, 25, 26.

76 *Injunction—Action of Tort with Claim for Injunction—Sum Claimed less than £20—Injunction Granted—Right to Appeal in Respect of Injunction—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120.*—Where in an action of trespass brought in a County Court the plaintiff claims a sum not exceeding £20 and an injunction, and judgment is given against the defendant for damages and an injunction is granted, the defendant may, without the leave of the judge, appeal against that part of the judgment which relates to the injunction, though by reason of the proviso in sect. 120 of the County Courts Act, 1888, he cannot appeal as to the damages.

BRUNE v. JAMES [1898], 1 Q. B. 417; 67 L. J. [Q. B. 283; 77 L. T. 802; 46 W. R. 257—Div. Ct.

77. *Ejectment—Title to Land in Question—Annual Value not exceeding £20—Leave*

**Appeals—Continued.**

*of Judge—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120*—An appeal lies without leave from the decision of a County Court Judge in an action of ejectment on title, or in which the title to a hereditament comes in question, as distinguished from an action for the recovery of small tenements by landlord against tenant, though the annual value of the hereditament does not exceed £20.

MILLETT *v.* BALLARD, [1904] 2 K. B. 593; 73 [L. J. K. B. 989; 52 W. R. 675; 91 L. T. 23; 20 T. L. R. 693—Div. Ct.

78. *Leave of Judge Necessary—Death of Judge—Right of Appeal—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 120, 124, 186.*—Where leave to appeal is necessary and the County Court Judge dies before an application for leave is made, but before the time for applying expires,

**HELD**—that there is no jurisdiction to hear the appeal.

FELL *v.* LANCASHIRE AND YORKSHIRE RY. CO., [(1907) 96 L. T. 785—Div. Ct.

79. *Misdirection—Point not Raised at Trial.*—Where a person wishes to appeal from the decision of a County Court judge on the ground that he did not properly direct the jury, objection must be taken at the time of such summing up and the point of law then raised.

CLIFFORD *v.* THAMES IRONWORKS CO., [1898] 1 [Q. B. 314; 67 L. J. Q. B. 244; 78 L. T. 164; 46 W. R. 222—Div. Ct.

80. *Misdirection—New Trial—Appeal to High Court—Time for Taking Point of Law.*—If parties desire to come straight to the Divisional Court by way of appeal from the judgment of the County Court, they must take the point of law at the trial. If they desire to apply to the County Court Judge for a new trial on the ground of misdirection they are entitled to do so, even though they have not interposed in the course of the summing-up; and upon his refusal to grant a new trial they are entitled to appeal to the Divisional Court. The latter is the better course to adopt.

HANDLEY *v.* LONDON, EDINBURGH, AND GLASGOW [ASSURANCE CO., [1902] 1 K. B. 350; 71 L. J. K. B. 39—Div. Ct.

81. *Question of Law raised at Trial—Request of Judge's Note—Conditions Precedent to Appeal—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120—Rules of Supreme Court, 1883, Ord. 59, r. 8*—In order that the Divisional Court shall have jurisdiction to hear an appeal from a County Court, it is necessary and a condition precedent that the question of law should be raised at the trial before the County Court Judge, and he should be requested to make a note of it. Though it is imperative on the County Court Judge

to make a note of the question of law raised at the request of either party, it is not imperative on either party to request that a note be made, so as to make his right of appeal depend on his having raised the point in a particular way.

As a general rule, the Court before whom the appeal comes cannot have proof that the point of law was properly raised unless a request to make a note has been made, but the existence of the notes is not a condition precedent to the hearing of the appeal. The question must depend on the conduct of the parties and the circumstances of the particular case.

WOHLGEMUTH *v.* COSTE, [1899] 1 Q. B. 501; 68 [L. J. Q. B. 373; 80 L. T. 529—Div. Ct.

82. *Security for Costs of Appeal—Appellant getting rid of his Property for the Purpose of Avoiding Payment of Costs.*—On an appeal from the County Court that the judgment for the respondent might be set aside, the appellant was ordered to give security for the costs of the appeal on the ground that the appellant had got rid of his property for the purpose of avoiding payment of the respondent's costs.

MOORE *v.* PINNICK, (1901) 70 L. J. K. B. 471— [Div. Ct.

**COUNSEL.**

See BARRISTERS.

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IV. IN GENERAL . . . . .

For Court for Crown Cases Reserved—see CRIMINAL LAW, 67—70.

For Consular Courts—see CRIMINAL LAW, 82.

**I. HOUSE OF LORDS.**

1. *Appeal as to Costs—Appeal not Heard.*—The respondent had sued the appellants in respect of injury done to some cattle, but failed, because the contract was an "owner's risk" contract, and he could not prove wilful misconduct. The Court of Session, however, affirming the decision of the sheriff, had allowed the respondent his costs on the ground of the appellants' refusal to give him proper information as to the accident before trial. Against this decision the appellants appealed.

**House of Lords—Continued.**

**HELD**—that the appeal, being one as to costs only, could not be entertained.

CALEDONIAN RY. CO. v. BARRIE, [1903] A. C. 126  
[—H. L. (Sc.).]

**2. Concurrent Judgment of Fact in Courts below—Differing from.**—There is no rule of law or of practice binding the House of Lords to uphold two concurrent judgments on a question of fact. The House ought to form and express its own opinion thereon.

McIntyre Bros. v. McGavin ([1893] A. C. 268; 67 J. P. 548), observations of Lord Herschell explained.

MONTGOMERIE & CO., LD. v. WALLACE-JAMES, [1904] A. C. 73; 73 L. J. P. C. 25; 90 L. T. 1  
[—H. L. (Sc.).]

**3. Decision of House of Lords—Final Character of.**—A decision of the House of Lords upon a question of law is conclusive, and binding upon the House, so that the question cannot be re-argued in any subsequent case, but the decision can only be set aside by an Act of Parliament.

Edinburgh Street Tramways Co. v. Lord Provost of Edinburgh ((1894) A. C. 456) followed.

LONDON TRAMWAYS CO., LD. v. LONDON COUNTY COUNCIL, [1898] A. C. 375, 62 J. P. 675; 67 L. J. Q. B. 559; 78 L. T. 361; 14 T. L. R. 360; 46 W. R. 609—H. L. (E.).

**4. Decision Reversed—Points not Argued—Form of Order.**—In an action for encroachment the respondents had obtained in the Court below interlocutors in their favour upon several points. Upon appeal the appellants argued only one point and succeeded thereon.

**HELD**—that the order should reverse only the one interlocutor argued before the House.

MONTGOMERIE & CO., v. WALLACE-JAMES, [1904] A. C. 214; 73 L. J. P. C. 116—  
H. L. (App. Com.).

**5. Discharge of Judgment by Consent.**—Where, after an appeal has been lodged, the respondent petitions that the judgment of the Court below in his favour may be discharged, and the action remitted for trial upon its merits, the consent of both parties to the adoption of this course must be brought before the House itself.

HANNAH v. HUNTER, [1904] A. C. 379; 73 L. J. P. C. 73—H. L. (E.).

**6. Lords Equally Divided in Opinion—Costs.**—Where the Lords present at the hearing of an appeal are equally divided in opinion, and the judgment appealed from therefore stands, the practice is to make no order as to costs.

PAQUIN, LD. v. BEAUCLEER (formerly HOLDEN), [1906] A. C. 148; 22 T. L. R. 395—H. L. (E.).

**7. Small Errors in Accounts—No Ground for Interference.**—The House of Lords will not interfere to correct small errors on both sides of an account.

THE MARPESSA, [1907] A. C. 241; 76 L. J. P. [128, 97 L. T. 1, 23 T. L. R. 572—H. L. (E.).]

**II. PRIVY COUNCIL.**

**8. Appeal—Concurrent Findings of Fact in Courts below—Obligation on Appellant.**—Where there are concurrent findings of fact in the Courts below, it is incumbent on an appellant to the Judicial Committee to adduce very clear proof that there is error in the judgment appealed from. It is not sufficient to allege that the judges in the Courts below have approached the question from a wrong point of view, and have failed to give just weight to various minute circumstances.

Judgment of the Court below affirmed.

Allen v. Quebec Warehouse Company ((1887) 12 App. Cas 101; 56 L. J. P. C. 6; 56 L. T. 30—P. C.) approved and allowed.

WHITNEY v. JOYCE AND ANOTHER, (1906) 75 [L. J. P. C. 89; 95 L. T. 74—P. C.]

**9. Appeal—Costs—Suits between Crown and Subject.**—In future the rule will be that in suits with a subject the Crown neither pays nor receives costs unless the case is governed by some local statute or unless there are some exceptional circumstances justifying a departure from the ordinary rule.

JOHNSON v. REX, (1904) 91 L. T. 234; 53 W. R. 207—P. C.

**10. Appeal—Court-Martial—Proclamation of Martial Law in Natal—Retrospective Operation—Civil Courts Remaining Open—Special Leave to Appeal.**—The Privy Council refused special leave to appeal in the case of certain natives condemned to death by a court-martial, although martial law had not been proclaimed at the date of commission of the crime, and it was admitted that the sittings of the ordinary courts had not been suspended. No application had been made to the Colonial Courts to interfere in the matter; and the Council felt that it was, under the circumstances, impossible for them to interfere with the conduct of the Colonial Executive in the serious situation which had arisen.

MGOMINI AND OTHERS v. GOVERNOR AND ATTORNEY-GENERAL OF NATAL, (1906) 94 L. T. 558; 22 T. L. R. 413; 21 Cox, C. C. 154—P. C.

**11. Appeal—Court-Martial—Sentence—Sentence Confirmed by Colonial Statute—Application for Special Leave to Appeal.**—The Judicial Committee cannot entertain an appeal from a sentence passed by a court-martial in a district in a colony where martial law was proclaimed, when an Act of the



**Privy Council—Continued.**

colonial legislature has been passed making lawful the sentences passed by the courts-martial.

**TILONKO v. ATTORNEY-GENERAL OF NATAL**, [1907] A. C. 93; 76 L. J. P. C. 29; 95 L. T. 853; 23 T. L. R. 21—P. C.

At a later date, the Supreme Court of Natal having refused an application by the same petitioner for a writ of *habeas corpus*, the Judicial Committee declined to give leave to appeal therefrom, [1907] A. C. 461; 76 L. J. P. C. 105; 23 T. L. R. 668—P. C.

**12. Appeal—Leave to Appeal—Enlargement of Time—Excuse for Delay—Clergy Discipline Act**, 1892 (55 & 56 Vict. c. 32).—Where the time for appealing against a sentence passed under the Clergy Discipline Act, 1892, has elapsed, the time will not be extended unless the delay is satisfactorily explained.

*Semble*, poverty alone is not a sufficient excuse.

**LEE v. ATHERTON**, [1904] A. C. 805; 74 [L. J. P. C. 14—P. C.

**13 Appeal—Special Leave—Previous Appeal to Supreme Court of Canada.**—Where a petitioner has elected to appeal to the Supreme Court of Canada instead of to the Privy Council direct, special leave to appeal against the decision of the Supreme Court will not be granted unless a question of law is raised of sufficient importance to warrant it.

*Ex parte Clergue* ([1903] A. C. 52; 72 L. J. P. C. 99; 89 L. T. 373—P. C. *infra*) followed.

**EWING & Co. v. DOMINION BANK**, [1904] A. C. [806; 74 L. J. P. C. 21—P. C.

**14. Appeal—Special Leave—Canadian Appeals—Revised Statutes of Canada**, 1886, c. 135, s. 71.—Where a suitor, having the choice of appealing from the High Court of Canada either to the Supreme Court or to the Privy Council, elects to appeal to the former, he cannot appeal further to the Privy Council without special leave; and such leave will only be granted in a very strong case.

**CLERGUE AND ANOTHER v. MURRAY AND [ANOTHER, EX PARTE CLERGUE**, [1903] A. C. 521; 72 L. J. P. C. 99; 89 L. T. 373—P. C.

**15. Appeal—Special Leave—Previous Appeal to Supreme Court of Canada.**—Unless some question of law of real importance is involved, special leave will not be granted to an appellant who has elected to appeal to the Supreme Court of Canada instead of direct to His Majesty.

*Ex parte Clergue*, ([1903] A. C. 521; 72 L. J. P. C. 99; 89 L. T. 373—P. C. *supra*) followed.

**CANADIAN PACIFIC RY. Co. v. BLAIN**, [1904] A. C. 453; 73 L. J. P. C. 109—P. C.

**16. Appeal—Leave to Appeal from High Court of Australia—Principles on which Leave Granted.**—The principles upon which special leave will be given to appeal from a decision of the High Court of Australia are the same as those applicable to appeals from the Supreme Court of Canada as stated in the case of *La Cité de Montreal v. Les Ecclesiastiques, &c.* ((1889) 14 App. Cas. 662; 59 L. J. P. C. 20—P. C.).

The application will not be granted save where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or is otherwise of public importance or of a very substantial character.

**DAILY TELEGRAPH NEWSPAPER Co., LD. v. [McLAUGHLIN]**, [1904] A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233, 20 T. L. R. 674—P. C.

**17. Appeal—Special Leave—Appeal from High Court of Australia—Leave to Appeal—Grounds upon which Leave will be Given.**—Where a party elects to appeal to the High Court of Australia instead of appealing direct to His Majesty in Council, and the judgment appealed from is affirmed, the Privy Council will not as a rule entertain a petition by him for special leave to appeal to His Majesty in Council. A very special case must be made out to induce the Privy Council to give leave to appeal in such a case. The rule is different where the party asking for special leave to appeal is not the appellant to the High Court of Australia.

The rule laid down as to Canada in *Clergue v. Murray* ([1903] A. C. 521; 72 L. J. P. C. 99; 89 L. T. 373—P. C., No. 14, *supra*), followed.

**THE VICTORIAN RAILWAYS COMMISSIONERS v. [BROWN]**, [1906] A. C. 381; 75 L. J. P. C. 65; 95 L. T. 73; 22 T. L. R. 644—P. C.

**18 Appeal—Special Leave—Abstract Point of Law.**—Special leave will not be granted to appeal from a decision not itself impeached in order to obtain a ruling upon some abstract point of law.

**R. v. LOUW, EX PARTE ATTORNEY-GENERAL FOR [CAPE OF GOOD HOPE]**, [1904] A. C. 412; 73 L. J. P. C. 65; 91 L. T. 210; 20 T. L. R. 572—P. C.

**19. Appeal—Special Leave—Appeal from Repeated Orders.**—In April, 1898, there was final judgment against the appellant; motions to set it aside were dismissed in June, 1899, and in August, 1904, and a stay of execution was refused in March, 1905.

**HELD**—(1) that, as the order of March, 1905, was merely a repetition of that of August, 1904 (from which an appeal was barred), an appeal against it should be dismissed.

(2) That special leave ought not to be given to appeal against the orders of 1899 and 1904 on the ground of delay, and of the

**Privy Council—Continued.**

impossibility of the appellant obtaining any relief whilst the undisputed judgment of 1898 stood.

GRIEVE v. TASKER, [1906] A. C. 132; 75 [L. J. P. C. 12; 94 L. T. 115—P. C.]

20. *Appeal—Special Leave—Appeal raising no Question of Law*—Where a case raises no question of law, and does not involve any question of public importance, special leave to appeal will not be given merely upon the ground that the case is of a substantial character and of great importance to the parties.

WILDEY ORE CONCENTRATOR SYNDICATE v. GUTH-  
[RIDGE, [1906] A. C. 548; 75 L. J. P. C. 87;  
95 L. T. 73; 23 R. P. C. 535—P. C.]

21. *Appeal—Special Leave—Important Question of Law, but No Sufficient Doubt*.—Special leave to appeal from the Supreme Court of Canada will not be granted where the decision appears to be plainly right, or not attended by reasonably sufficient doubt.

TOWNSEND v. COX, [1907] A. C. 514—P. C.

22. *Appeal—Special Leave—Criminal Conviction and Sentence—Isle of Man*.—The judicial committee refused special leave to appeal from a conviction and sentence in the Isle of Man where no fact was established sufficient to countervail the solemn determination of the judges and the jury, and where there appeared to be evidence for the jury.

EX PARTE ALDRED, [1902] A. C. 81; 71 [L. J. P. C. 27; 86 L. T. 163; 20 Cox, C. C. 49—P. C.]

23. *Appeal—Special Leave—Martial Law—Military Authorities not justiciable by ordinary Tribunals*.—When actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals. The fact that for some purposes some tribunals have been permitted to pursue their ordinary course is not conclusive that war is not raging.

ELPHINSTONE v. BEDREECHUND ((1830) Knapp—P. C. 316) followed.

The petitioner asked for special leave to appeal. It appeared from the petitioner's own petition, as well as the documents accompanying it, that the district in which he was arrested by the military authorities, and the district to which he was removed (and of which removal he also complained), was a district which had been proclaimed under martial law, and where actual war was raging.

Held—that as the fact of actual war was established the Civil Courts had no jurisdiction to call in question the propriety of the action of military authorities; and that special leave must be refused.

EX PARTE D. F. MARAIS, [1902] A. C. 109; 71 [L. J. P. C. 42; 50 W. R. 273; 85 L. T. 734; 18 T. L. R. 185—P. C.]

24. *Appeal—Special leave—Omission to state in Petition that Statute in Question has been Repealed—Costs*.—Special leave to appeal against a decision of the Supreme Court of Canada was granted upon a petition which omitted to state that the statute involved had been repealed. The appellant succeeded on the appeal.

Held—that, the omission being unintentional, he ought not under the circumstances to be deprived of his costs.

MCDONALD v. BELCHER AND OTHERS, [1904] A. C. [429, 73 L. J. P. C. 91—P. C.]

25. *Appeal—New Trial—Necessity for Motion—No Motion—Power of Court on Hearing of Appeal—Consolidated Laws of British Honduras, Part VI., c. 13, s. 213*.—The statute which requires a new trial to be applied for on motion within a specified period is imperative, and on an appeal from a judgment entered upon the findings of a jury, the Privy Council cannot relax the rule.

Therefore on such an appeal the only point open to the appellant is whether the findings justify the judgment.

G. D. EMERY & CO. v. WELLS, [1906] P. C. 515; [75 L. J. P. C. 104, 95 L. T. 589—P. C.]

26. *Pauper—Appeal in formâ pauperis—Certificate of Counsel*.—Where a litigant, who has not in the Court below sued as a pauper, applies for leave to appeal in formâ pauperis, it is not necessary for his application to be based upon the certificate of an independent counsel, who did not represent him in the Court below.

MITCHELL v. NEW ZEALAND LOAN AND MERCANTILE AGENCY CO. AND OTHERS, (1903) 89 L. T. 83; [1904] A. C. 149; 73 L. J. P. C. 17—P. C.]

27. *Pauper—Appeal in formâ pauperis—Special Leave*.—Special leave to appeal in formâ pauperis was granted where the Ceylon Civil Procedure Code made no provision for appeals in formâ pauperis and the case was, as regards the amount, value, and nature, fit for appeal.

PONAMA v. ARUMOGAM, EX PARTE PONOMA, [1902] [A. C. 561, 71 L. J. P. C. 121—P. C.]

28. *Pauper—Appeal in formâ pauperis—Special Leave*.—The plaintiff and proposed appellant sued the respondent as Chief Justice of St. Lucia, and was non-suited. The Court of Appeal for the Windward Islands dismissed the plaintiff's appeal, and granted leave to appeal to Her Majesty in Council, but refused leave to appeal in formâ pauperis on the ground of jurisdiction. On petition for special leave to appeal in formâ pauperis,

Held—that the order should be granted.

On a further petition against an order or decree in a separation suit, and against an order or decree in a mortgage suit, and against an order directing execution of the last-mentioned order or decree,

**Privy Council—Continued.**

**HELD**—that leave to appeal should be given, as the two suits were so mixed up together; but that their Lordships had no jurisdiction to stay the sale in execution.

QUINLAN *v.* CHILD, QUINLAN *v.* QUINLAN, [1900]  
[A. C. 496; 69 L. J. P. C. 85—P. C.]

29. *Pauper—Leave to Appeal in formâ pauperis—Idle and Frivolous Appeal—Real Question to be Argued—Success of Applicant Doubtful.*—Leave to appeal to the King in Council in *formâ pauperis* is not of course, and in the opinion of their Lordships it ought not to be granted where it is apparent that the proposed appeal is idle and frivolous. It would be wrong to put parties to the expense of opposing such an appeal in a case where they could not recover any costs if successful. In saying this, their Lordships do not intend to invite a premature discussion of the merits of the case on a petition to discharge an order to appeal in *formâ pauperis*, nor will they entertain an application of that character. Usually the statement of counsel showing there is a real question to be argued should be received, and it is enough if there be such a question, although the success of the proposed applicant may be doubtful.

QUINLAN *v.* QUINLAN, [1901] A. C. 612; 70  
[L. J. P. C. 122; 85 L. T. 360—P. C.]

30. *Pauper—Petition for Leave to Appeal in formâ pauperis—No Application for Leave to Appeal made to the Court below—Petition Dismissed.*—Where an inferior Court has power to grant leave to appeal on the usual conditions, a litigant, desirous of appealing from a decision of such Court to the Privy Council in *formâ pauperis*, must first apply to such Court for leave to appeal. If such application be not made, the Judicial Committee (except, perhaps, under very exceptional circumstances) will not entertain a petition for leave to prosecute an appeal in *formâ pauperis*.

WALKER *v.* WALKER, *EX PARTE* WALKER, [1903]  
[A. C. 170; 72 L. J. P. C. 36; 51 W. R. 658;  
88 L. T. 133—P. C.]

31. *Practice—Findings of Fact—Review of.*—Where there are concurrent judgments of the two Courts below on a question of fact, it is not the practice of the Privy Council to review concurrent finding of fact, though it may be done in exceptional circumstances.

ALLAN *v.* MORRISON, [1900] A. C. 604; 69  
[L. J. P. C. 141—P. C.]

### III. COURTS OF LOCAL JURISDICTION.

#### (a) Mayor's Court, London.

32. *Jurisdiction—Waiver—Prohibition.*—In an action in the Mayor's Court for a sum exceeding £50, the whole cause of action did not arise within the City of Lon-

don. The defendant obtained orders for particulars on his undertaking to plead to the issue. He also obtained an order for discovery of documents. The defendant having applied for a writ of prohibition,

**HELD**—that the defendant had waived the objection to the jurisdiction, and a writ of prohibition should not issue; and that the defendant should have made his application for prohibition before his undertaking to plead to the issue.

SUCKAN *v.* WEINER, (1901) 17 T. L. R. 494—  
[Div. Ct.]

33. *Practice—Appeal—Security for Costs—Plaintiff's Appeal—Stay of Proceedings—Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. 107), s. 8.*—On an appeal by an unsuccessful plaintiff in the Mayor's Court, the Judge of that Court has no power to order him to give security for the defendant's costs of the original trial—security in such a case being limited to the costs of the appeal.

The mere fact that an unsuccessful plaintiff gives security for the costs of an appeal does not operate as a stay of proceedings.

GREEN *v.* ISAACS, (1907) 96 L. T. 122—Div. Ct.

34. *Practice—Costs—Action for Libel—Less than £5 Recovered—Mayor's Court of London Act, 1857 (20 & 21 Vict. c. clvii.), s. 11—Mayor's Court Rules, 1890 and 1892.*—In an action for libel, tried in the Mayor's Court of London with a jury, the plaintiff recovered 50s. damages, and judgment was entered for that amount with costs. There is not in the Mayor's Court any scale of costs applicable to cases where less than £5 is recovered. The Registrar, on taxation, allowed the plaintiff ordinary costs beyond Court fees and allowances to witnesses.

**HELD**—that the plaintiff was not prevented from recovering costs by reason of the fact that there was no scale of costs applicable to the case.

HALL *v.* LAUNSPEACH, [1898] 1 Q. B. 513; 67  
[L. J. Q. B. 372; 78 L. T. 243; 14 T. L. R. 215.]

#### (b) Lancaster Palatine Court.

35. *Costs—Taxation—Higher and Lower Scale—Under the Amount or Value of £300—Orders of November 27th and 28th, 1884*—The order of the 28th of November, 1884, of the Chancery Court of the County Palatine of Lancaster, "as to Court fees and solicitors' costs," only introduces a modification of the lower scale of costs established by the order of the 27th of November, 1884, and has no application to any cases to which that lower scale did not apply.

IN RE MANCHESTER REAL ICE SKATING AND SUP-  
PLY CO., [1900] 1 Ch. 573; 69 L. J. Ch. 421;  
48 W. R. 490; 82 L. T. 513—C. A.]

### Courts of Local Jurisdiction—Continued

36. *Jurisdiction—Persons residing outside County—Service—Court of Chancery of Lancaster Act, 1854* (17 & 18 Vict. c. 82), s. 8.]—Under sect. 8 of the Court of Chancery of Lancaster Act, 1854, the Court of Appeal has jurisdiction to give leave to serve notices of orders and other proceedings in the winding-up of a company, which is being wound up by the Court of Chancery of the County Palatine of Lancaster, on persons residing in England outside the County of Lancaster.

RE STATE BANKING CORPORATION, LD., (1907)  
[51 Sol. Jo. 263—C. A.]

37. *Practice—Service of Order out of the Jurisdiction—Writ of Attachment—Court of Chancery of Lancaster Act, 1850* (13 & 14 Vict. c. 43), s. 15—*Court of Chancery of Lancaster Act, 1854* (17 & 18 Vict. c. 82), s. 7.]—In cases where it is impossible to enforce an order properly made by the Palatine Court by reason of the non-residence of the person to be bound thereby within the jurisdiction of the Court, the proper practice is to apply in the Chancery Division to have the order made an order of the High Court under the Court of Chancery of Lancaster Act, 1850, sect. 15, notwithstanding the provisions of sect. 7 of the Court of Chancery of Lancaster Act, 1854.

DUNMORE v. WHARAM, (1898) 67 L. J. Ch.  
[221; 78 L. T. 38, 46 W. R. 366—Byrne, J.]

#### (c) Liverpool Court of Passage.

38. *Appeal—Power to Give Leave to Appeal—Interlocutory Order—Liverpool Court of Passage Act, 1883* (56 & 57 Vict. c. 37), ss. 6, 9, 10.]—Where a Judge at chambers has power to give leave to appeal, the Judge of the Liverpool Court of Passage has also power to do so under sects. 6 and 10 of the Liverpool Court of Passage Act, 1883, and sect. 9 does not cut it down.

HUNTER v. JACOBSON, (1899) 80 L. T. 641—  
[C. A.]

39. *Interpleader Issue—New Trial—Liverpool Court of Passage Act, 1893* (56 & 57 Vict. c. 37), s. 10.]—An application lies to the Court of Appeal for a new trial of an interpleader issue tried in the Liverpool Court of Passage, as from any other "issue" under sect. 10 of the Liverpool Court of Passage Act, 1893.

COATES v. MOORE, [1903] 2 K. B. 140; 72  
[L. J. K. B. 539; 51 W. R. 648; 89 L. T. 8—  
C. A.]

40. *Removal of Action into High Court—Common Law Right—Discretion—5 & 6 Vict. c. 111, s. 2—Liverpool Court of Passage Act, 1893* (56 & 57 Vict. c. 37, s. 5).]—The common law right of a defendant to remove an action by *certiorari* from the Liverpool Court of Passage to the High Court where the debt or damages claimed do not exceed £50 has

not been taken away by sect 2 of 5 & 6 Vict. c. 111, or sect. 5 of the Liverpool Court of Passage Act, 1893, provided that the defendant with two sureties enters into the required recognizance. In view of the fact that the order made by the master was within one month of the delivery of the statement of claim the defendants were not out of time.

EDWARDS v. LIVERPOOL CORPORATION, (1902) 86  
[L. T. 627; 18 T. L. R. 529—Div. Ct.]

#### (d) Preston Court of Pleas.

41. *Appeal—Substitution for Proceedings in Error—Judicature Act, 1884* (47 & 48 Vict. c. 61), s. 23—*R. S. C. Ord. 59, rr. 8, 10-17.*]—In this action in the Court of Pleas for the borough of Preston the jury found a verdict for the defendants, and judgment was entered for them. The plaintiff gave notice of motion by way of appeal under Ord. 59, r. 10, in the King's Bench Division, asking that the verdict and judgment should be set aside and judgment entered for the plaintiff or a new trial had, upon the ground of misdirection.

The Court in question is an ancient Court of Record held in the borough under a charter. There is no modern Act of Parliament regulating its procedure and giving an appeal from it. It was admitted that, in the absence of a statute giving an appeal from the Court in question, no appeal would lie otherwise than by substitution for proceedings in error. The Officer at the Crown Office refused to enter the appeal.

HELD—that the officer at the Crown Office ought to be directed to enter the appeal; and that the appellant would have, as in a County Court appeal, to show at the hearing that he took the point of law sufficiently, and took it in time.

DARLOW v. SHUTTLEWORTH AND WIFE, [1902] 1  
[K. B. 721; 71 L. J. K. B. 460, 66 J. P. 516;  
50 W. R. 668; 86 L. T. 524; 18 T. L. R. 419—  
Div. Ct.]

#### (e) Salford Hundred Court.

See also COUNTY COURTS; PRACTICE  
AND PROCEDURE.

42. *Prohibition—"Cause of Action"—Plea to Jurisdiction—Salford Hundred Court of Record Act, 1868* (31 & 32 Vict. c. cxxx), ss. 6, 7.]—The expression "the cause of action" in sect. 6 of the Salford Hundred Court of Record Act, 1868, means the whole cause of action.

Whitehead v. Butt ((1891), 7 T. L. R. 609) approved.

By sect. 7 of the Act, "save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes."

### Courts of Local Jurisdiction—Continued.

**HELD**—that a defendant, against whom judgment had been signed in default of appearance in an action in the Salford Hundred Court, where the claim did not exceed £50, could not get a writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the Court, as sect. 7 conferred jurisdiction on the Court in such a case in the absence of a plea to the jurisdiction.

*Chadwick v. Ball* ((1885), 14 Q. B. D. 855; 54 L. J. Q. B. 396; 52 L. T. 949—C. A.) followed.

Decision of Divisional Court (69 L. J. Q. B. 229; 81 L. T. 786) reversed.

*PAYNE v. HOGG*, [1900] 2 Q. B. 43; 69 L.J.Q.B. [579; 47 W. R. 417; 82 L. T. 584; 16 T. L. R. 298—C.A.

**43. Party Ignorant of Absence of Jurisdiction.**—A clerk employed in the office of the Salford Hundred Court directed an interpleader issue to be tried before himself.

**HELD**—that, as one of the parties was ignorant of the fact that he had no jurisdiction, there was no such assent to his acting as could render the proceedings binding on that party.

*NATHAN AND ANOTHER v. BOTTOMLEY AND OTHERS*, [(1903) 19 T. L. R. 421—Div. Ct.

### IV. IN GENERAL.

**44. Principle Guiding Courts of Appeal—Declaration by Court of Appeal of Partial Validity of Will—Words and Clauses of Will omitted from Probate—No Cross-Appeal.**—A Court of Appeal ought only to decide in favour of an appellant on a ground then put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness-box.

Principle acted upon in "*The Tasmania*" ((1890) 15 App. Cas. 223 at p. 225; 63 L. T. 1; 6 Asp. M. C. 517—H. L. (E.)) adhered to.

Where words or clauses in a will have been omitted from the probate, the Court has always acted on evidence pointedly addressed to the words or clauses said to have been improperly inserted in the will, and it is most important that this practice should not be departed from.

The District Judge of Colombo revoked the probate granted to the appellant of the will of her deceased husband. On appeal by the respondents, the next of kin of the deceased, the judges of the Supreme Court made an order declaring that the testator died intestate as to his immovable property, and expunged from the will the references made therein to immovable and real properties.

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**HELD**—that on the evidence the Supreme Court ought to have dismissed the widow's appeal, and to have affirmed the decision of the District Judge setting aside the will; that if the respondents had not been content with the order as it stood, the order appealed from ought to have been discharged; but as it was, matters should be left as they were, and the appeal simply dismissed and no order made as to the costs of the appeal.

*KARUNARATNE v. FERDINANDUS*, [1902] A. C. 405; [71 L. J. P. C. 76; 86 L. T. 329—P. C.

## COURTS MARTIAL.

See COURTS; DEPENDENCIES AND COLONIES; ROYAL FORCES.

## COVERTURE.

See HUSBAND AND WIFE.

## COWSHEDS AND DAIRIES.

See PUBLIC HEALTH.

## CREMATION.

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## CRIMINAL LAW AND PROCEDURE.

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SLANDER, 51, 52; MAGISTRATES;  
PUBLIC HEALTH, 72.

## I. GENERALLY.

## (a) Capacity to Commit Crime.

1. *Infant doli incapax* — “*Malitia supplet ætatem*” — *Evidence — Statement made by Prisoner before Arrest in Answer to Questions—Guilty State of Child's Mind.*—A boy K., aged thirteen, was charged with the wilful murder of another boy, R., who was rather younger than the prisoner. K., his mother, a police-constable, and R.'s father were at the police-station together, and R.'s father said to K.: “Now, if you were in my place, who have looked high and low for my boy, where would you look for him?” (Bucknill, J., admitted the prisoner's answer.) K.'s answer was: “Look in the Slate-lodge; he went up there to swim his dog.” The Slate-lodge was the name by which a reservoir was known. R.'s father and K.'s mother then went up to the reservoir, and a cap was seen floating in the water. The grappling irons were sent for and K., having pointed to a place where they were to begin, said “it was there.” They began dragging operations, and R.'s body was recovered at the second attempt. The prisoner was arrested. For the defence, it was urged that, though there was plenty of evidence to show that K. had stolen the watch R. had on him at the time, yet there was no evidence to show that he had murdered R.

Bucknill, J., in summing up, pointed out that the commission of a crime was in itself no evidence whatever of the guilty state of mind which is essential before a child between the ages of seven and fourteen can be condemned.

The jury found the prisoner guilty of manslaughter. He was sentenced to ten years' penal servitude.

REG. v. KERSHAW, (1902) 18 T. L. R. 357—

[Liverpool Assizes.

## (b) Evidence.

And see title EVIDENCE.

2. *Child—Attempt to commit unnatural offence—Indecent Assault on Boy under 13—Evidence not on Oath—Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 15 (1)—Offence involving bodily injury.*—On a charge against a man under section 62 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), of attempting to commit an unnatural offence with a boy under 13, and with indecently assaulting him,

HELD—by Darling, J., that the evidence of the boy, who could not be sworn, as he did not understand the nature of an oath, was not admissible under the provisions of section 15 (1) of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), because the charge was not one in respect of “offences involving bodily injury,” or any other offence referred to in the schedule.

REG. v. BEER, (1898) 62 J. P. 120—Darling, J.

3. *Child—When Child can be Sworn—Understanding the Nature of an Oath—Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 15.*—For a child to understand the nature of an oath within the meaning of sect. 15 of the Prevention of Cruelty to Children Act, 1904, so that he can be sworn, on a prosecution for any of the offences mentioned in that section, he must understand that his duty in giving evidence on oath is something more than mere duty of telling the truth.

Semle—he need not understand that a prosecution for perjury may ensue upon the giving of false evidence on oath.

REG. v. DENT, (1907) 71 J. P. 511—Rentoul, [Comm.

4. *Admission obtained by questioning Prisoner—Caution to be given—Entrapping Prisoner by Questions.*—No one, either policeman or any one else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. A prisoner must be fairly dealt with. When a prisoner is once taken into custody, a policeman should ask no question at all without administering previously the usual caution. The judge has a discretion to exclude evidence of admissions so obtained.

REG. v. HISTED, (1899) 19 Cox, C. C. 16—  
[Hawkins, J.

5. *Answers by Soldier to Officer—Whether Admissible.*—A soldier, suspected of murder, was taken to the guard-room, and was there asked by an officer certain questions suggested by the police superintendent. After a few questions had been asked and answered, the superintendent stopped the officer and arrested the soldier.

HELD—that the answers might be given in evidence.

REG. v. BROWN AND OTHERS, (1904) 68 J. P. 15—  
[Wills, J.

Generally—Continued.

6. *Conduct of Party—Witness for Defence at Police Court Convicted of Perjury—Evidence that Such Previous Evidence False and Induced by Defendant.*—The conduct of a litigation of a party to it, if such as to lead to the reasonable inference that he disbelieves in his own case, *e.g.*, subornation by him of witnesses to commit perjury, may be proved and used as evidence against him.

So, when the defendant was indicted for endeavouring to persuade certain other persons to kill and murder another person, evidence of a witness who had given evidence at the police court for the defence, but who now swore that such evidence was false, and that he had been induced to give such evidence by defendant, was admitted.

REG. v. WATT, (1906) 70 J. P. 29; 20 Cox, C. C. 852—Phillimore, J.

7. *Confession—Admissibility of.*—The admissibility of statements made by prisoners must depend on the special facts of each case.

Where an official in the Post Office having authority over a prisoner had, after cautioning him, plied him with questions for some hours, the Court allowed only the earlier part of the prisoner's statement to be given in evidence.

REG. v. KNIGHT AND ANOTHER, (1905) 69 J. P. 108; 21 T. L. R. 130; 20 Cox C. C. 711—Channell, J.

8. *Confession—Inducement to Confess—Duty of Prosecuting Counsel and Solicitor—Bail.*—A confession made in consequence of an inducement held out by a person in authority is not admissible evidence. A statement made by an accused person after he has been told that it will be better for him to speak the truth, cannot be admitted as evidence against him.

*Seem*, it is the duty of prosecuting counsel and solicitors having the charge of prosecutions to satisfy themselves before putting in evidence a confession, that it was not made under such circumstances as to be inadmissible.

*Seem*, bail is not to be withheld unless it is otherwise impossible to ensure the prisoner's attendance at the trial.

REG. v. ROSE (1898) 18 Cox, C. C. 717; 67 [L. J. Q. B. 289; 78 L. T. 119, 14 T. L. R. 213—C. C. R.

9. *Depositions—Illness—Approaching Confinement—Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17.*—Proof by a police sergeant that a witness is apparently very close indeed to her confinement is not sufficient evidence of her inability to attend the Court so as to allow her depositions taken before the coroner to be read. Coroners' depositions stand on the same footing as depositions taken before magistrates and the provisions of the Indictable Offences Act, 1848.

REG. v. BUTCHER AND ANOTHER, (1901) 64 J. P. [808—Darling, J.

10. *Depositions—Illness—Recent Confinement—Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17.*—A recent confinement of a woman, which renders her unable to travel, is an illness within sect. 17 of the Indictable Offences Act, 1848, so as to empower the Judge at the trial to allow her deposition taken at the police court to be read.

REG. v. GOODFELLOW ((1880) 14 Cox, C. C. 326—Bowen, J.) followed.

REG. v. MARSELLA, (1901) 17 T. L. R. 164—[Bruce, J., Guildford Assizes.

11. *Depositions—Suicide of a Witness—Admissibility of Deposition taken Before Coroner.*—On December 5th, 1906, a coroner's jury returned a verdict of wilful murder against the prisoner. A witness called before the coroner committed suicide immediately after the inquest and before the preliminary inquiry before the magistrates, which took place on December 11th, 1906, when the accused was committed for trial on the charge of wilful murder.

The prisoner had been present at the coroner's inquest, and had been represented there by a solicitor, who had cross-examined the witness in question. The deposition of this witness as taken by the coroner contained statements made to the witness in the prisoner's absence.

*Held*—that on proof of the death of such witness and that such deposition had been duly signed by both the coroner and the witness, and that the prisoner was present and had full opportunity of cross-examining such witness by her solicitor, the deposition was admissible at the subsequent trial of the prisoner at the assizes, but that such portions as were obviously hearsay, or on other grounds inadmissible as legal evidence, should not be read to the jury.

REG. v. COWLE, (1907) 71 J. P. 152—

[Grantham, J.  
And see No. 18, *infra*.

12. *Depositions of Dying Person—Not stating place where taken—Opinion of Medical Practitioner—Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 6.*—The deposition of a dying person taken under sect. 6 of the Criminal Law Amendment Act, 1867, is not admissible in evidence unless it states the place where it was taken.

It is no objection to the admissibility of such a deposition that at the trial the doctor states that he did not at the time think that the deponent would not recover, although at that time he expressed a contrary opinion to the magistrate.

REG. v. CURTIS, (1905) 21 T. L. R. 87—

[Bigham, J.

13. *Depositions of Witness taken at Hospital—Magistrate not sitting in open Court—Admissibility—Indictable Offences Act, 25--2*

*Generally—Continued.*

1848 (11 & 12 Vict. c. 42), ss. 17, 19—*Criminal Law Amendment Act, 1867* (30 & 31 Vict. c. 35), s. 6—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 20, sub-s. 1.]—Upon a charge of murder the deposition of the person who was killed was taken before her death by a magistrate at the hospital where she was lying, under sect. 17 of the Indictable Offences Act, 1848, and all the requirements of that section were complied with. The deposition was not taken under sect. 6 of the Criminal Law Amendment Act, 1867.

*HELD*—that, as the magistrate in taking the deposition was not acting under the Summary Jurisdiction Acts, the deposition was admissible in evidence, though not taken in open Court.

*Reg. v. Simpson* ((1898), 62 J. P. 825—Wills, J.) not followed.

*REG. v. KATZ*, (1901) 64 J. P. 807; 16 T. L. R. [67—Darling, J., C. C. Ct.

14. *Depositions of Witness taken at Hospital—Signature of Witness not Imperative—Admissibility—Indictable Offences Act, 1848* (11 & 12 Vict. c. 42), ss. 17, 19—*Criminal Law Amendment Act, 1867* (30 & 31 Vict. c. 35), s. 6.]—A deposition of a woman who subsequently died was taken by a magistrate at a hospital. At the time the deposition was taken it was intended that it should be taken in accordance with the provisions of sect. 6 of the Criminal Law Amendment Act, 1867. The accused was present and had a full opportunity of cross-examining the witness. The deposition was read over to the witness and she assented to it as correct, but she did not sign it, as her hands had been seriously burnt and were covered with bandages. It would have been harmful to her to take the bandages off, and it was impossible for her to sign or make a mark with them on. The magistrate who took the deposition signed it, and he was one of the magistrates who ultimately committed the accused for trial.

*HELD*—that the deposition had been taken in accordance with the provisions of sect. 17 of the Indictable Offences Act, 1848, and was admissible, although it had not been signed by the witness.

*Reg. v. Simpson* ((1898) 62 J. P. 825—Wills, J.) not followed.

*REG. v. HOLLOWAY*, (1901) 65 J. P. 712—[Wills, J., C. C. Ct.

15. *Dying Declaration—Admissibility.*—Upon an indictment for the murder of a woman, A. B., it was shown that on the 29th of June, an inspector of police had seen her at the hospital. He asked her questions, and from the answers she gave he wrote down a statement. On the 7th of July, the woman appeared to be in a dying condition, and to be aware of it. She said she feared she must die and asked to see her mother and a clergyman. The doctor told her he had given up all hope, and that she might not

live to see her mother. A police magistrate came shortly afterwards and read over to her the statement she had made on the 29th of June, and he affixed a note stating it had been so read over to her and signed it.

*HELD*—that though this statement might be admissible, it had better not be admitted in evidence.

On the same day the woman had also made a statement to the magistrate, of which he took notes, but before this statement was completed she became exhausted. The magistrate then took the statement of the 29th of June, repeated portions of it to her in his own words, wrote down such portions, and asked her if it was correct. He then read the whole statement to her and she signed it.

*HELD*—this statement was admissible as a dying declaration.

*REG. v. WHITMARSH* (No. 1), (1898) 62 J. P. 680 [Darling, J.

16. *Dying Declaration—Answers only Taken Down in Writing—Inadmissibility.*—A dying declaration made in answer to questions put to the declarant, the answers only being taken down in writing, is not admissible in evidence.

*Reg. v. Mitchell* ((1892) 17 Cox, C. C. 503—Cave, J) followed.

*REG. v. SMITH*, (1901) 17 T. L. R. 522—[Bruce, J.

17. *Dying Declaration—Beyond all Hope of Recovery—Questions and Answers.*—A magistrate and a doctor visited a dying woman for the purpose of taking a statement from her. In reply to a question put to her by one of them, she said, "I am aware that I am seriously ill."

*HELD*—that the prosecution had not proved that in her own opinion the woman was beyond all hope of recovery, and that therefore the statement was not admissible.

The magistrate asked the woman questions, and the doctor took down her answers in writing.

*HELD*—that such a statement was not admissible as a dying declaration.

*REG. v. SMITH*, (1901) 65 J. P. 426—Bruce, J.

18. *Dying Declaration—Statement made by Victim in Great Pain.*—Upon an indictment for murder a statement made by a dying woman, admittedly in great agony, was admitted.

*Reg. v. Abbott* ((1903) 67 J. P. 151—Kennedy, J., *infra*) distinguished.

*REG. v. COWLE*, (1907) 71 J. P. 152—[Grantham, J.

*And see* No. 11, *supra*.

19. *Dying Declaration—Woman whilst in great pain says repeatedly, "I'm dying"—Statement then made not admitted—Agreement to Commit Suicide—Survivor Guilty*



## Generally—Continued.

of Murder.]—The prisoner and his wife agreed to commit suicide together by taking poison. After taking the poison the wife, when in great pain, said repeatedly to the nurse, "I'm dying." The nurse was of opinion that she really thought she was dying, and the doctor did not think there was any prospect of her recovery. The woman then made a statement to the nurse, which the prosecution proposed to put in as a dying declaration.

HELD—that the statement was not admissible, on the ground that it was referable more to agony than to any fixed idea of impending death. If two persons agree together to commit suicide, and in accordance with that agreement attempt to take their lives, but one of them survives, the survivor is guilty of murder.

REG. v. ABBOTT, (1903) 67 J. P. 151—

[Kennedy, J.]

20. *Hearsay — Misconception of — Prisoners Jointly Indicted—Case Stated on Behalf of One Prisoner only—Quashing Conviction of Others—Crown Cases Act, 1848* (11 & 12 Vict. c. 78), s. 2.]—The defendant was charged with conspiring with two other persons to obtain goods by false pretences from various tradesmen. During the trial a deputy chief constable was called and asked, with reference to a shop opened by one of the persons charged, who had pleaded guilty, "Did you make inquiries as to whether any trade had been done?" The answer was, "I did." He was then asked, "Did you, as a result of such inquiries, find that any trade had been done?" and he answered, "I did not."

HELD—that this evidence was inadmissible, and that the conviction must be quashed. The Court has power to quash a conviction against a prisoner even though no question as regards that prisoner has been raised in the case reserved, and the Court will exercise this power where it is quite clear that the law applicable to the question raised in the case is equally applicable to such prisoner.

REG. v. SAUNDERS, [1899] 1 Q. B. 490; 68

[L. J. Q. B. 296; 63 J. P. 150; 80 L. T. 28; 15 T. L. R. 186—C. C. R.]

21. *Letter Written by Prisoner in Custody—Not Warned that it might be used against him—Admissibility.*—The prisoner, being then in custody for having wounded G. some days previously, wrote a letter to G. There was no evidence that he was warned that any letter he wrote might be given in evidence against him.

G. having died, the prisoner was convicted for murder.

HELD—that the letter was admissible.

REG. v. HEAL, (1905) 69 J. P. 224—

[Grantham, J.]

22. *Prima facie Evidence of a Crime—Prisoner not giving Evidence—Inference legitimately drawn therefrom by Jury.*—Where transactions are proved against a defendant which are capable of an innocent explanation, and the defendant could have given it, and there is *prima facie* evidence that he is acting illegally, the jury may draw their own conclusions from the fact that the defendant does not give evidence on his own behalf.

REG. v. CORRIE AND ANOTHER, (1904) 68 J. P. [294; 20 T. L. R. 365—C. C. R.]

23. *Prisoner's—After Plea of Guilty—"Stage of the Proceedings"—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1.]—A prisoner is not entitled to give evidence on oath in mitigation of his sentence after he has pleaded guilty.

REG. v. HODGKINSON AND MANNING, (1901) 64 J. P. [808—Darling, J.]

24. *Prisoner's—Cross-examination of Accused—Previous Convictions—Prevention of Cruelty to Children Act, 1894* (57 & 58 Vict. c. 41)—*Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), ss. 1, 6.]—By sect. 1 (f) of the Criminal Evidence Act, 1898, it is provided that a person charged and called as a witness in pursuance of that Act shall not, with certain exceptions, be required to answer any question as to his previous conviction; and sect. 6 provides that "this Act shall apply to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act." . . .

The appellant was charged before a Court of Summary Jurisdiction with an offence under the Prevention of Cruelty to Children Act, 1894, sect. 12 of which Act provides that in any proceeding against any person for an offence under that Act such person shall be competent, but not compellable, to give evidence. He gave evidence on his own behalf, and in cross-examination was asked whether he had been previously convicted of an offence under the same Act. He answered in the affirmative. The justices convicted him.

HELD—that the evidence as to the appellant's previous conviction was not admissible, and therefore that the conviction was bad. Section 1 of the Criminal Evidence Act, 1898, applied.

CHARNOCK v. MERCHANT, [1900] 1 Q. B. 474; 69

[L. J. Q. B. 221; 64 J. P. 183; 48 W. R. 334; 82 L. T. 89; 16 T. L. R. 139—Div. Ct.]

25. *Prisoner's—Cross-examination of Prisoner—Nature and Conduct of Defence—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1 (f).]—The prisoners were charged with conspiring by false pretences to induce the prosecutor to sell a mare to one of them. One of the prisoners gave evidence on his own behalf, and was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April for £19, or has he

**Generally—Continued.**

invented all that?" He replied, "No, it is a lie, and he is a liar." No other attack was made on the prosecutor or his witnesses.

**HELD**—that this was not a sufficient attack on the prosecutor to render the prisoner liable to be cross-examined as to character.

**REG. v. ROUSE AND ANOTHER**, [1904] 1 K. B. 184; [73 L. J. K. B. 60; 68 J. P. 14; 52 W. R. 236; 89 L. T. 677; 20 T. L. R. 68; 20 Cox, C. C. 592—C. C. R.]

**26. Prisoner's—Cross-examination of Prisoner—Nature or Conduct of Defence such as to involve Imputations on the Character of the Prosecutor or the Witnesses for the Prosecution—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f).]**—Upon a charge of receiving property knowing it to have been stolen the prisoner gave evidence upon his own behalf to the effect that, in receiving the property he had been acting under the instructions of a sergeant of police, a witness for the prosecution. In cross-examination the prisoner was asked, and admitted that he had been previously convicted.

**HELD**—that the circumstances were not such as to justify the putting of the question as to the previous conviction.

**REG. v. BRIDGWATER**, [1905] 1 K. B. 131; 74 [L. J. K. B. 35, 69 J. P. 26; 53 W. R. 415; 91 L. T. 838, 21 T. L. R. 69; 20 Cox, C. C. 737—C. C. R.]

**27. Prisoner's—Evidence of Defence Before Grand Jury—Judge's Comments on Accused's Failure to give Evidence—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1.]**—Under sect. 1 of the Criminal Evidence Act, 1898, a prisoner cannot give evidence for the defence before a grand jury. A grand jury has nothing to do with the defence.

The presiding judge has a right under the Criminal Evidence Act, 1898, to comment on the failure of the accused to give evidence on his own behalf. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case. It is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the accused to give evidence, or as to what those comments should be.

**REG. v. RHODES**, [1899] 1 Q. B. 77; 68 [L. J. Q. B. 83; 62 J. P. 774; 47 W. R. 121; 79 L. T. 360; 15 T. L. R. 37; 19 Cox, C. C. 182—C. C. R.]

**28. Prisoner's Evidence of Defence Before Grand Jury—Judge's Duty to Inform Prisoner of his Right to Address Jury—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1—The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 2.]**—A person charged with an offence has no right to give evidence on his own behalf before the grand jury.

**Reg. v. Rhodes** ([1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 62 J. P. 774; 47 W. R. 121; 79 L. T. 360; 15 T. L. R. 37; 19 Cox, C. C. 182) followed.

The Judge ought to inform an undefended prisoner of his right, on his trial, to address the jury on his own behalf, but the omission of the Judge to do so does not invalidate the conviction.

**REG. v. SAUNDERS**, (1899) 63 J. P. 24, 15 T.L.R. [104—C. C. R.]

**29. Prisoner's—Imputations on Character of Witness for the Prosecution—Questioning Prisoner as to Previous Convictions—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f) (ii).]**—Where a prisoner makes a statement on oath in her own defence, to the effect that one of the witnesses for the prosecution committed the offence for which she is indicted, the nature of the defence is such as to involve imputations on the character of that witness within the meaning of sect. 1 of the Criminal Evidence Act, 1898, even though such statement relates only to facts material to the actual charge for which the prisoner is then being tried, and not to any antecedent facts, and is not made for the purpose of casting imputations, but only as a necessary part of the defence.

**REG. v. MARSHALL**, (1899) 63 J. P. 36—[Darling, J.]

**30. Prisoner's—Prisoners Jointly Indicted—Evidence of one Prisoner Inculcating Another Prisoner—Right of Counsel for the Other Prisoner to Cross-examine—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f), (iii).]**—Where the prisoners are jointly indicted and are separately defended, and one prisoner elects to be sworn and to give evidence on his own behalf, and in the course of his evidence he gives evidence inculcating the other prisoner, counsel for the latter can cross-examine him.

**REG. v. HADWEN**, [1902] 1 K. B. 882; 71 [L. J. K. B. 581; 66 J. P. 456, 50 W. R. 589; 86 L. T. 601; 18 T. L. R. 555; 20 Cox, C. C. 206—C. C. R.]

**31. Prisoner's—Prisoner Sole Witness for the Defence—Right of Prosecution to Sum Up—Comments on Prisoner's Evidence—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), ss. 1, 2, 3—Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 2.]**—Where, upon the trial of a person charged with a criminal offence, that person is the only witness for the defence, the right given by sect. 2 of the Criminal Procedure Act, 1865, to the counsel for the prosecution to sum up the evidence is not taken away by the Criminal Evidence Act, 1898, but is postponed until after the person charged has given his evidence, and in such summing up counsel is entitled to comment upon the evidence given by the person charged as well as upon that given for the prosecution.

Generally—*Continued.*

REG. v. GARDNER, [1899] 1 Q. B. 150; 68 L. J. [Q. B. 42; 62 J. P. 743, 47 W. R. 77, 79 L. T. 358; 15 T. L. R. 26; 19 Cox, C. C. 177—C. C. R.]

**32. Prisoner's Evidence Before Committing Justices—Admissibility at Trial.]—**If a prisoner when before the committing justices elects after the usual caution to give evidence, the prosecution may at the trial put in such evidence before closing their case.

REX v. BOYLE, (1904) 20 T. L. R. 192—Jelf, J.

**33. Refreshing Memory—Solicitor's Dictation to Shorthand Writer—Production and Proof of Attorney-General's Fiat—Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), s. 1.]—**Evidence by a solicitor, who was allowed to look at his own account of his interviews with the prisoners, dictated by him to a shorthand writer, and by him written in longhand shortly after the interview took place, is admissible.

The determining point in all such cases is whether or not the writing looked at by the witness can be relied on to accurately refresh his memory as to the facts thereby recorded, even when the memory of the witness is previously a blank on the subject.

When original notes cannot be found, the witness may look at a copy of them if he can swear positively from his own recollection, after looking at the copy, that it is correct. In all such cases it is the peculiar circumstances of each case that must be looked to to guide the Court in determining the question.

Judgment refused to be arrested on the ground that the *fiat* of the Attorney-General, under the Vexatious Indictments Act, 1859, had not been produced and proved.

REG. v. DEXTER, LAIDLER AND COATES, (1900) 19 [Cox, C. C. 360—Grantham, J.]

**34. Statement made by Accused in Answer to Question by Constable—Admissibility of Question and Answer—Voluntary Statement.]—**A statement made by an accused person in answer to a question put by a constable is admissible in evidence against the accused as a voluntary statement, provided that such statement has not been brought about by any inducement or threat.

The defendant was charged with cruelty to his horse by causing the same to be worked while in an unfit state, and in support of the charge the inspector proposed to give evidence of a question put by him to the defendant asking him if it were true that his carman told the police that he (the defendant) had sent the horse out knowing it was lame, and the defendant's answer thereto. The justices having refused to admit the evidence on the ground that the statement, being in answer to a question put by the inspector, was not a voluntary statement and was inadmissible,

Held—that the defendant's statement in answer to the question, not having been brought about by any inducement of advantage or by any threat, was a voluntary statement and ought to have been admitted.

ROGERS v. HAWKEN, (1898) 62 J. P. 279; 67 [L. J. Q. B. 526; 78 L. T. 655; 19 Cox, C. C., 122—Div. Ct.]

**36. Statement by Prisoner—Deposition—Evidence of Defendant—11 & 12 Vict. c. 42, s. 18—48 & 49 Vict. c. 69, s. 20.]—**The statement which a prisoner makes in giving evidence before the magistrates by whom he is committed for trial, may be used as evidence against him at the trial, and the deposition containing such statement may be put in evidence at the trial, although he then declines to give evidence.

If also, having given evidence when before the magistrates, he replies to questions put to him under the Indictable Offences Act (11 & 12 Vict. c. 42, s. 18), whether he desires to say anything in answer to the charge, by saying that his evidence already given is true, the whole of that evidence and his reply to the question may be given in evidence against him as a statement under that Act.

REG. v. BIRD, (1898) 79 L. T. 359; 47 W. R. 112; [62 J. P. 760; 19 Cox, C. C. 180—C. C. R.]

**37. Statement by One Prisoner Read Over to Another Prisoner—Admissibility.]—**The prisoner was indicted for stealing and receiving certain lace. Evidence was given that the prisoner and one C., a friend of his, were charged together with stealing and receiving the lace the subject of this indictment, and also other property the subject of other indictments. In reply to the charge C. said, "Yes, it's quite right; I sold them for Horace" (the prisoner). The prisoner said nothing. The police then read over to the prisoner a statement previously made by C. The prisoner again made no reply, though he had an opportunity of denying the allegations contained in the statement or of making any explanation.

Held—that under the circumstances this statement by C. might be proved, not as evidence of the facts, but to show the prisoner's conduct and demeanour on hearing it.

REX v. BROMHEAD, (1907) 71 J. P. 103—C. C. R.  
And see No. 188, *infra*.

(c) Indictment, Generally.

See also II. SPECIFIC OFFENCES and title HIGHWAYS, 57--59.

**38. Accessories—Accessories After the Fact—Prisoners Charged Together in One Indictment both as Principals and Accessories—Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 3.]—**A. and B. were jointly indicted for murder, and in different counts

**Generally—Continued.**

of the same indictment each of them was charged with being an accessory after the fact to the murder charged against the other.

**HELD**—that, on the Authority of *R. v. Blackson* ((1838) 8 C. & P. 43), and also by reason of the statute of 1861, they were properly so indicted, and the prosecution need not elect upon which counts to proceed.

*Reg. v. Brannon* ((1882) 14 Cox, C. C.) not followed.

*REX v. TUFFIN AND STONE*, (1903) 19 T. L. R. [640—Darling, J.

**39. Adding Counts—No Committal, but Evidence on Depositions—Vexatious Indictments Act, 1851 (22 & 23 Vict. c. 17).—**The indictment charged the defendants with committing certain offences for which they had been committed for trial, and also charged them with committing a further offence for which they had not been committed for trial, although the depositions contained evidence of such further offence.

The Court refused to allow the prosecution to give evidence of such further offence, being of opinion that the defendants would be improperly embarrassed if such charge were gone into then.

*REG. v. HARRIS*, (1900) 64 J. P. 360—[Grantham, J., C. C. C.

**40. Amendment—Power to Amend—Variation Between Indictment and Evidence—Names of One for Those of Another Person—Criminal Law Amendment Act, 1851 (14 & 15 Vict. c. 100).—**J. B. was indicted for obtaining 5s. from one D. by the false pretence that she had made funeral arrangements with a certain undertaker, and had paid him 5s. by way of deposit for the burial of G. S., a nurse child, who had died under her care. The evidence was that the false pretence was made as to the funeral arrangements for another such nurse child, W. D. It appeared that the defendant had also made certain false statements to one A. S. as to the funeral of G. S.

Counsel for the defence urged that there was no evidence to go to the jury on this count, and that there was no power to amend the count by substituting the name of W. D. for that of G. S., under sect. 1 of the Criminal Law Amendment Act, 1851, as such an amendment was not within the purview of the section, and also as the defendant might be prejudiced thereby.

**HELD**—that there was power to make the amendment.

*REX v. BYERS*, (1907) 71 J. P. 205—Kennedy, J.

**41. Amendment—When Should be Made.]—**The power to amend an indictment given to the Court by 14 & 15 Vict. c. 100, s. 1, is a power to amend an indictment in the case

of a material variance, and ought to be exercised to cure any technical flaw. The fact that the prisoner may be convicted if (and only if) the indictment be amended is no ground for refusing to amend it.

*REX v. MURRAY*, [1906] 2 K. B. 385; 75 [L. J. K. B. 593; 70 J. P. 295; 95 L. T. 295; 22 T. L. R. 596—C. C. R.

**42. Date—Certainty—Corrupt and Illegal Practices at Elections.]—**An indictment, charging that Y. "on November 2nd, 1903," at Dover unlawfully and corruptly did give money to a voter on account of such voter having voted "at a municipal election for the C. ward of the borough of D.," is good, although the date of the election is not specified.

*REX v. YEOMAN*, (1904) 20 T. L. R. 266—[Lord Alverstone, C.J.

**43. Dates Expressed in Figures—"Formal Defect"—Amendment—Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), ss. 1, 25.]—**The dates in an indictment were expressed in figures and not in words.

**HELD**—that this was a "formal defect" within the meaning of sect. 25 of the Criminal Procedure Act, 1851, which could be amended.

*REG. v. PRICE*, (1900) 17 T. L. R. 80—[Lawrance, J.

**44. Defendant Committed for Trial for Offences within the Vexatious Indictments Act—Other Offences mentioned but not Fully Proved—No Committal for Trial in respect thereof—Counts alleging these Latter Offences added to Indictment—Vexatious Indictments Act (22 & 23 Vict. c. 17)—30 & 31 Vict. c. 35, s. 1.]—**If a magistrate commits an accused person for trial for offences within the Vexatious Indictment Act, but refuses to commit him for trial on other such offences, the prosecution cannot add counts alleging these latter offences to the indictment. The prosecutor ought in such circumstances to be bound over to prosecute the offences on which the magistrate has refused to commit the accused for trial.

The defendant was arrested upon a warrant charging him with committing an offence within sect. 31 of the Bankruptcy Act, 1883. The solicitor for the prosecution told the magistrate that the accused would be charged with committing other offences within this section, and also with obtaining money by false pretences. Evidence of the offences within the Bankruptcy Act was then given. The solicitor for the prosecution then said that he intended to call other witnesses, when the magistrate said he did not consider it was necessary as he was going to commit the accused for trial for the offences under the Bankruptcy Act. No further evidence was called on the false pretence charges, and the magistrate was not asked to commit the accused for trial on these charges, nor did he express any opinion on them, and all the evidence on these charges

*Generally—Continued.*

was not before him. The defendant was indicted for the offences under the Bankruptcy Act and counts were added for obtaining money by false pretences.

**HELD**—that these latter counts must be quashed.

**REX v. COYNE**, (1905) 69 J. P. 151—Recorder of [London].

**45. Husband and Wife—Jointly Indicted for Feloniously Receiving—Second Summing-up and Second Verdict—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 94.**—If a wife has taken an independent part in the commission of a felony, she is liable to be convicted, although her husband was in the neighbourhood. The mere fact of marriage does not raise any presumption of coercion by the husband.

*Semble* (Lord Russell of Killowen, L.C.J.), when verdict and sentence have once been given the Judge ought not to give a second summing-up to the jury, or to take a second verdict.

**REG. v. BAINES AND OTHERS**, (1900) 69 L. J. Q. B. [681; 64 J. P. 408; 82 L. T. 724; 16 T. L. R. 413—C. C. R.

**46. Leave to Prefer under Vexatious Indictments Act—Grounds for—Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17)—30 & 31 Vict. c. 35, s. 1.**—A. had been committed for trial for conspiring with one B. to obtain property by false pretences. A warrant had been granted for the arrest of B., but he had not been arrested.

The hearing at the police court took a considerable time, and in order to avoid the necessity of a second lengthy hearing at the police court in the event of B.'s arrest, leave was applied for, and granted, to prefer an indictment against B. without a commitment by justices.

**REX v. KOPPLEWITCH**, (1905) 69 J. P. 216—[Recorder of London].

**47. Motion to Quash—Treason—Practice—Motion not considered.**—In the case of a charge of treason (*semble*, also "any enormous crime"), the Court will not allow a motion to quash the indictment on the ground of an objection appearing on the face of the record; but will leave the prisoner to take his objection by moving in arrest of judgment.

**REX v. LYNCH**, [1903] 1 K. B. 444; 72 L. J. K. B. [167; 67 J. P. 41; 51 W. R. 619; 88 L. T. 26, 19 T. L. R. 163; 20 Cox, C. C. 468—

Trial at Bar.

(d) Jurisdiction.

**48. Criminal Information—Libel upon Justices administering Licensing Acts—Jurisdiction of Court.**—The Court in its discretion will grant a criminal information to protect a person exercising a public official duty imposed upon him by statute, though he may not be acting in a judicial capacity, from a libel published of him in the exercise of that duty.

So, if a libel be published in a newspaper reflecting upon the conduct of named magistrates (members of the committee appointed by quarter sessions) in deciding the amount to be raised for the compensation fund by means of a charge upon existing licences under the Licensing Act, 1904, and imputing to them improper motives, the Court may grant a criminal information upon the ground that they were acting in the performance of a public duty imposed upon them by the Act, and had to give an independent and quasi-judicial decision upon the matter.

**REX v. RUSSELL AND ANOTHER**, (1905) 69 J. P. [450; 93 L. T. 407; 21 T. L. R. 749—Div. Ct.

**49 False Pretences—Property Obtained in England by False Pretences made in Scotland—Jurisdiction—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (13) and s. 13 (1).**—A person made false representations in Glasgow as to his credit and financial position. On the faith of those representations goods were supplied to him on credit at Gateshead, in the county of Durham. He was shortly afterwards made bankrupt. Upon these facts he was tried at Durham for the offences, under the Debtors Act, 1869, of having obtained the goods on credit by false representations within four months next before the presentation of a bankruptcy petition against him, and of having obtained credit for the goods under false pretences.

**HELD**—that the offences were committed at Gateshead, and that the Court had jurisdiction to try the prisoner.

**REG. v. ELLIS**, [1899] 1 Q. B. 230; 68 [L. J. Q. B. 103; 62 J. P. 838; 47 W. R. 188; 15 T. L. R. 57; 19 Cox, C. C., 210—C. C. R.

**50. Murder—Jurisdiction of Central Criminal Court—Child Found Dead and Last Seen Alive in that Jurisdiction—Evidence—Statement by Prisoner to her Husband Repeated to the Police in Presence of Prisoner—Admissibility.**—The prisoner was indicted for the murder of her infant child. She was seen to leave W., a place within the jurisdiction of the Central Criminal Court, by train, and she then had the child with her. She arrived the same evening at a house near G., a place outside the jurisdiction of the Central Criminal Court. She was then alone, but was carrying a brown paper parcel.

She returned the next day to a place within the jurisdiction of the Central Criminal Court, taking the parcel with her. She then made a statement to her husband, who took her to the police station, and, in her presence, repeated her statement to a police officer. The prisoner, on hearing what her husband said, made no reply, but burst into tears. The dead body of the child was found in the brown paper parcel.

**HELD**—that the statement made by the husband was admissible, and that the prisoner

**Generally—Continued.**

could be tried at the Central Criminal Court, within the jurisdiction of which the child was last seen alive and was found dead.

REX v. BEXLEY, (1906) 70 J. P. 263—  
[Grantham, J.]

**(e) Poor Prisoners' Defence Act, 1903**

51. *Appeal—Duty of Solicitor to Instruct Counsel on Appeal—Poor Prisoners' Defence Act, 1903* (3 Edw. 7, c. 38)—When a prisoner is defended under the Poor Prisoners' Defence Act, and a case is reserved for the consideration of the Court of Crown Cases Reserved, the solicitor assigned to the prisoner ought to instruct counsel to appear for the prisoner on the argument of the case.

REX v. PAYNE, (1905) 69 J. P. 440—  
[Common Serjeant, C. C. Ct.]

52. *Limitation of Power to Afford Legal Aid—Administration of the Act—Poor Prisoners' Defence Act, 1903* (3 Edw. 7, c. 38).—Legal Aid under the Poor Prisoners' Defence Act, 1903, can only be afforded to poor prisoners who set up a defence, either by way of evidence given or statement made by them, before the committing magistrate. If a defendant does not say anything at the police court, or reserves his defence, there is no power under this Act to give him any assistance. The Act does not contain any provisions showing how the Judge is to satisfy himself that the prisoner's means are sufficient for him to obtain legal aid.

REX v. NUNZIO CALIENDO, (1904) 68 J. P. 48—  
[Recorder of London, C. C. Ct.]

53. *Power of Court to Appoint Counsel, without Solicitor, to Defend—Poor Prisoners' Defence Act, 1903* (3 Edw. 7, c. 38).—The Court can assign counsel to defend a poor prisoner under the Poor Prisoners' Defence Act, without assigning a solicitor.

REX v. HART AND OTHERS, (1904) 68 J. P. 72—  
[Recorder of London, C. C. Ct.]

**(f) Practice, Generally.**

And see titles ANIMALS; MAGISTRATES

54. *Bail—Estreat of—Application by Sureties for the Court to Withdraw Estreat—Locus standi of Counsel for Prosecution—Withdrawal of Estreat.*—Upon an application by sureties for the Court to withdraw the estreat of their recognisances, which has been previously ordered, counsel for the prosecution has no locus standi.

The Court, upon being satisfied that the sureties had taken all reasonable steps to secure the attendance of the defendant, withdrew an estreat previously ordered, but which had not yet issued.

REX v. SANGIOVANNI, (1904) 68 J. P. 55—  
[Recorder of London, C. C. Ct.]

55. *Bench Warrant—Form of in Central Criminal Court—Time of Issue—Alteration of Practice.*—The practice of the Central Criminal Court as to the time when a bench warrant should issue, and as to the form such bench warrant should take, ought not to be altered without the authority generally of the Commissioners of that Court.

REG. v. NICHOLS, (1900) 64 J. P. 217.  
[Common Serjeant, C. C. Ct.]

56. *Conviction—Amending—Substituting "and" for "or"—Baines Act, 1849* (12 & 13 Vict. c. 45), s. 7.—Where an act followed by any one or more of specified consequences constitutes but one offence, and a man is convicted for doing the act and the conviction alleges two of such consequences in the alternative, Sessions may amend it by altering "or" into "and."

SMITH v. PERRY, [1906] 1 K. B. 262; 75  
[L. J. K. B. 124; 70 J. P. 93, 94 L. T. 140;  
21 Cox, C. C. 98—Div. Ct.]

57. *Conviction—Duplicity—Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 1.—The appellant was summoned and convicted for driving a motor car on a public highway "at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway and to the amount of traffic which actually was at the time or which might reasonably be expected to be on the highway."

HELD—that the conviction was bad for duplicity.

REX v. WELLS AND ANOTHER, (1904) 68 J. P.  
[392; 91 L. T. 98; 20 T. L. R. 549; 20  
Cox, C. C. 671—Div. Ct.]

58. *Conviction—Offence Insufficiently Described—Conspiracy and Protection of Property Act, 1875* (38 & 39 Vict. c. 86), s. 7—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 39.—A conviction under sect. 7 of the Conspiracy and Protection of Property Act of 1875 stated that the defendant, with a view to compel a person to abstain from working for another, unlawfully and wrongfully did injure his property.

HELD—that the conviction was not bad for not sufficiently stating the particular work which the complainant was compelled to abstain from doing; but that it was bad for not stating what was the property injured.

R. v. M'Kenzie ([1892] 2 Q. B. 519; 61  
L. J. M. C. 181; 56 J. P. 484; 41 W. R. 144;  
67 L. T. 201—Div. Ct.) considered.

Ex parte Wilkins ((1895) 64 L. J. M. C.  
221; 59 J. P. 294; 72 L. T. 567; 18 Cox, C. C.  
161—Div. Ct.) approved.

SMITH v. MOODY, [1903] 1 K. B. 56; 72  
[L. J. K. B. 43; 67 J. P. 69; 51 W. R.  
252; 87 L. T. 682; 19 T. L. R. 7; 20 Cox,  
C. C. 369—Div. Ct.]

**Generally—Continued.**

59. *Conviction—Permitting Premises to be used as a Brothel on Divers Days—Continuing Offence.*—A conviction of a licensed victualler for that he on the 26th, 28th 29th, and 31st days of January, and the 1st, 4th, 5th, and 6th days of February, 1901, permitted his house and premises to be used as a brothel, contrary to sect. 15 of the Licensing Act, 1872, is good, as the charge was of but one continuing offence.

EX PARTE BURNBY, [1901] 2 K. B. 458; 70 [L. J. K. B. 739; 85 L. T. 168—Div. Ct.]

60. *Conviction—Six Convictions—One Continuing Offence—Using a Place for the Purpose of Betting with Persons Resorting Thereto—Evidence of Betting on Six Days—Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3*—The appellant had been convicted in six convictions for using his shop on six different days for the purpose of betting with persons resorting thereto, and upon each conviction he was fined.

On appeal, it was submitted that the appellant ought only to have been convicted of one—i.e., a continuing—offence.

HELD—that all six convictions must stand.

FARMER v. CLUER, (1904) 68 J. P. 56—Quarter Sessions.

61. *Conviction—Two Convictions for Separate Offences on same Facts—Invalidity.*—Owners of a mine were charged with (1) allowing a shot to be fired in a mine not naturally wet throughout, contrary to an Order under the Coal Mines Regulation Act, 1896, and (2) allowing the said shot to be fired in a dry and dusty place contrary to the Coal Mines Regulation Act, 1887. They were convicted and fined on each charge.

HELD—that the conviction must be quashed as they had been convicted twice for one act.

MOORE v. WILSON, (1904) 5 F. (J. C.) 88—[Ct. of Justiciary.]

62. *Conviction—Uncertainty—Conviction for Constructing and Laying Out New Street Contrary to Bye-Law—Certiorari—Conviction Bad for Uncertainty—Conviction for more than one Offence—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10.*—The appellant was convicted for neglecting to comply with a notice specifying certain matters in respect of which the laying out or construction of certain streets were in contravention of the bye-laws relating to new streets.

HELD—that the conviction must be quashed, in that it was either for more than one offence contrary to the Summary Jurisdiction Act, 1848, or was void for uncertainty.

REX v. SLATER, EX PARTE BOWLES, (1903) 67 J. P. [299—Div. Ct.]

65. *Costs—Appeal from a Conviction to Quarter Sessions—Order as to Costs—Sepa-*

*rate Court of Quarter Sessions—Borough or County Funds—Liability to Costs—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 9.*—Two persons were convicted by the justices of the borough of Huddersfield of an offence under the Vagrancy Act, 1824. An appeal from the conviction was taken to the quarter sessions, where the conviction was quashed and the treasurer of the borough of Huddersfield was ordered to pay to the defendants and to the police inspector of the borough (the prosecutor) their costs of the appeal. The borough of Huddersfield had no separate court of quarter sessions. Section 9 of the Vagrancy Act, 1824, empowers the justices at quarter sessions in an appeal from a conviction under the Act to order the costs of the prosecutor to be paid by the "treasurer of the county, riding, division, or place in which the offence shall have been committed."

HELD—that the order so far as it related to costs must be quashed, as the Legislature did not intend that one body should receive penalties and that another should pay the costs; that the word "place" must be construed as *ejusdem generis* with the words preceding it, and both on that account and because penalties would be payable to the county fund the costs should be paid by counties, boroughs, or places with a separate court of quarter sessions.

REG. v. JUSTICES OF THE WEST RIDING OF YORK-SHIRE, EX PARTE THE CORPORATION OF HUDDERSFIELD, [1900] 1 Q. B. 291; 69 L. J. Q. B. 13, 16 T. L. R. 4—Div. Ct.

66. *Costs—Act Causing Murder Committed in Borough—Death Occurring Outside Borough in County—The Criminal Law Act, 1826 (7 Geo. 4, c. 64), ss. 12, 24, 25.*—The act which caused a murder was supposed to have been committed in the borough of Wigan. The death, however, took place in the county of Lancaster and outside the borough. The case was dealt with on the county coroner's inquisition, and an order was made by the clerk of assize that the expenses of the prosecution should be paid by the borough.

HELD—that the Criminal Law Act, 1826, s. 12, did not affect the question, and that the order directing the borough to pay the costs was right.

RE JAMES BROWN, EX PARTE THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF WIGAN, (1899) 62 J. P. 521; 19 Cox, C. C. 33—Ridley, J.

67. *Crown Cases Reserved—Case Stated on Behalf of One Prisoner Only—Quashing Conviction of Others—Crown Cases Act, 1848 (11 & 12 Vict. c. 78), s. 2.*—The Court for the Consideration of Crown Cases Reserved. The Court has power to quash a conviction against a prisoner, even though no question as regards that prisoner has been raised in the case reserved, and the

**Generally—Continued.**

Court will exercise the power where it is quite clear that the law applicable to the question raised in the case is equally applicable to such prisoner.

REG. v. SAUNDERS, [1899] 1 Q. B. 490, 68 [L. J. Q. B. 296; 63 J. P. 150; 80 L. T. 28; 15 T. L. R. 186—C. C. R.]

68. *Crown Cases Reserved—Restatement of Case.*—If there is any important omission from a case stated for the consideration of the Court for Crown Cases Reserved, the parties ought to communicate with the Judge who stated the case, and ask him to insert the omitted matter if he thinks it requisite. The Court has power to send a case back to the Judge to be restated, but it will not do so unless a vital fact proved at the trial is omitted. The Court refused to send a case back where the allegations complained of as incorrect were only matters of narrative leading up to the point submitted.

REX v. LAWSON, (1905) 69 J. P. 122, 92 L. T. 801; [20 Cox, C. C. 812—C. C. R.]

69. *Crown Cases Reserved—Power to State Case on Point of Law taken on the Trial at the previous Quarter Sessions.*—At the trial of an indictment at Quarter Sessions a point of law was taken, and it appeared that in effect the Recorder then consented to state a case. At the next quarter sessions he consented to state a case and did so.

HELD—that the Recorder had jurisdiction to state a case.

REX v. MEAN, (1905) 69 J. P. 27; 21 T. L. R. 172 [—C. C. R.]

70. *Crown Cases Reserved—Shorthand Notes of Evidence at Trial—Notice to be Given if Case to be Argued by Counsel—Rules of Court, June 1st, 1850.*—The Judge who states a case for the consideration of the Court for Crown Cases Reserved cannot adopt a transcript of the shorthand notes of the evidence given at the trial and make them part of the case. The case itself must briefly state the questions of law reserved, and such facts only as raise the questions submitted.

Where a case is intended to be argued by counsel, notice thereof must be given to the clerk of the Court two days before the sitting of the Court.

REX v. GRAY, (1904) 68 J. P. 40—C. C. R.

72. *Recognisance to Prosecute—Failure to Prefer Bill in Time—Discharge of Grand Jury—Application to Enlarge Recognisance.*—When a prosecutor has entered into a recognisance, under the provisions of sect. 2 of the Vexatious Indictments Act, 1859, to prosecute a charge, but fails to prefer his bill of indictment before the Grand Jury,

the Court cannot, after the Grand Jury have been discharged, entertain an application by him to enlarge his recognisance to the next sessions.

REG. v. EAYRES, (1900) 64 J. P. 217—Common [Serjeant, C. C. Ct.]

73. *Trial—Arraignment—Arraignment in Court for Previous Conviction before Trial for Subsequent Offence—Writ of Error—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 116—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 9.*—The appellant was indicted on an indictment containing three counts: (1) Attempted larceny from a till; (2) with an offence against sect 7 (3) of the Prevention of Crimes Act, 1871, as that, having been twice previously convicted, he was found under such circumstances as to show that he was about to commit an indictable offence; and (3) with having been twice convicted of felony previous to the misdemeanour alleged in the first count. On the arraignment of the prisoner all three counts were read out and pleaded to by him. It was then stated to the deputy recorder by counsel for the defence that if verdict passed against the prisoner, he would move in arrest of judgment on the ground that he ought not to have been arraigned on the third count. The jury was accordingly discharged, and the case postponed to the next sessions. At the next sessions there was no fresh arraignment, but the prisoner was tried as a person who had already been arraigned and pleaded not guilty.

HELD—the conviction must be quashed, as there was manifest error in the proceedings and record contrary to sect. 116 of the Larceny Act, 1861, as extended by the Prevention of Crimes Act, 1871, s. 9.

The words of sect. 116 of the Larceny Act, 1861, in regard to the procedure upon an indictment for committing “any” offence after a previous conviction are general, and not confined to offences punishable under that Act.

FAULKNER v. REX, [1905] 2 K. B. 76; 74 [L. J. K. B. 562; 69 J. P. 241; 53 W. R. 665; 92 L. T. 769; 21 T. L. R. 417; 20 Cox, C. C. 838—C. C. R.]

74. *Trial—Deposition—Right to Exclude Part—Criminal Evidence Act—Right of Defendant to Examine Co-Defendant.*—Where a deposition contains statements that are not evidence, the Court may, on such depositions being put in and read at the trial, order such parts as contain such inadmissible statements to be excluded and not read to the jury.

Where a defendant gives evidence on his own behalf, counsel for another defendant cannot ask him further questions on behalf of his client without giving the prosecution the right of reply. But if the evidence given by the witness has been hostile to another defendant, counsel for such defendant has



**Generally—Continued.**

the right to cross-examine without giving such right of reply.

REG. v. PAGET AND OTHERS, (1900) 64 J. P. 281—  
[The Recorder, C. C. Ct.]

**75. Trial—Noisy and Disorderly Behaviour of Defendant in Court—Trial in Absence of Defendant.]**—The defendant, charged with a misdemeanor, screamed and threw herself down in the dock and behaved in such a manner that it was impossible to proceed with the case. She was ordered to be removed. A plea of not guilty was entered, and she was tried, convicted, and sentenced in her absence.

REG. v. BROWNE, (1906) 70 J. P. 472—  
[The Recorder, C. C. Ct.]

**76. Trial—Plea—Absence of Defendant—No Plea—Verdict of Acquittal.]**—Under the special circumstances of a particular case the jury were sworn, and a verdict of not guilty was given, although the defendant was absent and had not pleaded to the charge.

REG. v. HAYNES, (1900) 64 J. P. 441—  
[Ridley, J., C. C. Ct.]

**77. Trial—Right of Reply—Prisoners jointly indicted—Evidence Called on Behalf of One Prisoner.]**—Where two persons were jointly indicted for arson, and evidence was called on behalf of one of them,

HELD—that this gave the prosecution the right to a general reply.

REG. v. DAVIS AND ANOTHER, (1901) 17 T. L. R. 164—Lawrance, J., Birmingham Assizes.

**78. Trial—Several Prisoners indicted—Indictment charging Offences against Prisoners Jointly and also Individually—Separate Trials.]**—An indictment on which several defendants are charged may contain counts charging offences against individual prisoners as well as counts charging all the prisoners jointly. If it is likely that injustice may be caused to any prisoner by trying all the prisoners together, the Court may order the prisoners to be tried separately.

REG. v. COX, [1898] 1 Q. B. 179, 18 Cox, C. C. [672; 67 L. J. Q. B. 293; 77 L. T. 534; 14 T. L. R. 122—C. C. R.]

**79. Trial—Two Indictments against Prisoner—Acquittal on First—Claim by Prosecution to have Second Indictment Tried before Another Jury.]**—Where a prisoner has been acquitted on one indictment the prosecution have no right to claim that a second indictment should be tried before another jury.

REG. v. SIMS, (1905) 69 J. P. 8—  
[Recorder of London, C. C. Ct.]

**80. Trial—Unsworn Statement by Prisoner—At what Stage to be made.]**—An unsworn statement by a defended prisoner, who calls no evidence, must be made before the prosecuting counsel sums up his evidence.

REG. v. SHERIFF AND OTHERS, (1904) 20 Cox, C. C. [334—Darling, J.]

**81. Trial—Unsworn Statement by Prisoner—When Defended by Counsel—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1.]**—The Criminal Evidence Act, 1898, enables a prisoner to go into the witness-box and give evidence on his own behalf if he wishes to do so. This new right has not done away with the former privilege possessed by a prisoner of making his statement without being sworn before his counsel's address to the jury.

REG. v. POPE, (1902) 18 T. L. R. 717—  
[Phillimore, J.]

**82. Consular Court—Japan—Criminal Procedure—Trial by Jury—Trial "According to the Laws of Great Britain."]**—A British subject tried on a criminal charge in a foreign country by a Court constituted under an Order in Council, or the Foreign Jurisdiction Act, 1890, or any of the statutes repealed by that Act, has no inalienable right to be tried according to the procedure of British Courts in this country, provided that the proceedings are not contrary to natural justice.

CAREW v. JAPAN (CROWN PROSECUTOR), [1897] [A. C. 719; 18 Cox C. C. 625; 66 L. J. P. C. 95; 77 L. T. 1; 13 T. L. R. 512—P. C.]

**(g) Prevention of Crimes.**

**83. Previous Convictions—Proof—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 7.]**—Where a person is indicted for an offence under sect. 7 of the Prevention of Crimes Act, 1871, the previous convictions may not be proved before the jury until the other facts constituting the subsequent offence have been found by them.

REG. v. BROWN, (1901) 65 J. P. 136—  
[The Recorder, C. C. Ct.]

Disapproved in *Reg. v. Penfold* ([1902] 1 K. B. 547; 71 L. J. K. B. 306; 66 J. P. 248; 50 W. R. 671; 86 L. T. 204; 18 T. L. R. 286; 20 Cox, C. C. 161—C. C. R.).

**84. Previous Convictions—Proof—When Evidence of Previous Convictions to be Given—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), ss. 7, 9—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 116.]**—On a trial of an indictment under sect. 7 of the Prevention of Crimes Act, 1871, evidence having been given of the prisoner having been found in certain public places under circumstances which raised the suspicion that he was about to commit a felony, it was proposed to call evidence of a previous conviction.

HELD—that the offence was a statutory offence, and was not complete unless the previous conviction and the time were proved, and these necessary ingredients should therefore be given in evidence before the tribunal, whether it be a Court of Summary Jurisdiction or a jury.

*Reg. v. Brown* ((1901) 65 J. P. 136—The Recorder of London) disapproved.

**Generally—Continued.**

Decision of Deputy Chairman of Clerkenwell Sessions ((1901) 66 J. P. 41) affirmed.

REX v. PENFOLD, [1902] 1 K. B. 547; 71 [L. J. K. B. 306; 66 J. P. 248; 50 W. R. 671; 86 L. T. 204; 18 T. L. R. 286; 20 Cox C. C. 161—C. C. R.

**(h) Principals and Accessories.**

85. *Principals and Accessories—Indictment Against Defendant as Principal—Verdict of Jury, Accessory After the Fact.*—The defendant and one T. R. were indicted as principals for a misdemeanour. The jury convicted T. R., and returned a verdict against the defendant of being an accessory after the fact.

HELD—that a verdict of guilty ought not to have been entered against the defendant on that finding by the jury.

REX v. BUBB, (1906) 70 J. P. 143—C. C. R.

**(i) Restitution of Property.**

86. *Current Coin of the Realm—Curiosity—Restitution Order—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 100—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), ss. 27 (3), 33 (1).—A butler stole from his master a five-pound gold piece, presented by the Goldsmiths' Company to the latter in the Jubilee Year, 1887, the year of its date. The gold piece had been kept in a cabinet until November, 1898, when it was stolen by the butler, and had never been in circulation. The butler sold the gold piece for £5 to the son of and at the shop of a dealer in new and second-hand clothes, jewellery and other articles. The gold pieces of the issue to which the gold piece in question belonged were by royal proclamation constituted current coin of the realm.

HELD—that the magistrates acted within their powers in making an order for the restitution of the gold piece under sect. 100 of the Larceny Act, 1861. A coin, though current coin of the realm, which may be used in payment of a debt or otherwise as money, may also be dealt with as if it were a medal, or ancient coin, or other curiosity.

MOSS v. HANCOCK, [1899] 2 Q. B. 111; 68 L. J. [Q. B. 657; 47 W. R. 698; 80 L. T. 693; 15 T. L. R. 353; 19 Cox, C. C. 324—Div. Ct.

87. *False Pretences—Money Found on Persons—Return to Prosecutor.*—A prisoner who had been brought back from Cape Colony pleaded guilty to charges of obtaining goods by false pretences. He then stated, by his counsel, that of £553 found on him the greater part was obtained from the sale of the goods obtained by false pretences from the prosecutor. It appeared that £90 of the £553 was directly traceable to another source. Counsel applied for an order for the payment to the prosecutor of £463. Counsel for the trustee in the prisoner's bankruptcy opposed the application. Application granted.

REX v. COHEN, (1907) 71 J. P. 190—

[Commissioner Rentoul, K.C., C. C. Ct.

88. *Goods Obtained by False Pretences—Amounting or not Amounting to Larceny—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 100—*Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 24].—Where a person has been convicted of obtaining goods by false pretences or other wrongful means not amounting in law to larceny, and has parted with the goods, the Court cannot make an order of restitution of such goods.

If the goods were obtained in such a manner as to amount in law to larceny, the Court can make an order of restitution, although the person obtaining the goods has only been convicted of obtaining them by false pretences.

REX v. WALKER AND OTHERS, (1901) 65 J. P. [729—The Recorder, C. C. Ct.

89. *Goods Obtained by False Pretences—Not Amounting to Larceny—Disaffirmance of Transaction by Person Defrauded—Goods or Proceeds in Possession of Defendant—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 100—*Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 24].—Where a person has been convicted of obtaining goods by false pretences or other wrongful means not amounting in law to larceny, and the person defrauded has disaffirmed the transaction, and the goods or the proceeds thereof are in the possession of the defendant, the Court can make an order of restitution of the same.

REX v. GEORGE, (1901) 65 J. P. 729—

[Common Serjeant, C. C. Ct.

90. *Indictment for Larceny and one for False Pretences in respect of the same Offence—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 100].—The prisoner pleaded guilty to an indictment for obtaining goods by false pretences; he also pleaded guilty to an indictment which charged him with stealing the same goods.

HELD—that the Court had power to make an order of restitution.

REX v. BIANCI, (1904) 67 J. P. 443—C. C. Ct.

91. *Power of Court—Larceny Acts, 1861* (24 & 25 Vict. c. 96) ss. 75, 76, 100 & 1901 (1 Edw. 7 c. 10), s. 1].—The Court has no power to make an order of restitution in the case of a person convicted under the Larceny Act, 1901.

REX v. BROCKWELL, (1905) 69 J. P. 376—

[The Recorder, C. C. Ct.

**(j) Reward.**

92. *Advertising Reward for Stolen Property—No Questions will be Asked—Any Property whatsoever—Dog—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 102].—The words "any property whatsoever" in sect. 102 of the Larceny Act, 1861—which imposes a penalty on any one who publicly advertises a reward

## Generally—Continued.

for the return of any property whatsoever which shall have been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked, or prints or publishes any such advertisement—include a dog.

MIRAMS v. OUR DOGS PUBLISHING CO., [1901] 2 [K. B. 564; 70 L. J. K. B. 879; 49 W. R. 626; 85 L. T. 6; 17 T. L. R. 649—C. A.]

93. *Advertising Reward for Stolen Property—No Questions to be Asked—“Newspaper”*—Fiat of Attorney-General—*Larceny Act*, 1861 (24 & 25 Vict. c. 96), s. 102—*Larceny (Advertisements) Act*, 1870 (33 & 34 Vict. c. 65), ss. 2, 3—*Post Office Act*, 1870 (33 & 34 Vict. c. 79), s. 6—*The Bazaar, Exchange and Mart, and Journal of the Household*, is a “newspaper” within the meaning of sect. 2 of the *Larceny (Advertisements) Act*, 1870. Therefore, the fiat of the Attorney-General is necessary before an action is brought against its printer or publisher in respect of an advertisement, which contravenes sect. 102 of the *Larceny Act*, 1861.

WILKINS v. GILL; MAJOR v. GILL, (1904) 20 [T. L. R. 3—Channell, J.]

94. *Advertising Reward for Stolen Property—No Questions to be Asked—Penalty Recovered from Printer and Publisher—Second Action against Owners of Newspaper—Held not to Lie—Larceny Act*, 1861 (24 & 25 Vict. c. 96), s. 102.—An informer recovered judgment for a penalty against the printer and publisher of a newspaper in respect of an advertisement enquiring after some stolen property, and stating that no questions would be asked. He now sued the syndicate owning the paper for a penalty in respect of the same offence.

HELD—that he was estopped, and could not maintain his action.

NUTT v. SOL SYNDICATE, LD., (1903) 19 T. L. R. [27—Lawrance, J.]

95. *Reward to Person Active in Apprehension of Offender*—(7 Geo. 4, c. 64, s. 28).—One of two prisoners threw a piece of iron at a police-constable, causing a severe scalp wound in the back of his head. Whilst the constable was on the ground unconscious and surrounded by a hostile crowd, a girl came up, blew his whistle and remained with him until he regained consciousness and other police-constables had arrived. One of the prisoners was arrested about an hour afterwards, the other not till some days later, and they were convicted on an indictment under sect 18 of the *Offences Against the Person Act*, 1861.

HELD—that the Court had power to order a reward to be paid to the girl under 7 Geo. 4, c. 64, s. 28.

REX v. PLATT AND ANOTHER, (1905) 69 J. P. 424—[Recorder of London.]

## II. SPECIFIC OFFENCES.

## (a) Miscellaneous Offences.

For offences under Debtors' Acts see BANKRUPTCY, 83, 84, 105—109.

And see TRADE MARKS.

96. *Cremation—Burning of Body in Private House*—“*Procuring the Cremation of any Body with Intent to Conceal the Commission of an Offence*”—*Cremation Act*, 1902 (2 Edw. 7, c. 8), s. 8 (3).—By sect. 8 (3) of the *Cremation Act*, 1902 (2 Edw. 7, c. 8), “every person who, with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation of any body, or, with such intent, makes any declaration or gives any certificate under this Act, shall be liable to conviction on indictment to penal servitude for a term not exceeding five years.”

J. B. was indicted in four counts under this sub-section, for that she, with intent to conceal the commission of certain offences therein specified, procured the cremation of certain dead bodies. The evidence for the prosecution was that the bodies, which were those of children, were burnt by the prisoner in a kitchen range or stove in the prisoner's own house.

Counsel for the defence having submitted that “cremation” in the section did not mean merely burning, but burning in a crematorium, it was

HELD—that there was no evidence on these counts “of procuring the cremation of any body” to go to the jury.

REX v. BYERS, [1907] 71 J. P. 205—Kennedy, J.

97. *Going about Armed—Discharging a Revolver in a Public Street—Common Law*—2 Edw. 3, c. 3.—A man who discharges a pistol or other weapon in a public street may be convicted upon indictment under the statute of 1323, which enacts, *inter alia*, “that no man, great nor small, of what condition soever he be, except the King's servants, in his presence, and his ministers in executing of the King's precepts, or of their office . . . go, nor ride, armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.”

He may also be convicted on a count charging “that he on the same date did go about in a certain public street . . . armed in public without lawful occasion in such a manner as to be nuisance and to alarm the public lawfully using the said street.”

The statute is only an affirmation of the common law: cf. *Sir John Knight's Case* ((1686) 3 Mod. 117).

REX v. MEADE, (1903) 19 T. L. R. 540—Wills, J.

98. *Inciting to Disclose Official Secrets—Indictment—Necessary Averments—Official*

**Specific Offences—Continued.**

*Secrets Act, 1889 (52 & 53 Vict. c. 52), ss. 2, 3.*  
—An indictment, under sections 2 and 3 of the Official Secrets Act, 1889, against defendants for conspiracy to incite, and for inciting and attempting to procure a person employed by persons holding a contract with the Government, involving an obligation of secrecy corruptly to communicate documents and information, must contain an averment that such person incited, &c., has, by means of his office, &c., either obtained possession of or control over such documents, or has acquired the information.

REG. v. STUART AND PAGE, (1899) 63 J. P. 712—  
[The Recorder, C. C. C.]

**99. Inciting to Murder—Conspiracy to Murder—Soliciting, Persuading, Endeavouring to Persuade to Murder—Evidence—Actual Communication—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 4.**—To constitute the misdemeanour, under sect. 4 of the Offences Against the Person Act, 1861, of soliciting, encouraging, persuading, or endeavouring to persuade, or proposing to any person to murder any other person, the prosecution must show that there was some actual communication between the accused and the person solicited, &c., though it is not necessary to show that the mind of the person solicited was affected thereby.

REG. v. KRAUSE, (1902) 66 J. P. 121; 18 T. L. R. [238—Lord Alverstone, L.C.J.—C. C. C.]

**100. Inciting to Murder—Encouraging Persons to Murder the Sovereigns and Rulers of Europe—Indictment—Sufficiency—Aiding and Abetting—Publication of Document Calculated to Disturb the Government of some Foreign Country—Libel.**—A. was indicted for publishing a libel, in the form of a pamphlet, attempting to justify the crimes of assassination and murder, and to incite persons to commit those crimes upon the sovereigns and rulers of Europe. There were also counts under sect. 4 of the Offences Against the Person Act, 1861, charging him with encouraging and endeavouring to persuade persons unknown to murder the sovereigns and rulers of Europe. B. was charged with aiding and abetting A. to commit these misdemeanours.

HELD—that the words “sovereigns of Europe” specified a sufficiently definite class, and that the counts were good.

The jury were directed that if they found A. guilty, then B., who had sold copies of the pamphlet, was guilty of aiding and abetting if he knew what was in the pamphlet, or deliberately shut his eyes to what was in it.

*Semble*—a document published in this country, which is calculated to disturb the government of some foreign country, is not a seditious libel, nor punishable as a libel at all

REG. v. ANTONELLI AND ANOTHER, (1906) 70 J. P. [4—Phillimore, J.]

**101. Loaded Firearms—Attempt to Discharge—Evidence—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 14, 18**  
—During an interview between the prosecutor and the prisoner the latter put his hand into his overcoat pocket and commenced to pull out a loaded revolver. Before the prisoner quite got the revolver out of his pocket, the prosecutor jumped up from his chair and sprang on to the prisoner, who had then got the revolver clear from his pocket and had half risen from his chair. The prosecutor held the prisoner’s arm before he could raise it up. There was a struggle for some minutes, and the prisoner nearly got his arm free. Whilst they were struggling the prisoner said several times, “You’ve got to die.” The prisoner was convicted on an indictment charging him with feloniously attempting to discharge a certain revolver loaded with gunpowder and leaden bullets at the prosecutor with intent to do him some grievous bodily harm.

HELD—that there was evidence of such attempt, and that the conviction must be affirmed.

REG. v. LINNEKER, [1906] 2 K. B. 99; 75 [L. J. K. B. 385; 70 J. P. 293; 54 W. R. 494; 94 L. T. 856; 22 T. L. R. 495; 21 Cox C. C., 196—C. C. R.]

**102. Loaded Firearms—Attempt to Discharge—Intent to Kill—Evidence—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 14.**—A prisoner pointed a loaded revolver at another person and pulled the trigger. In consequence of the revolver being a central fire revolver, loaded with rim-fire cartridges, it could not, as the prisoner knew, and did not, in fact, go off.

HELD—that he could not be convicted under sect. 14 of the Offences Against the Person Act, 1861, of attempting to discharge the revolver with intent to kill.

REG. v. JONES, (1902) 18 T. L. R. 156—  
[Kennedy, J., Stafford Assizes.]

**103. Personation at Election—Election of County Councillor—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37).**—The prisoner was indicted before Palles, C.B., at the Commission of Oyer and Terminer for Dublin City, held on the 3rd February, 1900, for that he did unlawfully personate and falsely assume to vote in the name of another person at an election for a county councillor for the borough of Dublin on the 15th January, 1900, the count concluding “against the statute and against the peace.” In a second count he was indicted for an attempt to commit the said offence.

HELD—that the first was a good count by statute, and, *semble*, would have been good at common law.

REG. v. CLARKE, [1900] 2 I. R. 304—Q. B. Div.

**104. Rescue of Distress for Rent—Breach of Criminal Law.**—The defendants were indicted for rescuing and taking away with

**Specific Offences—Continued.**

force and arms certain goods that had been distrained for rent due by one of them, the said goods then being in the custody of the bailiff, and the rent still unpaid.

HELD—that this was a breach of the criminal law.

REX v. NICHOLSON AND KING, (1901) 65 J. P. [298—McConnell, K.C., London Qr. Sess

105. *Riot—What Constitutes—Persons Riotously and Tumultuously Assembled Together—Riot (Damages) Act, 1886* (49 & 50 Vict. c. 38), s. 2.]—There are five necessary elements of a riot. (1) number of persons, three at least; (2) common purpose, (3) execution or inception of the common purpose; (4) an intent to help one another, by force if necessary, against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

Therefore, these five elements must be proved in order to obtain compensation under sect. 2 of the Riot (Damages) Act, 1886, for the destruction of a building by persons riotously and tumultuously assembled together.

FIELD AND OTHERS v. RECEIVER FOR METROPOLITAN POLICE DISTRICT, (1907) 2 K. B. 853, 76 L. J. K. B. 1015; 71 J. P. 494; 23 T. L. R. 736; 5 L. G. R. 1121—Div. Ct.

106. *Shooting—Self Defence—Husband and Wife Living Separate—Husband Breaking into Wife's House at Night—Wife Shooting for Purpose of Frightening Supposed Burglar.*—A man who was living apart from his wife obtained entrance, in the night time, into her house by opening an area window. The wife heard that someone was in the house, came downstairs with a pistol, and fired a shot, which wounded her husband. She said she did not know it was her husband till after she had fired, but thought that there were burglars in the house.

The jury were directed that if the prisoner had reasonable grounds for believing that the person was in her house for a felonious purpose, and only fired for the purpose of frightening such person, not knowing it was her husband, she ought to be acquitted.

REX v. DENNIS, (1905) 69 J. P. 256—  
[The Recorder, C. C. Ct.

107. *Unlawful Angling—Seizure of Tackle—Exemption from further Penalty—Meaning of Word "Angling"—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 25.]—Fishing by means of night-lines, consisting of two pegs driven into the ground with lines and hooks and a stone weight attached, does not constitute "angling" within the meaning of the proviso in sect. 25 of the Larceny Act,  
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1861, so as to exempt the person unlawfully fishing with the same from any penalty other than their seizure.

BARNARD v. ROBERTS, (1907) 71 J. P. 277, 96 [L. T. 648; 23 T. L. R. 439—Div. Ct.

And see FISHERIES, I, 21.

For offences as to Game, &c., see title GAME AND SPORT

**(b) Abortion.**

108 *Attempt to Procure—Thing not Noxious—Inciting a Woman to Attempt to Procure—Offences against the Person Act, 1861* (24 & 25 Vict. c. 100), s. 58.]—A person who incites a woman to administer to herself a thing that, to his knowledge, is not in fact noxious or capable of procuring abortion, but which he knows she will take in the belief that it is capable of procuring abortion, is not guilty of inciting her to attempt to commit the crime within the meaning of the statute. But the woman who takes the thing, in the belief that it is capable of procuring abortion, though in fact it is not capable of so doing, is guilty of the attempt to commit the crime.

*Semble*, if the person who incites the woman to take the thing believes the thing to be noxious or capable of procuring abortion, he is guilty of inciting her to attempt to commit the crime, although, owing to facts being otherwise than he believed, the commission of the crime in the manner proposed was impossible.

REG. v. BROWN AND OTHERS, (1899) 63 J. P. [790—Darling, J.

109. *Evidence—Previous Offences—Admissibility—Using Instruments with Intent to Procure Miscarriage—Use by Prisoner of Similar Instruments on Other Women.*—The prisoner was indicted under sect. 58 of the Offences Against the Person Act, 1861, for feloniously using instruments upon a certain woman with intent to procure her miscarriage.

At the trial evidence, on behalf of the prosecution, of another woman was admitted to prove that, about nine months before the commission of the offence alleged in the indictment, the prisoner had used similar instruments upon her after she had told him that she was pregnant, and that he had then told her that he would "put her all right," and that he had "put dozens of girls right."

HELD (by Kennedy, Darling, Jelf, Bray, and A. T. Lawrence, JJ.; Alverstone, L.C.J., and Ridley, J., dissenting)—that the evidence was admissible.

REX v. BOND, [1906] 2 K. B. 389; 75 L. J. K. B. [693, 70 J. P. 424; 54 W. R. 586; 95 L. T. 296; 22 T. L. R. 633—C. C. R.

Specific Offences—*Continued.*

## (c) Assault.

110. *Information—Party Aggrieved—Not a Free Agent—Proceedings by Another on his Behalf—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 42.*—An information under sect. 42 of the Offences Against the Person Act, 1861, for unlawfully assaulting a person who is so feeble, old, and infirm as to be incapable of instituting proceedings, and who is not a free agent but completely under the control of the person committing the assault, and is therefore unable to authorise proceedings to be taken, may be laid by another person on his or her behalf.

*Nicholson v. Booth* ((1888) 57 L. J. M. C. 43; 52 J. P. 662; 53 L. T. 187; 16 Cox, C. C. 373—Div. Ct.) distinguished.

*PICKERING v. WILLOUGHBY*, [1907] 2 K. B. [296; 76 L. J. K. B. 709; 71 J. P. 311; 97 L. T. 244; 23 T. L. R. 466—Div. Ct.]

111. *Conviction—Conviction for Common Assault—“Upon Complaint by or on Behalf of the Party Aggrieved”—Necessity for Alleging this in Conviction—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100, s. 42).*—*Semble*, in a conviction for a common assault under sect. 42 of the Offences Against the Person Act, 1861, it is not necessary to set out that the conviction was upon complaint by, or on behalf, of the party aggrieved.

*Craven v. Frolich*, (1905) 69 J. P. 40—Q. Sess.

## (d) Bigamy.

112. *Absence for Seven Years—Absence includes Wilful Desertion—No Knowledge of Consort being Alive—Means of Knowledge is not Knowledge—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.*—By sect. 57 of the Offences Against the Person Act, 1861, a person shall not be guilty of bigamy whose wife or husband “shall have been continually absent from such person for seven years then last past, and shall not have been known by such person to have been living within that time.”

**HELD**—(1) that a man who has married again is entitled to the protection of the section, although he wilfully deserted his wife;

(2) that the Crown must prove actual knowledge, and not merely means of knowledge, on the part of the prisoner that his first wife was living during the seven years.

*Reg. v. Curgerwen* ((1865) L. R. 1 C. C. 1) followed.

*REX v. FAULKES*, (1903) 19 T. L. R. 250—**[Kennedy, J.]**

113. *Evidence of Former Marriage.*—In an indictment for bigamy the evidence tendered of the former marriage was a cer-

tificate of the priest in charge of a Roman Catholic church, by whom it was alleged the parties had been married, identity of the prisoner as one of the persons mentioned in the certificate, and a statement of the prisoner when the warrant of arrest was read over to him: “That’s all right; but I did not know that my former wife was alive.”

**HELD**—that the evidence was insufficient to prove the former marriage.

*REX v. LINDSAY*, (1902) 66 J. P. 505; 18 T. L. R. [761—Walton, J., Oxford Assizes.]

114. *Second Marriage Contracted Abroad—Necessity for Averment in Indictment that Defendant is a British Subject—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57—Proviso.*—In an indictment for bigamy in which the second marriage is alleged to have been contracted abroad, it is not necessary to allege in the indictment that the defendant was a subject of His Majesty.

*REX v. AUDLEY*, [1907] 1 K. B. 383; 76 L. J. [K. B. 270; 71 J. P. 101; 96 L. T. 160; 23 T. L. R. 211—C. C. R.]

115. *Second Marriage Taking Place Abroad—“Or Elsewhere”—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.*—By sect. 57 of the Offences Against the Person Act, 1861, it is enacted that “who-soever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony.”

**HELD**—that the words “or elsewhere” applied to places beyond the King’s dominions.

*THE TRIAL OF EARL RUSSELL*, [1901] A. C. 446 [70 L. J. K. B. 998; 85 L. T. 253; 17 T. L. R. 685—H. L. (E)]

116. *Validity of First Marriage—Belief by Prisoner that First Marriage Invalid—Onus of Proof.*—Where a prisoner, charged with bigamy, alleges that his first marriage was invalid on the ground that when he married his first wife she had a husband living, it is for the prisoner, after the prosecution have proved his two marriages, to prove that the first husband was alive at the time of the prisoner’s first marriage.

Where he alleges that at the time of his second marriage he *bonâ fide* believed that his first marriage was invalid, on the ground that the woman he then married had a husband alive at the time, he must prove that he had such belief, and also that he made very careful and serious inquiries which justified such belief.

*REX v. THOMSON*, (1906) 70 J. P. 6—Common [Serjeant, C. C. Ct.]

## (e) Breach of the Peace.

117. *Binding over “to be of Good Behaviour”—Disturbance of Peace Natural*

**Specific Offences—Continued.**

*Consequence of Acts of a Person—Insulting Roman Catholics at Public Meetings.*—Every one must be taken to intend the natural consequences of his own acts, and if a disturbance of the peace is the natural consequence of the acts of a person he is liable, and justices are right in binding him over to keep the peace. The appellant called himself a "Crusader" who was going to preach a Protestant crusade. He supplied himself with a crucifix, which he waved about, and round his neck hung beads. He used expressions most insulting to the faith of the Roman Catholic population of Liverpool, amongst whom he went. Disturbances and riots were caused by his conduct. Large crowds assembled in the streets, and a serious riot was only prevented by the interference of the police. The appellant stated, with respect to a meeting he intended to hold, that he had received a letter informing him that the Catholics were going to bring sticks, and he told his supporters that the police had refused to give him protection, and he should look to them for protection. The stipendiary magistrate of Liverpool bound over the appellant "to be of good behaviour."

**HELD**—that the police and the magistrates were right in thinking that the appellant's language and conduct went very far indeed towards inciting people to commit, or was at any rate language and behaviour likely to occasion, a breach of the peace.

*WISE v. DUNNING*, [1902] 1 K. B. 167; 71 L. J. [K. B. 165, 66 J. P. 212; 50 W. R. 317, 85 L. T. 721; 18 T. L. R. 85; 20 Cox, C. C. 121—Div. Ct.

**(f) Concealment of Birth.**

118. *Secret Disposition of the Dead Body of Child—Offences Against the Person Act, 1861* (24 & 25 Vict. c. 100), s. 60.]—In a prosecution for concealment of birth the prosecution must prove not only the concealment of the fact of the birth, but also that that concealment was carried out by the secret disposition of the dead body of the child.

So where a woman was delivered of a child and put its body upon her bed, and covered it over with a petticoat, where it was subsequently found by a policeman, who had been fetched by a woman who had been in the room where the bed was, but had not seen the child, the jury were directed to acquit the defendant.

*REX v. ROSENBERG*, (1906) 70 J. P. 264—Jelf, J.

**(g) Conspiracy.**

119. *Conspiracy to Abduct Child—Immunity of one Conspirator—Offences Against the Person Act, 1861* (24 & 25 Vict. c. 100), s. 56.]—The defendant was convicted of conspiring with one C., contrary to the provisions of sect. 56 of the Offences Against the Person

Act, 1861, by force to lead and take away a child under the age of fourteen years, with intent to deprive L., the guardian of such child, of the possession of the said child.

C. was the mother of the said child and had obtained a divorce from her husband. L. had been appointed by the Court guardian of the child.

There was no evidence that at the time of the conspiracy C. was claiming any legal right to the possession of the child, beyond the fact that she had taken out a summons that the child should be examined by a physician on her behalf.

**HELD**—without expressing any opinion as to the effect of the proviso to sect. 56 upon C., that no immunity of one of the parties to a conspiracy to do an unlawful act would prevent the other party from being convicted of such conspiracy.

*REX v. DUGUID*, (1906) 75 L. J. K. B. 471; 70 [J. P. 294; 94 L. T. 887; 22 T. L. R. 506; 21 Cox, C. C. 200—C. C. R.

120. *Conspiracy to Indemnify Bail—An Unlawful Act—Not a Criminal Offence unless with Intention to Pervert Justice.*—The defendants were indicted for that they "contriving and intending to obstruct and pervert the due course of law and justice at and upon the trial of E. M. . . ." unlawfully did conspire, &c., together to indemnify certain persons against their liability on their recognisances as bail for the appearance of an accused person at his trial.

**HELD**—that this count charged a conspiracy to do an unlawful act.

**HELD** further—that though it is an unlawful act to indemnify bail, it is not a criminal offence to do so unless an intention to pervert justice is also proved.

*Reg. v. Broome* ((1851) 18 L. T. (O. S.) 19) followed.

*REX v. STOCKWELL AND OTHERS*, (1902) 66 J. P. [376—The Recorder, C. C. Ct.

121. *Conspiracy to Obtain Passport—Misdemeanour—Act Prejudicial to the Public Interest.*—A conspiracy to obtain a passport from the Foreign Office by the false representation that it is required for the use of a certain person, with the intent that it should be used by another person, is an indictable misdemeanour, as tending to produce a public mischief.

In such a case it is for the Court and not for the jury to say whether such an act may tend to the public mischief, and it is not an issue of fact upon which evidence can be given.

*REX v. BRAILSFORD AND McCULLOCH*, [1905] 2 K. B. 730; 69 J. P. 370; 93 L. T. 401; 21 T. L. R. 727; 75 L. J. K. B. 64; 54 W. R. 283; 21 Cox, C. C. 16—Div. Ct.

122. *Conspiracy to Pervert due Course of Justice—Contempt of Court—Conspiracy—*

**Specific Offences—Continued.**

*Article in Newspaper—Antecedents of Prisoners Awaiting Trial*] — It is a criminal offence to publish writings which are calculated or tend to influence the minds of the magistrate or jurors against a person who is to be brought before them for trial.

An act which tends to pervert the course of justice is a contempt of court, but it is none the less an indictable offence.

A conspiracy to publish an article in a newspaper may be inferred if the article could not have appeared in the newspaper without the concurrence of the persons charged with conspiracy.

HELD—on a special case stated for the consideration of the Court for Crown Cases Reserved, that the publication of information concerning the antecedents of two prisoners who were awaiting trial was of such a character as to interfere with and obstruct the ordinary course of justice, and that inasmuch as the articles could not have appeared without the co-operation of the editor and the reporter, there was evidence of conspiracy by them.

REX v. TIBBITS AND WINDUST, (1901) 50 W. R. [125; 85 L. T. 521; 18 T. L. R. 49; [1901] 1 K. B. 77, 71 L. J. K. B. 4; 66 J. P. 4—C. C. R.

123. *Conspiracy and Protection of Property—“Besetting”—Seamen—Shipping Federation—Deposit Ship—Licence from Board of Trade—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 111.*]—The “Siren” was occupied by the Shipping Federation as a deposit ship for men intending to serve as seamen on board ships belonging to members of the federation, which is an association of ship-owners. Thirty-seven persons were on board the “Siren” and had entered into engagements to remain on board of her until engaged to ship as seamen on board vessels belonging to members of the federation, receiving in the meantime daily wages and rations from the federation, the engagements between the thirty-seven persons and the federation through its officials, being *bonâ fide* the servants and in the constant employment of the federation. Neither those officials had at any material time a licence from the Board of Trade under sect 111 of the Merchant Shipping Act, 1894, for the purpose of engaging or supplying seamen to be entered on board any ship in the United Kingdom, nor were the federation or its servants the owner, master, or mate of any ship, or *bonâ fide* the servant and in the constant employment of the owner, or a superintendent within that section. The thirty-seven persons while so on board the “Siren” did not work or serve as seamen or otherwise. The respondents beset the “Siren” and the approach thereto with a view to compel the thirty-seven men to abstain from being on the “Siren.”

HELD—that the thirty-seven men engaged by the federation had been beset by the respondents within the meaning of sect. 7 of the Conspiracy and Protection of Property Act, 1875, with a view to compel them to abstain from doing acts which they had a legal right to do. They had a legal right to be upon the ship, to stay there, and to receive their wages if they could get the money, and that there might have been a breach of the Merchant Shipping Act, 1894, s. 111, but that would not prevent the men from having a legal right to be on the ship.

FARMER v. WILSON AND OTHERS, (1900) 69 L. J. [Q. B. 496; 64 J. P. 486; 82 L. T. 566; 16 T. L. R. 309—Div. Ct.

124. *Conspiracy and Protection of Property—Seafaring Man Out of Employment—Intimidation—Construction of Statute—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).*]—Seafaring men are not as a class excepted from the provisions of the Conspiracy and Protection of Property Act, 1875. In construing sect. 16 of that Act the word “seamen” therein is to be taken to mean persons employed under and subject to the liabilities imposed by the Merchant Shipping Acts.

REG. v. LYNCH AND JONES, [1898] 1 Q. B. 61, 8 [Asp. M. L. C. 363; 18 Cox C. C. 677; 67 L. J. Q. B. 59; 77 L. T. 568; 14 T. L. R. 78, 46 W. R. 205—C. C. R.

125. *Indictment—Joinder of Counts.*]—If several people are engaged in any unlawful combination and conspiracy, they can be charged in one indictment with a count for the conspiracy, and in other counts with separate acts which are connected with the general conspiracy as separate misdemeanours against all or against any of them. Further than that it is not right to go. And it is a misuse of the process of the Court to charge in the same indictment one, two, or more people with one crime, and other people with another crime, even when one of the parties to the first crime is also charged with being a party to the second crime. Accordingly, in such a case, the Court will put the prosecution to their election on which count they will proceed, and will either sever the indictment or quash one of the counts.

REX v. WARREN AND OTHERS, (1907) 71 J. P. 566 [—Common Serjeant, C. C. Ct.

126. *Indictment Against Three—Plea of Guilty by One—Acquittal of the Other Two—Judgment Ought Not to be Passed Against the One—Power of Court to Allow Withdrawal of Plea of Guilty before Judgment—Crown Cases Act, 1848 (11 & 12 Vict. c. 78).*]—The appellant and two other persons were indicted together upon an indictment which contained five counts charging the obtaining



*Specific Offences—Continued.*

of money by false pretences, and also a sixth count alleging a conspiracy between the three defendants to defraud the prosecutors. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were included in one arraignment. All pleaded not guilty to the five counts; the appellant pleaded guilty to the sixth count, the other defendants pleading not guilty to that count as well as to the five. Thereupon a verdict of not guilty was returned in favour of the appellant on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness against them. The jury acquitted the other defendants upon all six counts. It was inferred that the appellant was given in charge to the jury upon the five counts in order that, no evidence being offered against him upon those counts, the jury might find a verdict in his favour upon them.

HELD—that the trial ought to have been regarded as in substance joint; and that the plea of guilty ought not to have been followed by judgment; that the unfettered power which the statute 11 & 12 Vict. c. 78 (2) confers upon the Court for the Consideration of Crown Cases Reserved to make such order as justice may require might in this case be exercised in favour of the appellant; and that the question arising upon the plea of guilty was a question arising “on the trial” within sect. 78 (2)

*Reg v. Brown* ((1889) 24 Q. B. D. 357; 59 L. J. M. C. 47; 54 J. P. 408, 38 W. R. 95; 61 L. T. 594; 16 Cox C. C. 715—C. R.) followed.

*Reg v. Clark* ((1866) L. R. 1 C. C. 54; 12 Jur. (N.S.) 946; 36 L. J. M. C. 16, 15 W. R. 48, 15 L. T. (N.S.) 190) disapproved.

HELD ALSO—that the Court had power to allow the appellant to withdraw his plea of guilty at any time before, though not after, judgment.

*REX v. PLUMMER*, [1902] 2 K. B. 339, 71 [L. J. K. B. 805; 66 J. P. 647, 86 L. T. 836, 18 T. L. R. 659, 51 W. R. 137; 20 Cox C. C. 243—C. C. R.]

**127. Prisoners Indicted Together—Some Found Guilty, Some Acquitted—Repugnancy.**—Two railway guards, a porter, and cattle-dealers were indicted for conspiracy to defraud a railway company. The two guards abstracted used but unexpired return half-tickets from a locked box in the guards' van; the porter sold these tickets to the cattle-dealers at prices greatly below the ordinary fares.

HELD—that all were rightly included in one indictment for conspiracy, and that a finding that some but not all conspired is good, and not repugnant.

*REG. v. QUINN AND OTHERS*, (1899) 19 Cox C. C. [78—FitzGibbon, L.J.]

**(h) Cruelty to Children.**

*See also* MANSLAUGHTER.

**128. Attendance of Child in Court—When Necessary—Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 16.**—Sect 16 of the Prevention of Cruelty to Children Act, 1894, does not mean that in all prosecutions for cruelty to a child, such child must necessarily be present in Court, except in the particular circumstances provided for by the section.

It only applies where the child is capable of giving evidence, and where its attendance is desired for that purpose.

*REX v. HALE*, [1905] 1 K. B. 126, 74 L. J. K. B. [65, 69 J. P. 83; 53 W. R. 400; 91 L. T. 839, 21 T. L. R. 70, 3 L. G. R. 40; 20 Cox C. C. 739—C. C. R.]

**129 Evidence—Children under Sixteen—Certificate of Birth—Proof of Age—Custody or Charge of Child.**—Whether a person has the custody, charge, or care of a child is a question of fact, the age of a person may be proved by any lawful evidence; the production of a certificate of registration of birth is not, therefore, essential in cases where the age of a person is to be proved.

*Scmble*, the neglect made penal by the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41) s. 1 is wilful neglect.

*REG v. COX*, [1898] 1 Q. B. 179; 18 Cox, C. C. [672, 67 L. J. Q. B. 293; 77 L. T. 534; 14 T. L. R. 132—C. C. R.]

**130. Evidence of Neglect Antecedent to Dates Specified in Indictment—Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 18 (4).**—The defendants were indicted for neglecting their children between the 9th of November, 1900, and the 9th of April, 1901. Evidence was tendered on behalf of the prosecution of neglect before the above-mentioned dates, but was not admitted.

*REX v. MILLER AND ANOTHER*, (1901) 65 J. P. [313—Phillimore, J., C. C. Ct.]

**131. Guardianship—Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 6—Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15)—Revocation of Order—Costs.**—When a criminal court revokes an order as to the custody of children made under the Prevention of Cruelty to Children Act it has no power as to costs.

*RE O'HALLORAN*, (1906) 70 J. P. 8—Qr. Sess.

**132. “Parent” — Father of Illegitimate Child—Person Presumed to have the Custody of the Child—Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), ss. 1, 23.**—The respondent, who was the father of an illegitimate child, was charged by the appellant, under sect. 1 of the Prevention of Cruelty to Children Act, 1894, with wilfully neglecting and abandoning it. The mother

**Specific Offences—Continued.**

of the child had died more than a year before the trial without having taken bastardy proceedings against him, nor had he the actual custody, charge, or care of the child.

**HELD**—that the respondent was not the legal "parent" of the illegitimate child within the provisions of sect. 23, sub-sect. 1, of the Act, and that he was not therefore responsible or liable under sect. 23, sub-sect. 3, of the Act, as being presumed to have the custody of the child for the child's maintenance.

**BUTLER v. GREGORY**, (1902) 18 T. L. R. 370—  
[Div. Ct.]

**133. Procedure—Retrospective Operation of Amending Statute—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5—Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 27.**—By the Criminal Law Amendment Act, 1885, s. 5, it is provided that no prosecution shall be commenced for an offence under sub-sect. (1) of that section more than three months after the commission of the offence.

By sect. 27 of the Prevention of Cruelty to Children Act, 1904, which came into operation on October 1st, 1904, it is enacted that the limit of time mentioned in the above proviso shall be six months after the commission of the offence.

The defendants each committed an offence within the sub-section on a day less than three months before October 1st, 1904. In each case the prosecution was commenced after October 1st, 1904, and more than three months but less than six months after the commission of the offence.

**HELD**—that the amendment of the time limit was retrospective, and that the defendants were properly convicted.

**REX v. CHANDRA DEARMA, R. v. HUTCHINSON, [R. v. SLATER; R. v. COURT]**, [1905] 2 K. B. 335; 74 L. J. K. B. 450; 69 J. P. 198; 53 W. R. 431; 92 L. T. 700; 21 T. L. R. 353—  
C. C. R.

**134. "Wilfully"—"Neglect"—Meaning of—Prevention of Cruelty to Children Act, 1894, s. 1 (1).**—"Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. "Neglect" is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind. The standard of neglect varies as time goes on, and many things may be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation; regard must be had to the habits and thoughts of the time.

**REG. v. SENIOR**, [1899] 1 Q. B. 283; 68 [L. J. Q. B. 175; 63 J. P. 8; 47 W. R. 367; 79 L. T. 562; 15 T. L. R. 102; 19 Cox, C. C. 219—C. C. R.]

**(i) Disorderly Houses.**

**135. Brothel—Block of Flats—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13 (3).**—The appellant was employed by the owner as the porter in charge of a block of eighteen flats, among the tenants of which were twelve women who were in the habit of bringing men to them for the purpose of prostitution. The appellant knew the purpose for which the women used the premises, and was convicted under sect. 13 (3) of the Criminal Law Amendment Act, 1885, of being wilfully a party to the continued use of the premises or part thereof as a brothel.

**HELD**—that, as it was open to the magistrate upon the evidence to find that it was not a case of each single flat being used for prostitution by one woman who was the tenant of it, but of the building as a whole being used as a brothel, the conviction was right.

**Singleton v. Ellison** ([1895] 1 Q. B. 607; 64 L. J. M. C. 123; 59 J. P. 119; 72 L. T. 236; 43 W. R. 426; 18 Cox, C. C. 79—Div. Ct.) considered.

**DUROSE v. WILSON**, (1907) 71 J. P. 263; 96 [L. T. 645—Div. Ct.]

**136. Keeping a Brothel after a Previous Conviction—Procedure—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13.**—Where a defendant is indicted under sect. 13 of the Criminal Law Amendment Act, 1885, for keeping a brothel after a previous conviction for a similar offence, proof of such previous conviction should not be given until the jury have found the defendant guilty of the subsequent offence.

**REX v. HUBERTY**, (1906) 70 J. P. 6—Common [Serjeant, C. C. Ct.]

**(j) Embezzlement.**

**137. By Trustee—Evidence—Statement of Affairs made by Trustee in Bankruptcy—Admissibility—"In any Compulsory Examination"—Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 80, 85—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27, sub-s. 2.**—A prisoner was charged under sect. 80 of the Larceny Act, 1860, with the misappropriation of trust funds, and in order to prove that charge the statement of affairs made by him in the course of his bankruptcy under sect. 16 of the Bankruptcy Act, 1883, was tendered as evidence against him of the receipt of moneys by him.

**HELD**—that such statement of affairs was not a statement made by him "in any compulsory examination . . . before any Court on the hearing of any matter in bankruptcy" within the meaning of sect. 27, sub-sect. 2, of the Bankruptcy Act, 1890, and such statement was, therefore, admissible in evidence against the prisoner.

**REX v. PIKE**, [1902] 1 K. B. 552; 71 L. J. K. B. [287; 66 J. P. 296; 50 W. R. 672; 86 L. T. 205; 18 T. L. R. 285; 9 Manson, 121; 20 Cox, C. C. 164—C. C. R.]

## Specific Offences—Continued

138. *By Trustee — Indictment — Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 80.*—In an indictment against a person under sect. 80 of the Larceny Act, 1861, for fraudulently disposing of trust property, it is sufficient to allege that such person was a trustee; it is not necessary to allege that he was a trustee on some express trust created by some instrument in writing.

REG. v. PIPER, (1902) 65 J. P. 10—Ridley, J.,  
[C. C. Ct.]

139. *Indictment Charging Embezzlement of Money—Evidence Consistent with Embezzlement of either Money or Goods.*—Upon an indictment for embezzling money belonging to his employers a defendant cannot be convicted of embezzling goods belonging to his employers; the defendant is therefore entitled to ask any question tending to show that missing goods have never been converted into money, and that therefore there has not been any embezzlement of money.

If in such a case there is no evidence that the goods have been converted into cash, the Judge ought not to leave the question to the jury whether the goods have been converted into cash, for them to arrive at a conclusion by mere guess-work.

REG. v. CLARKE, (1905) 69 J. P. 150—Div. Ct.

140. *Receipt of Money by Servant in Paris for Employer in London—Omission by Servant to Enter such Receipt on Slips sent to London—Book kept in London from such Slips—Confession in London of Appropriation.*—The prisoner was employed at a branch shop in Paris by a firm of tailors, whose head office was in London. It was part of his duty to receive money in Paris on account of his employers, and to pay such money into a Paris bank to the credit of his employers. His duty then was to enter on slips an account of every sum so received, and to transmit these slips by post to London. From these slips entries were made in London, as the prisoner knew, in a book which was kept for the purpose of showing all the sums received and paid by the prisoner in Paris for his employers.

The prisoner received money in Paris for his employers and appropriated it to his own use. He omitted to enter the receipt of this money on the above-mentioned slips, and did not account for the same to his employers. He subsequently came to London and confessed to the misappropriation.

HELD—that the Court had no jurisdiction to try the prisoner for embezzlement.

REG. v. OLIPHANT, (1905) 69 J. P. 175—  
[Commissioner, C. C. Ct.]

*And see No. 143, infra.*

## (k) Falsification of Accounts.

141. *Document not Belonging to, or in*

*Possession of, Employer—Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24).*—An indictment under the Falsification of Accounts Act, 1875, alleged that the defendant, a servant, did make and concur in making a false entry in a certain account, but there was no allegation that that account belonged to or was in the possession of his employer or that it had been received by the defendant for or on behalf of his employer. The account was in fact the servant's own property.

HELD—that a conviction could not be sustained.

Decision of Q. Sess. (69 J. P. 400) reversed.

REG. v. PALIN, [1906] 1 K. B. 7; 75 L. J. K. B. [15; 69 J. P. 423; 54 W. R. 396; 93 L. T. 673; 22 T. L. R. 41—C. C. R.]

142. *Intent to Defraud—A Question for the Jury—Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24).*—On a charge under the Falsification of Accounts Act, 1875, the question of intent to defraud must be left to the jury. So where the tendency of a summing-up was to withdraw from the jury the consideration of the circumstances bearing on the question of intent to defraud, the conviction was quashed.

REG. v. DREWETT, (1905) 69 J. P. 37; 21 T. L. R. [164—C. C. R.]

143. *Jurisdiction—Offence, where committed—Entries made in Book in London by Employer from Slips sent by Servant in Paris—Omission by Servant from Slips of Sums Received by him for his Employers—Liability of Servant to Conviction for Omitting and Concurring in Omitting from such Book — Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24)*—The defendant was employed at a branch shop in Paris by a firm of tailors whose head office was in London. It was part of his duty to receive money in Paris on account of his employers and to pay such money into a Paris bank. His duty then was to enter on slips an account of every sum so received and to transmit these slips by post to London.

From these slips entries were made in London, by one of the defendant's employers, in a book which was kept for the purpose of showing all the sums received and paid by the defendant in Paris for his employers. The defendant knew this book was so kept and that items omitted from the slips would be omitted from the book.

The defendant received three sums of money in Paris on behalf of his employers, and, in pursuance of a scheme of fraud, appropriated these sums to his own use, and fraudulently omitted from the slips sent to London the receipt of these sums, intending that they should be omitted from the above-mentioned book kept in London, and thereby caused the receipt of such sums to be omitted from such book.

**Specific Offences—Continued.**

**HELD**—that the defendant was rightly convicted of omitting and concurring in omitting these sums from such book so kept in London.

**REX v. OLIPHANT**, [1905] 2 K. B. 67, 74 L. J. K. B. 591; 53 W. R. 556, 69 J. P. 230; 21 T. L. R. 416, 94 L. T. 824; 21 Cox C. C. 192—C. C. R.

*And see No. 140, supra.*

**144. Rate Collector—Balance in Hand—“False Entry”—Falsification of Accounts Act**, 1875 (38 & 39 Vict. c. 24), s. 1.]—The defendant, a rate collector, kept for the overseers a set of books which showed the state of accounts as between the overseers and the parish authorities. In one of these books, called the overseers' receipt and payment book, he made an entry.—“25th of March, 1898. Balance in hand, £131 10s. 5d.” That sum was the correct balance, for which the overseers were responsible to the parish, and ought to have been in the possession of the defendant, but was not. He was unable to produce the amount. He was indicted for the falsification of the overseers' receipt and payment book by making the above entry.

**HELD**—that the above entry in that book was not a “false entry” within the meaning of the Falsification of Accounts Act, 1875.

**REG. v. WILLIAMS**, (1899) 63 J. P. 103; 79 L. T. 739, 15 T. L. R. 158; 19 Cox C. C. 239—C. C. R.

**(l) Forgery.**

**145. Bank Note—“Body Corporate”—Forgery Act**, 1861 (24 & 25 Vict. c. 98), ss. 17, 19.]—The prisoner was indicted under sect. 17 of the Forgery Act for having in his possession certain plates for the impressing of a bank note of a certain body incorporate—to wit, the National Bank of the South African Republic.

**HELD**—that sect. 17 did not necessarily refer only to a body corporate established in this country, and that the prisoner was liable to be indicted under that section.

**REG. v. AUFFRET**, (1898) 62 J. P. 521—C. C. Ct.

**146. Punishment—Power to Impose Hard Labour—“Any Cheat or Fraud Punishable at Common Law”—Criminal Procedure Act**, 1851 (14 & 15 Vict. c. 100), s. 29.]—The prisoner was indicted for a common law forgery. There was no allegation in the indictment that the prisoner obtained any money or other property by means of the forgery with which he was charged. It was sought to bring the case within sect. 29 of the Criminal Procedure Act, 1851.

**HELD**—that the prisoner could not have imposed on him a sentence of imprisonment with hard labour upon a conviction on the indictment as if he had been convicted of “any cheat or fraud punishable at common law” under sect. 29 of the Criminal Procedure Act, 1851.

**REX v. HAMILTON**, [1901] 1 Q. B. 740; 70 [L. J. K. B. 480; 65 J. P. 265; 49 W. R. 575; 84 L. T. 332; 17 T. L. R. 401; 19 Cox C. C. 675—C. C. R.

**147. “Record”—Official Document of a Court of Competent Jurisdiction—Register of Ordinations—Forgery Act**, 1861 (24 & 25 Vict. c. 98), s. 28.]—The 28th section of the Forgery Act, 1861, deals with Courts both of record and not of record, but applies to official documents of a Court—i.e., documents which are records of a Court of competent jurisdiction (whether of record or not), and to be intended to cover records—not necessarily connected with litigation—kept as records for the purpose of a Court.

The register of ordinations is not the record of a Court, but only of the bishop, and does not come within the 28th section.

**REX v. ETHERIDGE**, (1902) 19 Cox C. C. 676—[Kennedy, J.]

**148. Transposing and Removing Dies—Intention to Defraud an Ingredient of Offence—Gold and Silver Wares Act**, 1844 (7 & 8 Vict. c. 22), s. 2.]—By sect. 2 of the Gold and Silver Wares Act, 1844, “Every person who shall transpose or remove . . . any mark of any die or other instrument provided or used, or to be provided or used, as aforesaid, from any ware of gold or silver to any other ware of gold or silver or to any ware of base metal,” shall be guilty of felony, &c.

**HELD**—that an intention to defraud is not an ingredient of the offence.

**REX v. SPITTLE AND ANOTHER**, (1902) 18 T. L. R. 436—Bigham, J., Birmingham Assizes.

**(m) Housebreaking Implements, Possession of.**

**149. Found by Night—Larceny Act**, 1861 (24 & 25 Vict. c. 96), s. 58.]—Two prisoners were watched from five o'clock in the morning until seven o'clock. At seven o'clock they were seen to attempt to break and enter a shop. They were followed, without being lost sight of, and were given into custody. Housebreaking implements were found upon B., and he was indicted under sect. 58 of the Larceny Act, 1861, for being found by night—i.e., between 9 p.m. and 6 a.m.—having in his possession, without lawful excuse, implements of housebreaking.

**HELD**—that B. was liable under this section.

**Thomas v. Powell** ((1893) 57 J. P. 329—Div. Ct.) followed.

**REX v. STEVENSON AND ANOTHER**, (1905) 69 J. P. 84—Q. Sess.

**150. Linen with Sticky Substance on it—Stone—Larceny Act**, 1861 (24 & 25 Vict. c. 96), s. 58.]—A stone and a piece of linen with treacle on it, such linen being used by housebreakers for the purpose of preventing noise

**Specific Offences—Continued.**

from broken glass, may each of them be "implements of housebreaking" within the meaning of sect. 58 of the Larceny Act, 1861.

REG. v. PERCIVAL AND ANOTHER, (1905) 69 J. P. [320—Q. Sess.]

**(a) Larceny.**

151. "*Animals Kept in a State of Confinement*"—*Ferrets—Resistance by Thief to Lawful Apprehension — Murder — Larceny Act, 1861 (21 & 25 Vict. c. 96), ss. 21, 22.*—Ferrets are animals "kept in a state of confinement" within the meaning of sects 21, 22 of the Larceny Act, 1861. *Semble*, therefore, persons found by a constable in possession of a ferret, known by them to be stolen, and resisting apprehension, may be convicted of murder if their resistance causes his death.

REG. v. SHERRIFF AND OTHERS, (1904) 20 Cox, C.C. [334—Darling, J.]

152. *Debts Collected on Commission—Failure to Account or Pay over Sums Received—Larceny Act, 1901 (1 Edw. 7, c. 10)*—The defendant was employed by the prosecutors to collect debts due to them from customers. His duty was to collect the money and pay it over to the prosecutors, less five per cent. for his own remuneration. He collected various sums, but did not pay them over or account for the same to the prosecutors, but fraudulently converted them to his own use.

HELD—that the defendant was properly convicted under the Larceny Act, 1901.

R. v. *Hotine* ((1904) 64 J. P. 143, No. 179, *infra*), considered.

REG. v. LORD, (1905) 69 J. P. 467—C. C. R.

153. *Director of Company—"Being a Director"—Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 81, 83*—To convict a person of offences as a director of a public company within sects. 81 and 83 of the Larceny Act, 1861, it is not enough to prove that such person acted as a director of the company, it must be proved that he was properly appointed such director.

REG. v. ATKINS, (1900) 64 J. P. 361—The [Recorder, C. C. Ct.]

154. *False Pretences — Competitor in Handicap Foot-race—False Statements as to Previous Performances—Attempt to obtain Prize—Remoteness.*—The defendant was convicted of attempting to obtain prizes for foot-races by false pretences. At the trial it was proved that entries for two races at an athletic meeting were made in the name of one Sims, and that such entries contained correct statements as to the recent performances of Sims as a runner, including a statement that he had never won a race. The entries were not written either by Sims or by the defendant. At the meeting the defendant

ran in the races in the name of Sims. By reason of the statements in the entries he obtained long starts, and won both races. He was, in fact, a superior runner and a previous winner. After the races he falsely stated, in reply to questions put to him by the handicapper, that he really was Sims, and that the statements in the entries were true statements as to his performances. He did not apply to have the prizes handed over to him.

HELD—that there was evidence for the jury of an attempt to obtain the prizes by false pretences, and that the attempt was not too remote from the pretence, and that the defendant was properly convicted.

REG. v. *Larner* ((1880) 14 Cox, C. C. 497—The Common Serjeant) disapproved.

REG. v. BUTTON, [1900] 2 Q. B. 597; 69 [L. J. Q. B. 901; 64 J. P. 600; 48 W. R. 703; 83 L. T. 288; 16 T. L. R. 525—C. C. R.]

155. *False Pretences—Evidence—Contract for Sale—Deposit—Balance by Worthless Cheque—Parting with Property and Possession.*—The prosecutor agreed to sell some iron to the defendant for £1 17s. Ten shillings was paid on account, and the balance was agreed to be paid when the iron was taken away. Next day the defendant, accompanied by another man, brought a pony and cart. The defendant and his assistant proceeded to load the iron on to the cart. During the loading the defendant went indoors, and after some conversation gave the prosecutor a cheque for the balance, £1 7s. The prosecutor and defendant then came out of the house, and found that the defendant's assistant had completed the loading, and that the cart had just reached the public road. The defendant then left, taking the iron. The cheque was subsequently dishonoured. The defendant was indicted for obtaining the iron by false pretences.

HELD—that there was evidence on which the jury could find (1) that the parties intended that the iron should remain the prosecutor's property until the whole of the purchase-money was paid; and (2) that the prosecutor had not parted with the possession or control of the iron when the cheque was given, and (3) that the prosecutor parted with the iron in the belief that the cheque was good and genuine.

REG. v. COSNETT, (1901) 65 J. P. 472; 49 W. R. [633; 84 L. T. 800, 17 T. L. R. 524—C. C. R.]

156. *False Pretences—Evidence of Misrepresentation—Obtaining Goods by False Pretences—Obtaining Credit by Fraud—24 & 25 Vict. c. 96, s. 88—32 & 33 Vict. c. 62, s. 13*—Misrepresentation, either by word or by conduct, is a necessary element in the offence of obtaining goods by false pretences. Evidence, therefore, that a person indicted under 24 & 25 Vict. c. 96, s. 88, for this offence, obtained goods from an intending vendor, being without the means of paying

*Specific Offences—Continued.*

for such goods, and with the intention of defrauding the owner, but without making any representation either as to his ability to pay or his intentions, is not sufficient to support a conviction for obtaining such goods by false pretences. Nor, since the owner intended to part with the property in the goods, is it sufficient to support a conviction for larceny. But such evidence is sufficient to support a conviction for obtaining credit by fraud on an indictment under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13. A vendor who delivers goods on the terms that they are to be paid for immediately after they have been received gives credit to the purchaser.

REG. v. JONES (WILLIAM), [1898] 1 Q. B. 119; [67 L. J. Q. B. 41; 77 L. T. 503; 14 T. L. R. 79; 46 W. R. 191; 19 Cox, C. C. 87—C. C. R.]

157. *False Pretences—Evidence of Similar Offences—Evidence of Subsequent Attempt to Obtain Chattels—Admissibility.*—The defendant was indicted for obtaining certain furniture by false pretences from a furniture dealer in Brighton between October 14th and 17th.

Evidence was given that the defendant a few days afterwards obtained other goods from another Brighton tradesman by means of false pretences the same as, or similar to, those charged in the indictment.

HELD—that the evidence was admissible as it appeared that it really related to one transaction and was all part of the same system of fraud.

REG. v. SMITH, (1905) 69 J. P. 51; 92 L. T. 208, [20 Cox, C. C. 804—C. C. R.]

158. *False Pretences—Evidence of Similar Acts—Obtaining Credit under False Pretences and by means of Other Fraud—Evidence of Credit Obtained from Other Persons Previously—Admissibility.*—The defendant was charged that he, in incurring a debt and liability to a person who let apartments, unlawfully did obtain credit for the amount of the debt and liability under false pretences and by means of fraud other than false pretences. Evidence was admitted of other cases in which the defendant had shortly before obtained apartments at other houses and had left owing money.

HELD—that the evidence was admissible as tending to establish a system and negating accident or mistake.

REG. v. WYATT, [1904] 1 K. B. 188; 73 L. J. K. B. [15, 68 J. P. 31; 52 W. R. 285; 20 T. L. R. 68; 20 Cox, C. C. 462—C. C. R.]

159. *False Pretences—Evidence of Similar Offences—Part of Scheme of Fraud.*—Defendant had obtained eggs from one B. by false pretences that he was honestly carrying on the business of a farmer or dairy-

man, and had advertised for a considerable time in various newspapers his wants for eggs. E. and C. were called, as well as B., for the prosecution, to prove that they also had acted on the same advertisement, and had supplied eggs to the defendant in separate transactions of a similar nature to that between the defendant and B. and had been defrauded.

HELD—that the evidence was admissible on the ground that it showed part of a scheme to defraud persons by the pretence of carrying on an honest and *bonâ fide* business.

REG. v. RHODES, [1899] 1 Q. B. 77; 68 [L. J. Q. B. 83; 62 J. P. 774; 47 W. R. 121; 79 L. T. 360; 15 T. L. R. 37; 19 Cox, C. C. 182—C. C. R.]

160. *False Pretences—Evidence—Person to whom False Pretence made.*—The defendant was an officer of the court of the Ancient Order of Foresters. His duties were to visit applicants for sick pay, and, if satisfied that they were entitled to receive sick pay, to put their names down on a list, which was given to the secretary. From this list the secretary made out orders on the treasurer authorizing him to pay the sum named therein. The defendant would then take these orders to the treasurer, and would receive the amounts therein specified. Sometimes the defendant would receive the money from the treasurer at once, but in such cases the secretary's order would be obtained subsequently and handed to the treasurer.

A member named Bennett owed the defendant £3. Bennett was not entitled to any sick pay, nor did he make any application for any sick pay, but the defendant obtained two sums of £1 each from the treasurer as sick pay for Bennett, and applied such sums as part satisfaction of the amount due to him from Bennett. He was indicted for obtaining these two sums by means of a false pretence made to the treasurer.

HELD—that there was evidence, on which the jury might convict, of a false pretence made by the defendant to the treasurer.

REG. v. TAYLOR, (1901) 65 J. P. 457; 49 W. R. [671; 17 T. L. R. 523—C. C. R.]

161. *False Pretences—Evidence—Two Indictments—Acquitted on First—Evidence of Prosecutor on First Indictment on Trial of Second Indictment—Admissibility—Relevancy.*—The defendant was indicted for obtaining money on the 5th of July from R. by means of a worthless cheque. He was acquitted upon this indictment.

He was then indicted for obtaining money on the 24th and 26th of June, and on the 6th of July, from other persons by means of other worthless cheques on the same bank. Upon this indictment R. was again called as a witness, and repeated the evidence he had given on the first-mentioned indictment, as to the false pretences made to him on the 5th of July.

**Specific Offences—Continued.**

**HELD**—that R.'s evidence was not inadmissible by reason of the fact that the defendant had already been acquitted on the charge founded upon that evidence.

**HELD FURTHER** (diss. Bruce and Ridley, JJ.)—that R.'s evidence was relevant on the second indictment.

**REG. v. OLLIS**, [1900] 2 Q. B. 758; 69 L. J. Q. B. [918, 64 J. P. 518; 49 W. R. 76; 83 L. T. 251; 16 T. L. R. 477—C. C. R.

**162. False Pretences—Evidence—Previous Acts—Obtaining Credit by Means of Fraud other than False Pretences—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13—Evidence of Credit obtained from other Persons—Admissibility.**—The defendant was charged that he, in incurring a debt and liability to a person who let apartments, unlawfully did obtain credit for the amount of the debt and liability by means of fraud other than false pretences. Evidence was admitted of other cases in which the defendant had shortly before obtained credit from persons letting houses or apartments, and also from a tradesman for goods supplied.

**HELD**—that the evidence was admissible as tending to establish a system and to negative accident or mistake.

**R. v. Wyatt** ([1904] 1 K. B. 188; 73 L. J. K. B. 15; 68 J. P. 31; 52 W. R. 285; 20 T. L. R. 68; 20 Cox, C. C. 462—C. C. R., No. 158, *supra*) followed.

**REX v. WALFORD**, (1907) 71 J. P. 215—C. C. R.

**163. False Pretences—Palmistry—Evidence—Witchcraft Act, 1736 (9 Geo. 2, c. 5), s. 4.**—The defendants were indicted under the Witchcraft Act, 1736, and also for attempting to obtain money by falsely pretending that they had power and ability to foretell future events, and that the examination of the palms of the hands of persons enabled them to foretell future events which would thereafter happen to such persons.

**HELD**—that evidence that one of the defendants used crystal balls and professed to be able by gazing into the balls to foresee future events was admissible, but that evidence that palmistry was a well-recognised science was not admissible.

**REX v. STEPHENSON**, (1904) 68 J. P. 524—[Q. Sess.]

**164. Fraudulent Misappropriation—Agent—“Banker, Merchant, Broker, Attorney, or other Agent”—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 75.**—The words “or other agent” in sect. 75 of the Larceny Act, 1861, do not apply to any person who happens to act on behalf of another; they apply only to agents of the class indicated in the preceding words of the section, “banker, merchant, broker, attorney.”

**Reg. v Portugal** ((1885) 16 Q. B. D. 487; 55 L. J. Q. B. 567; 50 J. P. 501; 34 W. R. 42—Div. Ct.) followed.

**REG. v. KANE**, [1901] 1 Q. B. 472; 70 L. J. Q. B. [143; 65 J. P. 26; 84 L. T. 240; 17 T. L. R. 181; 19 Cox, C. C. 658—C. C. R.

*And see* No. 166, *infra*.

**165. Fraudulent Misappropriation—Evidence—Account with Bank Fraudulently Obtained—Bank Director—Overdraft.**—The person convicted, a director of a bank, for a period of some years—from 1887 to 1893—was in the habit of drawing partly upon his own private account and partly on an account which was called a trust account, but still in his name, and from time to time that account was operated upon in the ordinary and natural way in which the account of a customer of a bank is treated. Money was paid in and money was paid out, at one time a very large overdraft—for the purpose of the purchase of shares—and at another time that overdraft was reduced to an amount of something like £300 or £400 down to the period of two or three years after the trust account had first begun. The Board was not consulted.

**HELD**—that there may have been ample evidence that the account was improperly obtained, and in one sense fraudulently obtained; that there was not evidence justifying the charge against the defendant of having fraudulently appropriated to his own use money of the bank; and that the conviction should be set aside.

**NELSON v. REX**, [1902] A. C. 250; 71 L. J. P. C. [55; 86 L. T. 164; 20 Cox, C. C. 150—P. C.

**166. Fraudulent Misappropriation—Intrusted as Agent with Banker's Cheque—“Direction in Writing to Apply”—Receipt by Defendant—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 75.**—The prosecutrix handed a cheque to the defendant with verbal instructions to apply the proceeds to an application for shares in a certain railway, and in the event of such shares not being obtainable to return the money to her. The defendant gave the prosecutrix a receipt, made out and signed by him, in which it was stated that the money was to be applied to the application for the shares in the railway, or to be returned if the shares were not obtainable.

**HELD**—that this receipt given by the defendant was a “direction in writing” within the meaning of sect. 75 of the Larceny Act, 1861.

**REG. v. KANE**, (1901) 65 J. P. 9—Ridley, J., [C. C. Ct.]

*And see* No. 164, *supra*.

**167. Husband and Wife—Wife Stealing Husband's Goods—When Leaving or Deserting, or About to Leave or Desert—Indictment—Negating Proviso—Married Women's Property Act, 1882 (45 & 46 Vict.**

**Specific Offences—Continued.**

c. 75), ss. 12, 16.]—It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception.

A wife, while her husband had been induced by J. to accompany him to Cardiff removed certain goods from her husband's house and deserted him, and subsequently joined J., in whose possession the goods were found. She and J were indicted by her husband for larceny. The indictment did not aver that she was the wife of her husband and that she had taken the goods when leaving or deserting, or about to leave or desert, her husband.

**HELD**—that sects. 12 and 16 of the Married Women's Property Act, 1882, must be read together, and the enacting clause in sect. 12, when read in connection with sect. 16, made the wife liable to criminal proceedings by her husband, subject to the proviso contained in the latter portion of sect. 12; that the conditions imposed by that proviso did not affect the quality or character of the offence, but they merely introduced matters which might be pleaded by way of defence and were not matters necessary to be negatived in the indictment, and that the indictment was good, though it did not aver the matters mentioned above.

**REX v. JAMES**, [1902] 1 K. B. 540; 71 L. J. K. B. [211; 66 J. P. 217; 50 W. R. 286, 86 L. T. 202; 18 T. L. R. 284; 20 Cox, C. C. 156—C. C. R

168. *Indictment—Amending—Criminal Procedure Act, 1851* (14 & 15 Vict. c. 100).—*Quære*, whether an indictment for compound larceny can be amended by striking out the words "from the person," so as to enable a jury to convict of simple larceny, there being jurisdiction to try that offence (but not the former) in a county whither the prisoner took the property previously stolen in another county.

**REX v. FENLEY AND OTHERS**, (1903) 20 Cox, [C. C. 252—Jelf, J.

169. *Indictment—No Date Alleged in Indictment—Application to Quash Indictment—Several Takings—Election.*—The prisoner was convicted of stealing a number of articles, the property of his master, during a period extending over several months. The indictment did not specify any date when the articles were alleged to have been stolen. Before trial objection was taken that the indictment ought to be quashed, as no such date was specified.

**HELD**—that it was not necessary to state any date in the indictment, though on the

trial a date for the taking must be proved, and the prosecution might have been put to their election to say upon which three cases they intended to proceed.

**REX v. NICHOLLS**, (1904) 68 J. P. 452—C. C. R.

170. *Indictment—Ownership of Property—Breaking and Entering Dwelling-house—Stealing Property Therein—Husband and Wife—Amendment.*—The defendants were indicted for breaking and entering the dwelling-house of H., and therein stealing certain goods and chattels of the said H., and in a second count they were charged with feloniously receiving the said goods and chattels. The evidence showed that the dwelling-house belonged to H., but that the goods and chattels stolen were the separate property of the wife of H. There was no evidence of any bailment of any of the said goods and chattels. After some of the defendants had given evidence, but before the verdict was given, application was made by the prosecution to amend the indictment by substituting the wife in place of the husband as owner of the said goods and chattels. This application was refused, and the defendants were convicted.

**HELD**—that the indictment was bad, though it ought to have been amended, and that the conviction must be quashed.

**REX v. MURRAY**, [1906] 2 K. B. 385; 75 [L. J. K. B. 593, 70 J. P. 295; 95 L. T. 295; 22 T. L. R. 596—C. C. R.

171. *Intent to Defraud—Making or Publishing a False Statement with Intention it should be Acted upon—Presumption of Law—Larceny Act, 1861* (24 & 25 Vict. c. 96), ss. 33, 34 ]—If a director or manager of a public company makes or publishes a false statement of account, knowing that it is false, with the intent that it shall be acted upon by those whom it reaches, he is guilty of publishing such statement with intent to defraud.

**REG. v. BIRT**, (1899) 63 J. P. 328—Ridley, J.

172. *Intention to Steal—Parting with Property in Goods without Payment—Complete Credit—Temporary Possession—Goods Stolen Outside the United Kingdom and Brought to London—Larceny Act, 1896* (59 & 60 Vict. c. 50).—The prisoners, whilst living in expensive rooms in an hotel in Paris, ordered a fur jacket to be made for one of them by the prosecutor. Before this fur jacket was delivered they ordered and received at their hotel various other fur articles. They were not asked to pay for any of these articles, but the prosecutor said that he regarded it as a cash transaction, and did not ask for payment because other goods were in order, and the transaction would not be complete till the delivery of the fur jacket. The prisoners brought the furs to London, where they were arrested, and indicted under the Larceny Act, 1896.



**Specific Offences—Continued.**

**HELD**—(1) that there was evidence of larceny according to English law; (2) that the Larceny Act, 1896, applied to a case such as this, when the property was alleged to have been stolen by the same person in whose possession it was afterwards found in England.

**REX v. GRAHAM AND ANOTHER**, (1901) 65 J. P. [248—London Qr. Sess., McConnell, K.C.

**173. Larceny by Bailee—Habeas corpus—Extradition—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 3**—[On an application for a writ of *habeas corpus* the evidence showed that a loan was raised on a bond by a person authorised so to raise the loan, and that there was a fraudulent appropriation by him of the money so raised.

**HELD**—that (following the decision of *Reg. v. De Banks* (50 L. T. 427) that amounted to evidence of larceny by a bailee under sect. 3 of the Larceny Act, 1861, and the rule was accordingly discharged.

**REG. v. HOLLOWAY PRISON (GOVERNOR OF)**, Ex [PARTE GEORGE, (1897) 18 Cox, C. C. 631, 66 L. J. Q. B. 830; 77 L. T. 247; 13 T. L. R. 583—Div. Ct.

**174. Letter Enclosing Banker's Cheque Delivered to Wrong Person—Animus furandi.**—[A letter intended to be delivered in Brighton, and addressed "Mrs. Fisher, 29, Gloucester Street," was delivered at 29, Gloucester Street, Lambeth, where the prisoner lodged. The prisoner, who was known to some persons in the name of Fisher, received the letter, and cashed a cheque that it contained.

**HELD**—that the prisoner could not be convicted of larceny of the cheque

**REG. v. FISH**, (1900) 64 J. P. 137—The [Common Serjeant, C. C. Ct

**175. Lost Property—Larceny from Finder—Constructive Possession of Finder.**—[The finder of a lost purse containing money and documents retained it, not feloniously, but in the hope of obtaining a reward, and showed it to the prisoner in order to obtain his opinion as to the amount of reward that would probably be offered. For this purpose he handed the purse and its contents to the prisoner to examine. The prisoner retained the purse and contents against the will of the finder.

**HELD**—that it was doubtful whether he could be convicted of larceny on a count where the property of the purse was laid in the owner, but that he could be convicted on a count laying the property in the finder.

**REG. v. SWINSON**, (1900) 64 J. P. 73—The [Common Serjeant, C. C. Ct.

**176. Company—"Manager" of a Public Company—Manager de facto not de jure—Liability to Conviction under sect. 84 of the**

**Larceny Act, 1861 (24 & 25 Vict. c. 96).**—[A person who is in fact the manager of a public company is liable to be convicted, as such manager, of offences under sect. 84 of the Larceny Act, 1861, although he had never been appointed manager, and the articles of association of the company contained provisions empowering the directors to appoint a manager.

**REX v. LAWSON**, [1905] 1 K. B. 541; 74 [L. J. K. B. 296, 69 J. P. 122; 53 W. R. 459; 92 L. T. 301; 21 T. L. R. 231, 20 Cox, C. C. 812—C. C. R.

**177. Master and Servant—Larceny by Servant of Fish caught by him at Sea—Reduction into Possession of Master.**—[The prisoner was employed by the prosecutors as the master of a fishing-smack engaged in making voyages from Grimsby to the North Sea and back, for the purpose of catching fish for the prosecutors, who sold the fish on the return of the vessel after each of its voyages. The prisoner had the full charge and control of the vessel during the voyages. Whilst returning to Grimsby with a cargo of fish which had been caught and deposited in the usual receptacle provided for that purpose in the hold of the vessel, the prisoner put into Bridlington harbour for the purpose of having a new trawl-net mounted. Whilst in that harbour a boat came from the shore, and by the prisoner's orders some of the fish were taken out of the hold, put into the boat, and taken ashore, where it was subsequently sold by the prisoner, who appropriated the proceeds.

**HELD**—that the fish had been reduced into the possession of the prosecutors before the prisoner took it out of the hold; and that the prisoner was properly convicted of larceny.

**REX v. MALLISON**, (1902) 66 J. P. 503; 86 L. T. [600, 20 Cox, C. C. 204—C. C. R.

**178. Misappropriation—Beneficial Owners—Co-owner—Larceny Act, 1868 (31 & 32 Vict. c. 116), s. 1.**—[Fifteen registered friendly societies appointed an amalgamated committee, consisting of two members from each society, for the purposes of a fête, such fête being outside the purposes for which the friendly societies were constituted. The members of the committee of each society guaranteed a sum towards the expenses of the fête. It was the duty of the amalgamated committee to make all arrangements as to the fête, to receive all the money derived from the sale of tickets, to pay for all the expenses of the fête out of such moneys, and then to hand over the balance in equal shares to each of the fifteen societies. This balance would then be paid by each society into a fund called the "Incidental Fund" which had no legal relation to the society, and not into the fund which properly belonged to the society, and was regulated by its registered rules. The prisoner and one M. were elected members of the amalgamated committee, and

**Specific Offences—Continued.**

were appointed respectively secretary and treasurer. After the fête M. had about £200 in hand, and, as neither he nor the prisoner had a banking account, they asked one C. to allow this money to be paid into his bank, and this was done. The prisoner afterwards, having obtained cheques from C., alleging that the money was wanted for the purposes of the committee, drew the money out of the bank, paid one or two small accounts, and absconded with the rest of the money. He was indicted for that he, being a beneficial owner with M. and others of the said money, stole the said money belonging to such beneficial owners, and in a second count with stealing the said money belonging to M. and others.

HELD—that the prisoner was properly convicted on the first count but not on the second.

REG. v. NEAT, (1900) 64 J. P. 39, 81 L. T. 680,  
[16 T. L. R. 109—C. C. R.]

**179. Money Intrusted as Security for Honesty during Employment—Larceny Act, 1901 (1 Edw. 7, c. 10).]**—The prisoner received sums of money from persons who entered his employment, as security for their honesty during their employment. He promised to repay the money to the depositors on their leaving his employment. The prisoner used the money for his own purposes, and when the depositors left his service they were unable to obtain the repayment of the sums they had deposited.

HELD—that the prisoner had not brought himself within the provisions of the Larceny Act, 1901.

REG. v. HOTINE, (1904) 68 J. P. 143—Common  
[Serjeant, C. C. Ct.]

**180. Purchase of Goods by Weight—Fraudulent Entry by Prosecutors' Servant of Less than Correct Weight—Passing of Property—Specific Goods.]**—The prisoner had for a number of years been in the habit of purchasing ashes from the prosecutors. Whenever the prosecutors had an accumulation of ashes, they sent for the prisoner, who saw the managing director and arranged verbally with him to buy as much as he required of the bulk at so much per ton. No specific quantities would be mentioned, the understanding being that the quantities purchased would be defined by the weighing. It was the duty of the weigher in the employment of the prosecutors to weigh out such ashes so sold to customers, and to enter the weight in a book in order that the customers might be charged in the books of the company with the proper weight. On the two dates charged in the indictment the weigher weighed out and delivered to the prisoner a certain weight of ashes, but in each case he entered in his book a weight that was less than the true weight of the ashes. The prisoner was a party to the fraud.

HELD—that the prisoner was properly indicted for the larceny of the balance of the ashes between the false weight so entered and the actual weight received.

REG. v. TIDESWELL, [1905] 2 K. B. 273, 74  
[L. J. K. B. 725; 69 J. P. 318; 93 L. T. 111;  
21 T. L. R. 531; 21 Cox, C. C. 10—C. C. R.]

**181. Receiving Property for or on Account of Another Person—Agreement Between Two Traders—Customers Hand Money to One Not Knowing of Other—Failure to Account According to Agreement—Larceny Act, 1901 (1 Edw. 7, c. 10), s. 1 (1) (b).]**—S. was indicted under s. 1 (1) (b) of the Larceny Act, 1901, for receiving money for or on account of the prosecutor, and fraudulently converting the same to his own use.

It appeared from the evidence for the prosecution that S., having traded as a coal dealer under a trade name, by an agreement with the prosecutor gave him the right to trade under that name. S. was to obtain orders for coal, for which he was to be paid by certain royalties or commission, paying over to the prosecutor sums received from customers, in full, twice a week. The prosecutor was to supply the coal to the customers. Business was entered into under this agreement, and S. failed to hand over and account for certain sums received from customers. It appeared that the customers knew the prisoner under the trade name which he had transferred to the prosecutor, and that they did not know the prosecutor, or that they were doing business with him.

HELD—that there was no evidence to go to the jury that S. had received the moneys for or on account of the prosecutor within (the meaning of) the sub-section.

REG. v. SOUTH, (1907) 71 J. P. 191—Common  
[Serjeant, C. C. Ct.]

**182. Receiving Stolen Property—Evidence—Other Property Found in Prisoners' Possession Stolen Subsequently to the Theft of Property Subject of Indictment—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19.]**—The prisoners were indicted for feloniously receiving property stolen on May 6th. This property, together with other property alleged to have been stolen on July 4th, in the same year, was found at the prisoners' house on July 17th by the police.

HELD—that evidence as to the stealing and finding of the property stolen on July 4th was not admissible.

REG. v. HEAD AND ANOTHER, (1904) 67 J. P.  
[459—Qr. Sess.]

**183. Receiving Stolen Goods—Property Stolen by a Wife from Her Husband—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16.]**—An indictment under sect. 91 of the Larceny Act, 1861, does not lie against a person for feloniously receiving goods stolen by a wife from her husband.

**Specific Offences—Continued.**

*Per Wright, J.*—but in future cases it seems that there might be an indictment for receiving at common law.

*Reg. v. Smith* (1870) L. R. 1 C. C. R. 206, 39 L. J. M. C. 112; 34 J. P. 484; 18 W. R. 932, 22 L. T. (N.S.) 554; 11 Cox C. C. 511—C. C. R.) followed.

*Reg. v. STREETER*, [1900] 2 Q. B. 601; 69 [L. J. Q. B. 915; 64 J. P. 537; 48 W. R. 702, 83 L. T. 288; 16 T. L. R. 526—C. C. R.

184. *Receiving Stolen Property—Receiving Property Feloniously Stolen by a Wife from her Husband — Indictment — Married Women's Property Act, 1882* (45 & 46 Vict. c. 75), ss. 12, 16—*Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 91.]—Theft by a woman from her husband (though a criminal offence under the Married Women's Property Act, 1882) is not a felony either at common law or by virtue of the Larceny Act, 1861:

Therefore the receiving of goods so stolen is not a felony by virtue of sect. 91 of the Larceny Act. It is, and is indictable as, a misdemeanour. It is better, though not necessary, to allege on the indictment that the goods belonged to the husband and had been stolen from him by his wife.

*REX v. PAYNE*, [1906] 1 K. B. 97; 75 L. J. K. B. 114, 70 J. P. 28, 54 W. R. 200; 94 L. T. 288, 22 T. L. R. 126; 21 Cox, C. C. 121—C. C. R.

185. *Receiving Stolen Property — Stolen Property Found in Prisoner's House—Prisoner not seen in House—For the Jury to say Whether it was there with his Knowledge and Sanction — Possession.*]—Where stolen property is found in a man's house it is a question of fact for the jury, on the man being indicted for feloniously receiving the property, whether it was found in his possession, that is to say, whether it was in his house with his knowledge and sanction.

*REG. v. SAVAGE*, (1906) 70 J. P. 36—Recorder [of London, C. C. Ct.

186. *Shooting Pigeons—Unlawfully Killing Tame Pigeons—Right of any Person other than Owner to Prosecute—Larceny Act, 1861* (24 & 25 Vict. c. 96), s. 23.]—Any person may prosecute an offender under sect. 23 of the Larceny Act, 1861, for unlawfully and wilfully killing a house pigeon under such circumstances as do not amount to larceny at common law; the right is not limited to the owner of the pigeon, or the person aggrieved; and it is immaterial that compensation has been paid to the owner, and the owner is satisfied with such compensation, and does not desire a prosecution.

*SMITH v. DEAR*, (1903) 67 J. P. 244; 83 L. T. [664; 20 Cox, C. C. 453—Div. Ct.

187. *Stealing and Receiving—Evidence—Other Property Stolen within Twelve Months found in the Possession of the Person Charged — Prevention of Crimes Act,*

1871 (34 & 35 Vict. c. 112), s. 19—*Admissibility—Withdrawal of such Evidence from Jury.*]—Where a person is indicted for stealing and receiving certain property, evidence, under the Prevention of Crimes Act, 1871, that there was found in the possession of such person other property, stolen within the preceding period of twelve months, ought not to be admitted if the substantial charge is stealing and not receiving.

It is essential to prove that such other property was in fact stolen; and evidence as to it properly admitted in the first instance either under the Prevention of Crimes Act, 1871, or to negative the defence of accident, ought to be withdrawn by the Judge from the consideration of the jury if the prosecution fails to prove that such property so found was stolen property.

*REX v. GIRON*, (1906) 70 J. P. 514; 22 T. L. R. [720—C. C. R.

188. *Stealing and Receiving—Evidence—Previous Conviction—Proof of Previous Conviction involving Fraud—Admissibility*]—On a charge of stealing and receiving proof having been given of part of the stolen property being found in prisoner's possession,

*HELD*—that a previous conviction for an offence involving fraud within five years might be proved upon due notice.

*R. v. Jones* ((1877) 14 Cox, C. C. 3) applied.

*REX v. BROMHEAD*, (1907) 71 J. P. 103—C. C. R.

*And see No. 37, supra.*

189. *Unlawful Possession—Deer — Deer killed outside Forest—"Came lawfully by such Deer"—Larceny Act, 1861* (24 & 25 Vict. c. 96), ss. 12, 14.]—The appellant was convicted by justices under sect. 14 of the Larceny Act, 1861, they holding that he had not, under the circumstances, satisfied them that "he came lawfully by such deer" within the meaning of sect. 14.

The deer in question was proved to have been one of a herd kept within a forest, which had escaped therefrom, and was killed by the appellant outside the boundaries of the forest upon land not belonging to the appellant.

*HELD*—that the justices were wrong; that the act done by the appellant was not, under the circumstances, done "unlawfully" within the meaning of sects. 12 or 14 of the Larceny Act, 1861.

*THEBKELED v. SMITH*, [1901] 2 K. B. 531; 70 [L. J. K. B. 921; 85 L. T. 275; 17 T. L. R. 612; 50 W. R. 158—Div. Ct.

190. *Venue in Compound Larceny—Indictment for Compound Larceny—No Power to Convict of Simple Larceny—Amending Indictment—Larceny Act, 1861* (24 & 25 Vict. c. 29), s. 40—*Criminal Procedure Act, 1851* (14 & 15 Vict. c. 100)]—The venue in simple larceny may be laid either in the county

**Specific Offences—Continued.**

where the larceny was committed, or another county into which the thief carried the stolen goods, in compound larceny it must be laid in the county where the larceny was committed.

Upon an indictment for compound larceny a jury cannot convict of simple larceny; and *quære* whether the indictment can be amended by striking out the words "from the person."

So, a prisoner was acquitted at Gloucester upon a charge of "larceny from the person" at Swindon in Wiltshire.

REX v. FENLEY AND OTHERS, (1903) 20 Cox, C. C. [252—Jelf, J]

**(o) Malicious Damage.**

See also FISHERIES.

191. *Act Wilful but not Malicious—Adding water to Milk to Increase Bulk—Fraudulent Motive—"Wilful or Malicious" Damage—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 52.*—A person commits wilful damage to property, within the meaning of sect. 52 of the Malicious Damage Act, 1861, if he does an act which in point of fact causes damage to the property, either intending to cause damage, or knowing that the act will cause damage to the property; and it is immaterial whether or not such act causes damage or loss to the owner of the property, and whether or not there was an intention to injure such owner.

A milk-carrier in the employment of a milk salesman, poured a quantity of water into the milk which he had received for delivery to his master's customers, whereby the milk was damaged and spoiled, with a consequent loss to the owner, and he did so with the fraudulent object of increasing the quantity of the milk sold and putting the surplus money in his own pocket; but otherwise he had no malice towards or intention to injure his master, the owner of the milk.

HELD—that the milk-carrier was guilty of the offence of committing wilful damage to property within sect. 52 of the Malicious Damage Act, 1861.

Hall v. Richardson (54 J. P. 345) disapproved.

ROPER v. KNOTT, [1898] 1 Q. B. 868; 62 J. P. [375; 67 L. J. Q. B. 574, 78 L. T. 594; 14 T. L. R. 383; 46 W. R. 636; 19 Cox, C. C. 69—C. C. R.]

192. *Breaking into Premises where Furniture was stored—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97)—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 5.*—B. was the owner of Gilttown House and demesne in the county of Kildare. The house had been burnt down except the kitchen, where some furniture, including a picture and two mirrors, was stored. M., a military chaplain at the Curragh Camp,

obtained leave to bring some of the band boys stationed at the Curragh to the demesne for a day's holiday. Some of the boys strolled over to the building, and from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them in struggling to get out broke the two mirrors.

HELD—that the acts were malicious, and were punishable as a crime under the Malicious Damage Act, 1861, and therefore the applicant was entitled to the full amount of compensation claimed.

IN RE BORROWES, [1900] 2 I. R. 593—C. A. (Ir.)

193. *Claim of Right of Recreation—Damage in Excess of what was Necessary for Assertion of Right—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 23.*—On a charge of maliciously damaging with intent to destroy plants, vegetables, &c., under sect. 23 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), the appellants contended that they had acted in the *bonâ fide* and reasonable exercise of their customary right as members of the public at large to roam over certain lands, and of free access thereto for the purpose of recreation. The justices convicted and fined the appellants on the grounds (1) that the right claimed did not and could not legally exist, and (2) that the appellants did more damage than they could reasonably suppose was necessary for the assertion of right claimed by them, and that, therefore, their jurisdiction was not ousted.

HELD—that the justices were right.

Reg. v. Clemens ([1898] 1 Q. B. 556; 67 L. J. Q. B. 482; 46 W. R. 636; 78 L. T. 594, *infra*) followed.

HEAVEN AND ANOTHER v. CRUTCHLEY, (1904) 68 [J. P. 53; 1 L. G. R. 473—Div. Ct.]

194. *Removing Obstruction—Asserting Public Right—Doing more Damage than Necessary—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 51.*—A structure was placed on land over which certain rights were claimed on behalf of the public. The defendants believing that they had a right to remove the structure, and that it was necessary that it should be removed in order that the rights of the public might be preserved, destroyed the structure.

HELD—that the defendants having done more damage to the structure than was necessary for the purpose of asserting the rights claimed, were properly convicted of maliciously damaging the structure.

REG. v. CLEMENS, [1898] 1 Q. B. 556; 67 L. J. [Q. B. 482; 78 L. T. 204; 14 T. L. R. 273; 46 W. R. 416; 19 Cox C. C. 18—C. C. R.]

195. *Shooting Dog—Act Necessary for Protection of Property—Bonâ fide Belief of Defendant—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 41.*—Upon an informa-

**Specific Offences—Continued.**

tion against a gamekeeper for "unlawfully and maliciously" shooting a dog it is a good defence that he did the act in the *bonâ fide* belief that it was necessary for the protection of his master's property (e.g., pheasants), and that nothing else could be done which would effectually protect it.

MILES v. HUTCHINGS, [1903] 2 K. B. 714; 72 [L. J. K. B. 775; 89 L. T. 420, 52 W. R. 284, 20 Cox C. C. 555—Div. Ct.

196. *Walking across Grass Field—Damage to Grass—Conviction for Wilful Damage—Malicious Damage Act, 1861* (24 & 25 Vict. c. 97), s. 52.]—The appellant was summoned under sect. 52 of the Malicious Damage Act, 1861, for wilfully and maliciously damaging certain grass in the respondent's field. It was proved that the appellant, in passing from one footpath to another, walked across the respondent's grass field, for a distance of about 130 yards—the grass being thick and deep; that he passed notice boards showing that there was no right of way, that he claimed no right of way; that after the respondent had told him he had no right to be there he persisted in going on, and said he should continue to cross the field when he chose. The justices found as a fact that, as the grass was long and thick, the appellant must have done some damage to the grass, and that he did actual damage to the amount of sixpence, and, being of opinion that the trespass was a wilful and malicious act, they convicted the appellant under the section:

HELD—that, upon the facts proved, the appellant was properly convicted under sect. 52, of having committed wilful or malicious damage to property.

GAYFORD v. CHOULEUR, [1898] 1 Q. B. 316; 62 [J. P. 165; 67 L. J. Q. B. 404; 78 L. T. 42; 14 T. L. R. 166; 18 Cox C. C. 702—Div. Ct.

**(p) Manslaughter.**

197. *Manslaughter—Death Caused while Playing Football*—The prisoner was indicted for the manslaughter of one J. B. while playing with him and others in a football match. During his summing up the learned judge said: "That the rules of the game were quite immaterial, and it did not matter whether the prisoner broke the rules or not. Football was a lawful game, but it was a rough one, and persons who played it must be careful to restrain themselves, so as not to do bodily harm to any other person. No one had a right to use force which was likely to injure another, and, if he did use such force and death resulted, the crime of manslaughter had been committed. If a blow was struck recklessly, which caused a man to fall, and if in falling he struck against something, and was injured and died, the person who struck the blow was guilty of

manslaughter, even though the blow itself would not have caused injury.

REG. v. MOORE, (1898) 14 T. L. R. 220—[Hawkins, J.

198. *Gate of Level Crossing—Gatekeeper improperly leaving Gate Open—Fatal Accident to Person Crossing—Evidence justifying Conviction.*—A gatekeeper at a railway level crossing propped open the gate for a cart, forgot to shut it, and went away to his lunch. A fatal accident having occurred to the driver of another cart, which was run into by a train, the jury convicted the gatekeeper of manslaughter.

HELD (on further consideration)—that they were justified in so doing.

Reg. v. INSTAN ([1893] 1 Q. B. 450; 52 L. J. M. C. 86; 57 J. P. 282; 41 W. R. 368; 68 L. T. 420; 17 Cox C. C. 602—C. C. R.) followed.

REX v. PITTWOOD, (1903) 19 T. L. R. 37—[Wright, J.

199. *Infant—Neglect after Birth—No Provision made before Birth.*—Upon a charge against a woman of the manslaughter of her new born child by neglect of proper care, it is not sufficient to show that she purposely arranged to be unattended at the time of birth. Evidence must be given of neglect towards the child after birth.

Reg. v. HANDSLEY (1875) 13 Cox C. C. 79 considered.

REX v. IZOD, (1905) 20 Cox C. C. 690—[Channell, J.

200. *Infant Child—Neglect to provide Medical Aid—Belief of the "Peculiar People"*—"Wilful Neglect"—Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1.]—Section 1 of the Prevention of Cruelty to Children Act, 1894, enacts that "If any person over the age of sixteen years, who has the custody, charge, or care, of any child under the age of sixteen years, wilfully . . . neglects . . . such child . . . in a manner likely to cause such child unnecessary suffering, or injury to its health, . . . that person shall be guilty of a misdemeanour." On the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of a child of the age of eight or nine months, that the child died of diarrhoea and pneumonia; that during its illness the prisoner, though aware of the gravity of its condition, had not provided it with any medical aid or medicine; that he had the means to do so; that he belonged to a sect called the "Peculiar People," who think it contrary to the teaching of the Bible to use medical aid or drugs for the sick; that the prisoner employed an experienced nurse, also a member of that sect, to nurse the child; that he was in other respects a kind father, and that the child's life would have

**Specific Offences—Continued.**

been prolonged and probably saved if medical assistance had been procured. The prisoner was convicted.

**HELD**—that there was evidence that the prisoner had “wilfully neglected” the child within the meaning of the above section, and that, death having ensued from such neglect, the prisoner was properly convicted of manslaughter.

REG. v. SENIOR, [1899] 1 Q. B. 283; 68 [L. J. Q. B. 175; 63 J. P. 8; 47 W. R. 367; 79 L. T. 562; 15 T. L. R. 102; 19 Cox C. C. 219—C. C. R.

**201. Neglect to Provide Food or Medicine for Infant—Means to Procure Proper Food and Medicine and Medical Attendance—Evidence of Actual Possession of Means—Natural Expectation that Prisoner would have Money Unspent.**—The prisoner was indicted for the manslaughter of a male child aged 17 months, of whom she had had the care. There was evidence that prior to October, 1900, the prisoner kept the child for 4s. a week, and that in October, 1900, she agreed to take the child for good and all for a lump sum of £15 paid her by the child’s mother. The prisoner alleged she had no money to enable her to employ a doctor. Death was caused or at any rate accelerated by want of proper food and medicine and medical attendance.

**HELD**—that there was some evidence that the prisoner was in actual possession of means at the time the neglect was charged against her, viz., in the beginning of October, 1901, when the child died, as at the rate of 4s. a week the £15 would have lasted for seventy-five weeks; and that it was not necessary to show that she actually had money at the time she failed in her duty to provide food and medicine if it was shown that she had previously received money, and that under the circumstances she would naturally be expected to have some of the money still unspent at the time when the child was alleged to have been neglected.

REG. v. JONES, (1902) 19 Cox C. C. 678—[Kennedy, J., Oxford Circuit.

**(g) Murder.**

**202. Agreement to Commit Suicide—Survivor Guilty of Murder.**—If two persons enter into an agreement to commit suicide together, and, in accordance with that agreement, they attempt to take their lives, but one of them survives, the survivor is guilty of murder. The fact that the survivor may not have made any real endeavour to take his life or have had any real intention to do so, makes no difference in law.

REG. v. STORMOUTH, (1898) 61 J. P. 729—[Ridley, J.

*vivor.*—If two persons agree to commit suicide together, and only one succeeds in the attempt, the survivor is guilty of murder.

REG. v. ABBOTT, (1903) 67 J. P. 151—

[J. Kennedy.

**204. Separate Existence of Child—Direction to Jury**—The true test of separate existence in the theory of the law (whatever it may be in medical science) is the answer to the question “Whether the child is carrying on its being without the help of the mother’s circulation?” If yes, then it has a separate existence, even though it may not be fully born, if no, it has no such separate legal existence.

REG. v. PRITCHARD, (1901) 17 T. L. R. 310—[Wright, J., Shrewsbury Assizes.

**(r) Obscene Books.**

**205. Selling Obscene Book—The Heptameron—Classic—Question for Jury—Titles and Contents of other Books found on Premises—Relevancy.**—In a prosecution for publishing and selling an obscene book with a view to corrupt the public morals, the jury must decide whether the book was put out and published in such a way as to be lewd, lascivious, and to manifestly tend to corrupt the public morals. In considering this question they must take into their consideration the persons to whom, and the time and the circumstances under which it was put forth.

The titles and contents of other books found on the premises where the book in question was sold may be relevant as tending to show that the one in question was sold with a view to corrupt the public morals.

REG. v. THOMSON, (1900) 64 J. P. 456—The [Common Serjeant, C. C. Ct.

**206. Sending Obscene Things by Post—Editor of English Newspaper Inserting Advertisements of Persons Abroad Offering Indecent Books and Photographs for Sale—Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 4—Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 8.**—Certain persons carrying on business abroad caused to be inserted in a newspaper in England advertisements of books and photographs. An officer of police wrote to the advertisers for samples of the books and photographs as advertised, and received in reply through the post from abroad the obscene books and photographs specified in the indictment. The editor was indicted for that he did sell, utter and publish, and cause and procure to be sold, uttered, and published by the several advertisers certain obscene libels, viz., the said books and photographs, and also under the Post Office (Protection) Act, 1884, for that he did send, and cause and procure to be sent by the said several

**203. Two Persons Agreeing to Commit Suicide—One Succeeding—Liability of Sur-**

**Specific Offences—Continued.**

advertisers certain postal packets which enclosed the said indecent and obscene books and photographs, and also for that he did conspire with the said several advertisers to commit the above offences.

The jury were directed that if they were satisfied that the books and photographs so sent to the police were obscene, and that the defendant at the time he inserted the advertisements in his newspaper knew the general character of what he was advertising, and that by the advertisements he brought about the sale to the police, they ought to convict him. The defendant was convicted on all the counts.

HELD—the conviction was right.

REX v. DE MARNEY, [1907] 1 K. B. 388; 76 L. J. [K. B. 210; 71 J. P. 14; 96 L. T. 159; 23 T. L. R. 221—C. C. R.

**(s) Perjury.**

207. *Illiterate Deponent—Affidavit not read over to Deponent.*—The defendant, who understood English and Yiddish, but not German, and who could not read or write, swore an affidavit with another man. The affidavit, which was, in fact, untrue, was not read over by the Commissioner to the defendant or to the other deponent, but it was translated, in German, to the other deponent by an interpreter. No evidence was given to show that the affidavit was read over to the defendant by anyone in a language which he understood.

HELD—there might be a case to go to the jury if a deponent swore to the truth of the contents of a false document without knowing what the contents were.

REX v. PETRICUS, (1903) 67 J. P. 378—  
[Common Serjeant, C. C. Ct.

208. *Indictment—Details—Commissioners for Oaths Act, 1889* (52 & 53 Vict. c. 10), ss. 2, 7.]—In an indictment charging perjury in an affidavit sworn before a Commissioner it is necessary to state circumstances showing the materiality of the statement relied on and the Commissioner's authority to administer the oath in the particular matter.

REX v. McDONALD, (1907) 21 Cox C. C. 70—  
[Darling, J.

**(t) Treason.**

210. *Becoming Naturalised in a Hostile State—Naturalisation Act, 1870* (33 & 34 Vict. c. 14), ss. 6, 15.]—By sect. 6 of the Naturalisation Act, 1870: "Any British subject, who has at any time before, or may at any time after, the passing of this Act, when in any foreign State, and not under any disability, voluntarily become naturalised in such State, shall, from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British

subject and be regarded as an alien." This section affords no protection to a British subject who in time of war goes through the correct formalities of naturalisation in the country of the enemy; his act of expatriation is an act of treason in itself, and as such confers no rights, and affords no protection to him in respect of subsequent hostile acts.

Evidence of overt acts committed by the prisoner in a foreign country in aid of the King's enemies in such country is sufficient to support a charge of treason under the Treason Act, 1351, s. 2.

REX v. LYNCH, [1903] 1 K. B. 444; 72 L. J. K. B. [167; 67 J. P. 41; 51 W. R. 619, 88 L. T. 26; 19 T. L. R. 163; 20 Cox C. C. 468—  
Trial at Bar.

**(u) Vagrancy.**

211. *Betting—Wagering in a Certain Place with Tokens—Vagrant Act Amendment Act, 1873* (36 & 37 Vict. c. 38), s. 3.]—A bookmaker while on the Recreation Ground at Sheerness was approached by several persons who handed him certain pieces of paper with different names of racehorses thereon, and sums of money.

HELD—that the mere betting on a horse race was not within the Vagrant Act, 1873; there must be a game of chance and some token whereby the game of chance is being carried on.

LESTER v. QUESTED, (1901) 85 L. T. 487; 66 J. P. [54; 50 W. R. 207—Div. Ct.

212. *Idle and Disorderly Person—Person "Wilfully Refusing or Neglecting" to Maintain Himself—Person Suffering from delirium tremens—Vagrancy Act, 1824* (5 Geo. 4, c. 83), s. 3.]—A man suffering from delirium tremens in his own house, being in a state dangerous to himself and those about him, was removed to the workhouse infirmary and detained there under an order from a justice being a judicial authority under the Lunacy statutes. He remained chargeable to the union for five days, and was discharged, the attack having passed off. The guardians, without any previous demand for the cost of his maintenance, summoned him under sect. 3 of the Vagrancy Act, 1824.

HELD—that the man should have been convicted as an idle and disorderly person under that statute.

REG. v. HOPKINS, (1900) 64 J. P. 582—Div. Ct.

213. *Pretending or Professing to Tell Fortunes—Information—Averment of Intent to Deceive and Impose—Vagrancy Act, 1824* (5 Geo. 4, c. 83), s. 4.]—An information was laid and a conviction obtained against a defendant under the Vagrancy Act, 1824, s. 4, for pretending to tell fortunes contrary to the statute. The information and the conviction alleged and averred that the defendant "did unlawfully pretend or profess to tell fortunes contrary to the form of the statute,"

**Specific Offences—Continued.**

but the same did not also allege and aver that the defendant did so "to deceive and impose on any of Her Majesty's subjects."

**HELD**—that the words "pretend or profess" imply that there was an intention "to deceive and impose," and the justices having so found that there was such intention, it was not necessary that the same should have been averred in the information or conviction.

REG. v. ENTWISTLE, EX PARTE JONES, [1899] 1 Q. B. 847; 68 L. J. Q. B. 580, 63 J. P. 423, 19 Cox C. C. 317, 80 L. T. 657—Div. Ct.

**214. Prostitute—"Behaving in an Indecent Manner"—Evidence—Vagrancy Act, 1824** (5 Geo. 4, c. 83), s. 3.]—A prostitute accosted several men at night, taking hold of them by the arm, and walking a short distance with them. One of these men complained to a police constable. The woman had been cautioned by the police. She was convicted by the magistrate of behaving in a riotous and indecent manner within sect. 3 of the Vagrancy Act, 1824.

**HELD**—That the appellant's conduct amounted to "behaving in an indecent manner" within the meaning of the section.

DUVAL v. DENMAN, (1901) 65 J. P. 297—[McConnell, K.C., North London Sessions.

**215. Purse Trick—False Pretences.]—Persons who obtain money by selling purses which they represent contain a larger sum of money than that for which the purse is sold ought to be dealt with as rogues and vagabonds, and ought not to be indicted for obtaining money by false pretences.**

REG. v. WARD, (1900) 64 J. P. 776—[The Recorder, C. C. Ct

**216. Wilful Neglect to Maintain—Bonâ fide Belief of Adultery—Vagrancy Act, 1824** (5 Geo. 4, c. 83), s. 3.]—The respondent T. E. was charged under sect. 3 of the Vagrancy Act, 1824, for that he, being able to work and maintain himself and his wife and family, "wilfully refused or neglected" to do so. The magistrates found that he refused to maintain his wife because of the bonâ fide belief that she had committed adultery, and that he had offered under certain conditions to support his children. They dismissed the summons, holding that under these circumstances T. E., the respondent, had not "wilfully refused or neglected."

**HELD**—that the magistrates were right.

MORRIS v. EDMONDS, (1898) 18 Cox C. C. 627, 77 L. T. 56—Div. Ct.

(v) **Women and Girls, Offences against.**

**217. Abduction—Evidence of Inducement to Leave—Criminal Law Amendment Act, 1885** (48 & 49 Vict. c. 69),

s. 7.]—To support an indictment under sect. 7 of the Criminal Law Amendment Act, 1885, it must be proved that the girl left her home in consequence of some persuasion, inducement or blandishment held out to her by the man. It is not sufficient to prove that she left her home without any inducement from the man, although the man had previously taken her about to places of entertainment and had had connection with her.

REG. v. KAUFMAN, (1904) 68 J. P. 189—[Common Serjeant, C. C. Ct.

**218. Abduction—Girl under Sixteen—"Taking Out" of Parents' Possession—Girl leaving Home Voluntarily—Prisoner not inducing her Conduct—Offences against the Person Act, 1861** (24 & 25 Vict. c. 100), s. 55.]—Upon a charge of taking a girl under sixteen years of age out of the possession of her parents, it must be shown that the prisoner took some active step, by persuasion or otherwise, to induce her to leave home, if the suggestion that she should go with him emanated from her, and he merely acquiesced, he is entitled to be acquitted.

REG. v. JARVIS, (1903) 20 Cox C. C. 249—Jelf, J.

**219. Attempting to Procure Woman to Become Prostitute Without the King's Dominions—Girl not Already a Prostitute—Criminal Law Amendment Act, 1885** (48 & 49 Vict. c. 69), s. 2 (2).]—A man who has attempted to take a woman across the seas to become the inmate of a brothel without the King's dominions, can only be convicted under sect. 2 (2) of the Criminal Law Amendment Act, 1885, of attempting to procure the woman to become without the King's dominions a common prostitute, if the woman was not previously a prostitute.

REG. v. GOLD, (1907) 71 J. P. 360—[Common Serjeant, C. C. Ct.

**220. Commencement of Prosecution—Rape—Defilement of Girl under Sixteen—Greater Offence Including the Lesser—48 & 49 Vict. c. 69, ss. 5, 9.]—A prosecution for rape is in fact a prosecution for any of the offences of which a person tried on an indictment for rape may be found guilty.**

Although then it is provided by the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5, that a prosecution for an offence under sect. 5 (1) shall not be commenced more than three months after the commission of the offence, a person originally charged with rape within the period limited may be subsequently convicted of the offence under sect. 5 (1).

REG. v. WEST, [1898] 1 Q. B. 174; 18 Cox C. C. [675; 67 L. J. Q. B. 62; 77 L. T. 536; 14 T. L. R. 121; 46 W. R. 316—C. C. R.

**221. Evidence—Corroboration—Offence against Girl—Corroboration of Child's Testimony—Refusal to be Medically Examined**



**Specific Offences—Continued.**

—*Criminal Law Amendment Act, 1885* (48 & 49 Vict. c. 69), s. 4 ]—The defendant was indicted for attempting to carnally know a girl under the age of thirteen years. When the defendant was accused by the child's mother of indecency towards the child he denied it, and said he had done nothing to her, but when told that the child said he had fastened the door of the room, where the offence was committed, with a towel-horse, he said he put the towel-horse at the door because it blew open. The door had a lock on and had not blown open since. The child was suffering from a venereal disease. When charged at the police station the defendant refused to be examined by a doctor till he had consulted his friends.

**HELD**—that the evidence as to the towel-horse was some corroborative evidence implicating the accused within the meaning of the section, but that the refusal to be examined by a doctor was not such evidence.

*Semble*, that the question whether there was corroborative evidence was really not a point of law, but a question of fact, and that no case should have been stated.

**REX v. GRAY**, (1904) 68 J. P. 327—C. C. R.

**222. Evidence—Application of Reg. v. Lillyman**, 1896, 2 Q.B. 167; 60 J.P. 536 ]—During the hearing of a charge of rape, it was proposed by the counsel for the prosecution to put in evidence the verbatim complaint of the prosecutrix—and this he claimed to do on the authority of *Reg. v. Lillyman*, (1896) 2 Q. B. 167, 60 J. P. 536. Hawkins, J., said that case was no authority for that proposition. No case had been more greatly misunderstood, nor more frequently misapplied. All that it decided was that the terms of a complaint were only admissible as evidence of a want of consent by the prosecutrix, and not as evidence of the truth of the charge against the person named in the complaint.

**REG v. ROWLAND**, (1898) Chelmsford Assizes, [62 J. P. 459—Hawkins, J.

**223 Evidence—Indecent Assault—Complaint made by Prosecutrix—Consent of Prosecutrix Immaterial in Law, but Non-consent Alleged—Complaint—Statement Preceded by Question—Admissibility.**—On the trial of an indictment for indecent assault, or for an offence of a like kind, if non-consent be a part of the story told by the prosecutrix, whether such non-consent be legally a part of the charge or not, particulars of a complaint, made by the prosecutrix at the first opportunity after the offence which reasonably offered itself, are admissible not merely as negating consent, but as being consistent with the story told by the prosecutrix. The statement is not evidence of the facts complained of, and

must only be regarded by the jury as corroboration of the complainant's credibility, and, when consent is in issue, of the absence of consent.

The mere fact that the statement was made in answer to a question is not in itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading and inducing or intimidating character will render it inadmissible. In each case the decision on the character of the question put, as well as other circumstances such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding Judge.

*Reg. v. Lillyman* ([1896] 2 Q. B. 167; 65 L. J. M. C. 195, 60 J. P. 536; 44 W. R. 654, 74 L. T. 730—C. C. R.) discussed.

**REX v. OSBORNE**, [1905] 1 K. B. 551; 74 [L. J. K. B. 311; 69 J. P. 189; 53 W. R. 494; 92 L. T. 393; 21 T. L. R. 288—C. C. R.

**224. Evidence—Indecent Assault—Complaint—Statement Made on Day of Assault Charged in Indictment as to Something Alleged to have Happened Three Weeks Before—Admissibility.**—The defendant was indicted for an indecent assault alleged to have been committed on the morning of the 27th of September, 1906, upon two girls under thirteen years of age.

At the trial evidence was given of a statement made by one of the girls in the afternoon of September 27th to her sister. The statement related to something alleged to have taken place three weeks before September 27th.

**HELD**—that the statement was not admissible.

**REX v. PANTANEY**, (1907) 71 J. P. 101—C. C. R.

**225 Evidence—Indecent Assault—Complaint made in Answer to Question—Particulars Inadmissible.**—Upon the trial of an indictment for indecent assault evidence was given that the girl made a complaint in answer to a question put to her by her mother in the absence of the prisoner.

**HELD**—that a conversation was not a complaint, and if the statement was not volunteered by the complainant of her own initiative, the particulars of such statement are, on that ground alone, not admissible in evidence with *Reg. v. Lillyman* ([1896] 2 Q. B. 167; 65 L. J. M. C. 195, 60 J. P. 536, 44 W. R. 654; 74 L. T. 730—C. C. R.).

**REG. v. MERRY**, [1900] 19 Cox C. C. 442—[Bruce, J.

**226. Evidence—Indecent Assault—Six-years-old Child—Complaint.**—A prisoner indecently assaulted a girl of six years of age, who went straight home to her mother, but did not complain to her, as she might have done. The girl again went out and again returned home, between three and four hours after the commission of the offence charged, and then did make a complaint to her mother.

**Specific Offences—Continued.**

**HELD**—that the girl's unsworn testimony could be given, and that her mother could be asked what was the statement made to her by her daughter.

**HELD ALSO**—that the complaint was made sufficiently soon after the act complained of to make it admissible as evidence.

**REG. v. KIDDLE**, (1899) 19 Cox C. C. 77—  
[Ridley, J.]

**227. Rape—Permission obtained by Fraud—Indecent Assault—Criminal Law Amendment Act, 1885** (43 & 49 Vict. c. 69), s. 4.]—If a woman gives conscious permission to the act of connection, the act does not amount to rape, although such permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act. The act may amount to an indecent assault.

The Criminal Law Amendment Act, 1885, s. 4, makes *Reg. v. Flattery* ((1877) 2 Q. B. D. 411; 46 L. J. M. C. 130; 25 W. R. 398; 36 L. T. 32; 13 Cox C. C. 388—C. C. R.) no longer law. **REG. v. O'SHAY**, (1899) 19 Cox C. C. 76—  
[Ridley, J.]

**III. CONVICTS' PROPERTY.**

**228. Forfeiture for Felony—Administrator of Convict's Property—Right of Administrator to Sell—Bona fides—Liability of Administrator for what he Receives—Claim by Convict against Administrator for Accounts, &c.—Costs—Forfeiture Act, 1870** (33 & 34 Vict. c. 23), ss. 12, 17, 20.]—The defendant was appointed administrator of the property of the plaintiff, who had been convicted of felony under the Forfeiture Act, 1870, and in that capacity it was his duty to take possession of the convict's property. The convict having served his term, brought an action against the defendant, claiming accounts of property received and payments made, delivery up, damages and costs.

**HELD**—that under sects. 12, 17, the administrator has power to sell a convict's property irrespective of whether money is, or is not, wanted for payment of his debts; and that therefore the only question to be decided in the action was whether the sale was made *bonâ fide*. Further, that the sale must be regarded as made *bonâ fide*, having been made in accordance with a reasonable course of practice followed at Scotland Yard in dealing with such property; and that the plaintiff could not recover.

**Costs.**—The costs of such an action are in the discretion of the Court: an administrator is entitled to the expense of rendering his accounts; and, if he has been dilatory in rendering them, the convict may be entitled to the costs of issuing a writ; probably sect. 20 is applicable only to actions by strangers against the administrator.

**CARR v. ANDERSON**, [1903] 1 Ch. 90; 72 L. J. Ch. [50; 51 W. R. 165; 87 L. T. 840; 20 Cox C. C. 416—Buckley, J.]

Affirmed on appeal, on the ground that discretion had in fact been exercised; but, *semble*, blind adherence to a departmental rule of practice will not be any protection to an administrator who exercises no discretion as to a particular sale.

[1903] 2 Ch. 279; 72 L. J. Ch. 534; 51 W. R. [465; 88 L. T. 503; 19 T. L. R. 394—C. A.]

**229. Convict—Tenant in Tail—Barring Entail—Administrator of Convict's Property—Fines and Recoveries Act, 1833** (3 & 4 Will. 4, c. 74), s. 15—**Forfeiture Act, 1870** (33 & 34 Vict. c. 23), ss. 10, 12.]—The person appointed administrator of a convict's property under the Forfeiture Act, 1870, has no power to disentail property of which the convict was seised for an estate tail, so as to convey it to a purchaser in fee simple.

But the convict can himself execute a disentailing deed (such deed not being an "alienation" of the property within sect. 8), and the administrator can then convey the fee simple which has become vested in him.

Decision of Kekewich, J. ([1906] 1 Ch. 440; 75 L. J. Ch. 203; 54 W. R. 327; 94 L. T. 250; 22 T. L. R. 258) affirmed upon the first point. **IN RE GASKELL AND WALTER'S CONTRACT**, [1906] 2 Ch. 1; 75 L. J. Ch. 503; 94 L. T. 658; 22 T. L. R. 464—C. A.

**CROPS.**

See AGRICULTURE; LANDLORD AND TENANT.

**CROSSED CHEQUES.**

See BANKERS, 14—18.

**CROWN.**

See BANKRUPTCY AND INSOLVENCY; CROWN PRACTICE; DEPENDENCIES AND COLONIES.

**CROWN DEBT.**

See BANKRUPTCY, 146.

**CROWN PRACTICE.**

- I. CIVIL PROCEEDINGS AGAINST CROWN AND CROWN SERVANTS . . . 845
- II. CROWN RIGHTS . . . 847
- III. CERTIORARI . . . 851
- IV. HABEAS CORPUS . . . 853
- V. MANDAMUS . . . 855

See also DEPENDENCIES AND COLONIES.

# I. CIVIL PROCEEDINGS AGAINST CROWN AND CROWN SERVANTS.

And see LIMITATION OF ACTION, 34.

1. *Costs—General Rule.*—In dealing with costs in colonial cases between the Crown and a subject the general rule is that the Crown neither receives or pays costs, unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

JOHNSON *v.* REX, [1904] A. C. 817; 73 L. J. P. C. [113; 20 T. L. R. 697; 53 W. R. 207—P. C.

2. *Costs—Liability of the Crown—Crown Suits Act, 1855* (18 & 19 Vict. c. 90), ss. 1, 2.]—The Crown is not liable to pay costs under the Crown Suits Act, 1855, unless the action, or proceeding, by, or on behalf of, the Crown, is taken in the name of the Attorney-General.

*Reg. v. Beadle* ((1857) 7 E. & B. 492; 3 Jur. (N.S.) 863; 26 L. J. M. C. 111); and *Secretary for War v. Booth* ([1901] 2 Ir. R. 692) approved and followed.

IN RE MADDEN'S ESTATE, [1902] 1 Ir. R. 63—[C. A.

3. *Liability of Servant of Crown for Breach of Contract—Commissioners of Works.*—The Commissioners of Works and Public Buildings held liable to be sued for breach of a contract whereby the plaintiffs agreed to erect a post-office for them: by Ridley, J., on the ground that the Commissioners had expressly contracted for themselves, and not as agents for the Crown; by Phillimore, J., on the ground that the Commissioners, having been incorporated by statute, could sue and be sued, though the property of the Crown could not be taken in execution.

GRAHAM & SONS *v.* COMMISSIONERS OF WORKS [AND PUBLIC BUILDINGS, [1901] 2 K. B. 781; 70 L. J. K. B. 860; 65 J. P. 677; 50 W. R. 122; 85 L. T. 96; 17 T. L. R. 540—Div. Ct.]

4. *Crown Counsel's Salary—Fees not paid—Crown's Cost as between Subject and Subject—The Exchequer Court (Scotland) Act, 1856* (19 & 20 Vict. c. 56), s. 24.]—In a bill of costs fees were claimed by the Crown for services rendered by the Solicitor-General, who appeared for the Crown. The defender objected that such fees were not proper charges against him, on the ground that the fees claimed had not actually been, and would not be paid, counsel for the Crown being paid by salary.

HELD—that the Crown, if successful, is entitled to recover costs as between subject and subject, notwithstanding counsel for the Crown receives a fixed yearly salary for his services.

LORD ADVOCATE *v.* STEWART (No. 2), (1899) 63 [J. P. 473—Lord Stormouth Darling.

5. *Liability of Servant of Crown for Negligence of Subordinate—Postmaster-General—Telegraph Acts, 1863* (26 & 27 Vict. c. 112), s. 42; 1868 (31 & 32 Vict. c. 110), ss. 2, 4, 5, and 6; 1878 (41 & 42 Vict. c. 76), s. 11.]—The common law immunity of heads of Government departments from liability in their official capacity for the negligent act of their subordinates has not been altered as regards the Postmaster-General by the provision of the Telegraph Acts, 1863 and 1878, which transferred the telegraphs to him.

So held in an action to recover damages for personal injuries caused by the negligence of a person employed by the Post Office to lay telegraph wires.

BAINBRIDGE *v.* THE POSTMASTER-GENERAL AND [ANOTHER, [1906] 1 K. B. 178; 75 L. J. K. B. 366; 54 W. R. 221; 94 L. T. 120; 22 T. L. R. 70—C. A.

6. *Liability of Servant of the Crown for Torts.*—If a tort is committed by the servants of persons or corporations, who are acting as officers of State with authority delegated by the Crown, or are acting for the public in the sense that they are in that capacity servants of the Government, and are as such managing some branch of the Government business, then such persons or corporations are not responsible for the tortious act of their servant.

But statutory trustees for public purposes, upon whom a duty lies towards members of the public, are liable to an action for breach of that duty, even though they have no funds and no property liable to execution.

*Mersey Docks v. Gibbs* ((1866) L. R. 1 H. L. 93) followed.

WHEELER *v.* COMMISSIONERS OF PUBLIC WORKS, [1903] 2 Ir. R. 202—C. A.

7. *Trespass—Action Against Lords of Admiralty—Defendants Sued in Official Capacity—Leave to Amend.*—An action being brought by the plaintiffs, owners of certain trust property at Dartmouth, for the purpose of establishing as against the Lords Commissioners of the Admiralty and the Director-General of Naval Works that they were not entitled to enter upon, or take possession of, or to acquire by way of compulsory purchase the land of the plaintiffs, for the purpose of establishing there a training college for cadets, and the statement of claim containing allegations of certain acts of trespass by the defendants, their servants and agents, for which damages and an injunction were claimed, the defendants made the preliminary submission that the Court had no jurisdiction to entertain the action for tort brought against them in their official capacity.

The plaintiffs had also taken out a summons to amend the action by suing the defendants in their individual as well as in their official capacity, and by adding the names of two marines and a civil engineer, who had committed the alleged trespass, as co-defendants.

**Civil Proceedings against Crown, etc.—Contd.**

**HELD**—that, without prejudicing any just claims of the plaintiffs, the action was misconceived and would not lie, and that no leave to amend should be given to the plaintiffs, as it would be changing one action into another of a substantially different character.

**RALEIGH v. GOSCHEN**, [1898] 1 Ch. 73; 67 L. J. [Ch. 59, 77 L. T. 429; 14 T. L. R. 36; 46 W. R. 90—Romer, J.]

**II. CROWN RIGHTS.**

See also **DISTRESS**, 9; **EXECUTORS**, 34, 35; **FERRIES**; **HIGHWAYS**, 139, 180; **MINES AND MINERALS**, 27.

8. *Bona Vacantia—Fund in Court Belonging to a Bachelor, Bastard, Intestate and "Heirless," Austrian—English Crown's Rights—Austrian Crown's Rights—"Mobilia Sequuntur Personam"—Domicil.*—Under the will and codicils of W. B., who died in 1837, a natural son of the testator became entitled, subject to the interests therein of two life annuitants, to two sums of New Consols in Court. The natural son died in 1883 at Vienna, a bachelor, a bastard and intestate. In 1890 letters of administration of his personal estate were duly granted to the solicitor for the affairs of Her Majesty's Treasury and his successors in office for the use of Her Majesty; one annuitant died in 1880 and the other in 1885. The funds not having been dealt with for fifteen years or upwards, the solicitor for the affairs of His Majesty petitioned for the payment of the fund to the Crown as *bona vacantia*. The Finance Minister of the Imperial Royal Austro-Hungarian Government was made a respondent. Between the law of Austria and that of England there was no real difference on this subject.

**HELD**—that as there was no one who could claim through the deceased, the English Crown stepped in and took the property because it was *bona vacantia*; that there was no right in any one else to say that there was to be a distribution according to the domicile of the deceased person, who in effect by dying "heirless" had made his domicile immaterial; and that the maxim "*Mobilia sequuntur personam*" did not apply, there being no *persona* to follow.

**IN RE BARNETT'S TRUSTS**, [1902] 1 Ch. 847; 71 [L. J. Ch. 408; 50 W. R. 681; 86 L. T. 346; 18 T. L. R. 454—Kekewich, J.]

9. *Bona Vacantia—Legal Devise to Tenant for Life and no More—Death of Testator Without Heirs—Sale Under Settled Land Act—Beneficial Interest of Trustees—Crown's Right to Proceeds of Sale—Settled Land Act, 1882 (45 & 56 Vict. c. 38), s. 2, sub-s. 2; s. 22, sub-s. 5.*—A testator made his will in the following terms: "Whatever property I may possess at the time of my decease shall be enjoyed by my dear wife A. B. during her life." There was no gift in remainder over after the death of the testator's wife, nor any

residuary devise or bequest. Executors and trustees were appointed by the will. The testator died without an heir or next of kin. His wife survived him, and six years afterwards, upon her application, the trustees of the will were appointed trustees of the settlement created by the will for the purposes of the Settled Land Act, 1882. The widow afterwards, in exercise of the powers conferred on her as tenant for life under the Settled Land Acts, sold certain freehold hereditaments, which formed part of the testator's estate, and the proceeds of the sale were paid to the trustees. The widow died.

**HELD**—that there was in the will a legal devise to the tenant for life, and nothing more; that the sale was good, both against the Crown and against anybody else, that as there was no heir to the testator the money belonged to the Crown as *bona vacantia* without any reconversion, and did not go to the trustees beneficially.

**Taylor v. Hoygarth** ((1844) 14 Sim. 8) distinguished.

**IN RE BOND; PANES v. ATTORNEY-GENERAL**, [1901] 1 Ch. 15; 70 L. J. Ch. 12; 49 W. R. 126; 82 L. T. 612—Kekewich, J.]

10. *Civil Servant—Right of Crown to Dismiss—Civil Service Act, 1884 (48 Vict. No. 24)—Public Service Act, 1895 (59 Vict. No. 25).*—Sect. 58 of the Public Service Act, 1895, of New South Wales enacts: "Nothing in this Act or in the Civil Service Act, 1884, shall be construed or held to abrogate or restrict the right or power of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service."

**HELD**—that the Act was not retrospective, and that a person dismissed from the public service after the passing of the Civil Service Act, 1884, and before the passing of the Public Service Act, 1895, could only be dismissed in accordance with the provisions of the former Act.

**YOUNG v. ADAMS**, [1898] A. C. 469; 67 L. J. P. C. [75; 78 L. T. 506; 14 T. L. R. 373—P. C.]

11. *Crown Lands—Deed of Concession—Restrictive Covenant—Lands "in Possession" of the Crown—Construction.*—The Crown in granting certain lands entered into a restrictive covenant as to the user of any other lands within a specified area "which . . . are . . . or shall come into the possession of" the Crown.

**HELD**—that the covenant affected only lands in the actual possession of the Crown, and not lands over which the Crown might have, but had not, assumed control.

**NEW TRINIDAD LAKE ASPHALT CO., LD. v. ATTORNEY-GENERAL FOR TRINIDAD**, [1904] A. C. 415; 73 L. J. P. C. 97; 91 L. T. 208; 20 T. L. R. 571—P. C.]

**Crown Rights—Continued.**

12. *Crown Lands—Title to Land—Rightful Possession and Occupation of the Natives—Extinguishment in Accordance with Law—Estate and Interest of the Crown—Jurisdiction of the Court—Land Act of 1892* (56 Vict. No. 37), ss. 136, 137—*Native Rights Act, 1865* (29 Vict. No. 11), ss. 3, 4, 5 ]—The respondent, as commissioner of Crown lands, by public notice offered a block of land in terms of sect. 137 of the Land Act, 1892. The appellant, an aboriginal inhabitant of New Zealand, thereupon commenced an action alleging a sufficient title of occupancy in himself and the other members of his tribe, and seeking to restrain the respondent from selling the land, or from advertising the land for sale or disposal, as being the property of the Crown. The substantial question was whether the appellant could sue, and whether, if the allegations in the statement of claim were proved, he would be entitled to some relief against the respondent.

HELD—(1) that an aggrieved person might sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority, (2) that the Supreme Court were bound to recognize the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law in any action in which such title is involved and means are provided for the ascertainment of such a title; (3) that if the appellant could succeed in proving that he and the members of his tribe were in possession and occupation of the lands in dispute under a native title which had not been lawfully extinguished, he could maintain this action to restrain an unauthorized invasion of his title, and (4) that it not appearing that the estate and interest of the Crown in the subject-matter of the action, subject to such native titles (if any) as have not been extinguished in accordance with law, were being attacked by this proceeding, the Court had jurisdiction to inquire whether as a matter of fact the land in dispute had been ceded by the native owners to the Crown in accordance with law.

*Wi Parata v. Bishop of Wellington* (3 N. Z. J. R. (N.S.), S. C. 72) considered.

*NIREAHA TAMAKI v. BAKER*, [1901] A. C. 561, 70 [L. J. P. C. 66; 84 L. T. 633; 17 T. L. R. 496—P. C.]

13. *Fishings—Scotland—Mussel Fishings—Crown Rights* ]—Mussel beds or scalps on the foreshore or in the estuary of a navigable river in Scotland form part of the heritable patrimonial property of the Crown; and they may be granted or leased by the Crown to a subject.

Decision of Ct. of Sess. ((1902) 4 F. 698) affirmed.

*PARKER AND OTHERS v. LORD ADVOCATE*, [1904] [A. C. 364, 20 T. L. R. 547—H. L. (Sc.).

14 *Land forfeited to Crown—Waiver of Forfeiture—Receipt of Rates.*]—Where land has been forfeited to the Crown by regular legal process, the fact that rates have subsequently been demanded from, and paid by, persons found in occupation of the land without any title, will not be held to be a waiver of the forfeiture.

*DE SILVA v. ATT.-GEN. FOR TRINIDAD*, (1898) 79 [L. T. 130—P. C.]

15. *Prerogative of Crown—Action between Subjects in which Title or Interest of Crown is involved—Transfer to Revenue Side—Stay of Proceedings after Judgment delivered.*]—It is part of the prerogative of the Crown to have an action between its subjects in which the title or interest of the Crown is concerned, in whatever stage such action may be, removed from the County Court into the Revenue side of the Queen's Bench Division; and, where an information is filed by the Attorney-General raising the same question as that to be decided in such an action, the Crown has the right to apply to have the action stayed until the information is determined, and such application may be made after judgment has been delivered in the action.

*STANLEY (LORD) v. WILD & SON*, [1900] 1 Q. B. [256, 69 L. J. Q. B. 318; 48 W. R. 242, 82 L. T. 14; 16 T. L. R. 99—C. A.]

16. *Treasure Trove—Gold Articles found Buried together—Onus of Proof—Concealment or Abandonment.*]—As appears from the definition of treasure trove given in *Chitty* on the Prerogative, it is the act of hiding with intent to resume possession, as opposed to loss or deliberate abandonment, that constitutes an article treasure trove.

Whether in claims to discovered valuables the Crown can insist upon the finder succeeding on the strength of his own title, *quære*, but if the Crown prove a *prima facie* case of intentional concealment, it is not sufficient for the finder to merely suggest a plausible theory; he must defeat the title of the Crown.

A number of gold articles were found by a ploughman in Ireland, and they eventually came into the possession of the defendants. The Crown contended that the fact that all the articles were found close together, and some packed inside others, raised the inference that they had been deliberately hidden; the defendants suggested *inter alia* that they were a votive offering to some deity.

HELD—that this suggestion was pure speculation, and that the correct inference was that contended for by the Crown.

The defendants then argued that the right of the Crown to treasure trove in the particular locality had been parted with by charter to a society, whose title had now devolved upon them.

**Crown Rights—Continued.**

**HELD**—that the word “franchise” upon which the defendants relied, could not be construed so as to include treasure trove; and that the articles must be delivered up to the Crown.

ATTORNEY-GENERAL *v.* TRUSTEES OF THE BRITISH MUSEUM, [1903] 2 Ch. 598; 72 L. J. Ch. 743, 51 W. R. 582; 88 L. T. 858; 19 T. L. R. 555—Farwell, J.

**III. CERTIORARI.**

*See also* FOOD AND DRUGS; INTOXICATING LIQUORS, 4, 6, 7, 11, 40, 90.

17. *When Granted — Discretion.*—The granting of a writ of *certiorari* at the instance of a private person is a matter of discretion, and not *ex debito justitiæ*, and a writ will not be granted where it will confer no benefit upon the applicant.

REX *v.* LONDONDERRY JUSTICES, [1905] 2 Ir. R. [318—C. A.]

18. *When Granted—Discretion—Poor Law — Maintenance — Order for—Distress Warrant — Ministerial or Judicial Act.*—Whether the granting of a distress warrant by justices for an amount due for the maintenance of a father and mother is a ministerial or judicial act, the Court has a discretion whether a *certiorari* ought to be granted.

REG. *v.* WEBBER, (1899) 16 T. L. R. 1—Div. Ct.

19. *Coroner's Certificate—Qualification of Jurors—Fine for Non-attendance—Quashing on Certiorari.*—A person not an inhabitant householder, nor occupying any premises within the jurisdiction of the coroner, but being only a shareholder in a limited company carrying on business within the jurisdiction, is not liable to serve on summons as a jurymen on an inquest held within the jurisdiction, or to be fined for disobedience to a jury summons left at the place of business of the company.

The coroner's certificate imposing a fine on such a person was quashed on *certiorari*.

REX *v.* WALDO, EX PARTE HUDSON, (1903) 67 [J. P. 103—Div. Ct.]

20. *Costs—Power of Court.*—The King's Bench Division and Court of Appeal have power to award costs to a successful applicant for a writ of *certiorari*.

Reg. *v.* London J.J. ([1894] 1 Q. B. 453; 63 L. J. Q. B. 301; 58 J. P. 380; 42 W. R. 225 70 L. T. 148—C. A.) followed.

REX *v.* WOODHOUSE, EX PARTE RYDER, [1906] [2 K. B. 501; 75 L. J. K. B. 745; 70 J. P. 485; 95 L. T. 399; 22 T. L. R. 603—C. A.]

21. *Justices—Appointment of Clerk to Justices—Whether a Judicial or Ministerial Act.*—An appointment by justices of a person to be their clerk is a ministerial, and not a judicial, act, and therefore cannot be brought up for review on *certiorari*.

REX *v.* DRUMMOND AND OTHERS, EX PARTE [SAUNDERS, (1903) 67 J. P. 300; 88 L. T. 833; 1 L. G. R. 567—Div. Ct.]

22. *Licensing Justices—General Annual Licensing Meeting.*—*Certiorari* will issue to bring up for review a decision of licensing justices granting or refusing to grant a licence at the general annual licensing meeting.

Reg. *v.* Sharman ([1898] 1 Q. B. 578; 67 L. J. Q. B. 460; 62 J. P. 296; 46 W. R. 367; 78 L. T. 320—Div. Ct., *see* INTOXICATING LIQUORS, 11) not followed.

REX *v.* WOODHOUSE AND OTHERS, EX PARTE [RYDER, [1906] 2 K. B. 501; 75 L. J. K. B. 745; 70 J. P. 486; 95 L. T. 367; 22 T. L. R. 603—C. A.]

**NOTE.**—The decision of the C. A. in the cases noted, Nos. 20 and 22, was reversed on the merits by the House of Lords. But such reversal does not appear to affect the points on which the case is here noted—*see sub. nom.*

LEEDS CORPORATION *v.* RYDER [1907] 1 A. C. 420; 76 L. J. K. B. 1032; 71 J. P. 484; 97 L. T. 261; 23 T. L. R. 721—H. L. (E.).

23. *Certiorari—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 26—Order of Justices.*—*Certiorari* will lie in a proper case to bring up and quash an order of justices granting an exemption from closing licensed premises under sect. 26 of the Licensing Act, 1872.

REX *v.* JOHNSON AND OTHERS, [1905] 2 K. B. [59; 74 L. J. K. B. 585; 69 J. P. 236; 53 W. R. 655; 92 L. T. 654; 21 T. L. R. 423—Div. Ct.]

24. *Order of Justices—Special Case Applied for but not Proceeded with—No Bar to Issue of Certiorari.*—The fact that a special case has been asked for, but dropped, is not necessarily a bar to the grant of a writ of *certiorari*.

REX *v.* PART AND ANOTHER, (1906) 70 J. P. 398 [—Div. Ct.]

25. *Quarter Sessions—Conviction Affirmed—“Unspeakable” Order.*—Quarter Sessions affirmed a conviction on appeal from petty sessions; the order did not state a case or show upon what evidence it was based.

**HELD**—that it could not be quashed on *certiorari* on an allegation that there was no evidence to support it.

Walsall Overseers *v.* L. & N. W. Ry. Co. ((1879) 4 App. Cas. 30; 48 L. J. M. C. 65; 39 L. T. 493—H. L.) applied.

REX *v.* GALWAY J.J., [1906] 2 Ir. R. 446—[K. B. D.]

26. *Quarter Sessions—Bias of Justices—Conviction Reversed.*—An order of Quarter Sessions reversing a conviction cannot be quashed on *certiorari* on the ground of the bias of one of the justices.

*Certiorari—Continued.*

The order of a biased tribunal is not void, but only voidable; therefore the appellant was in danger of conviction, and *nemo debet bis vexari pro una et eadem causa.*

REX v. GALWAY JJ., [1906] 2 Ir. R. 499—  
[K. B. D.]

27. *Rule Nisi—Ground for—Conviction—Alleged Bias of Justice.*—To entitle a person to a rule nisi for a writ of *certiorari* to remove a conviction of him into the High Court for the purpose of being quashed, it is not enough to allege that the justices, or one of them, had strong views on the subject appertaining to the offence of which the defendant is convicted.

Accordingly, where the affidavits in support of the application stated that the Chairman of the Justices had made remarks during the hearing of the summons against the defendant for driving a motor-car at a greater speed than 12 miles an hour, which remarks were alleged to indicate a strong bias against motor-cars generally, and had also strongly expressed his views when similar charges had been before the Bench on previous occasions, the Court held this was an insufficient ground on which to grant a rule nisi for a writ of *certiorari* to remove the conviction into the High Court.

EX PARTE WILDER, (1902) 66 J. P. 761—Div. Ct.

28. *Service of Rule Nisi on Justices—Affidavit—Crown Office Rules, 1906, r. 21.*—The affidavit of service of a rule nisi required by Crown Office Rule 21 need not be filed before the argument: it may be filed subsequently.

REX v. NORTHUMBERLAND, JJ., (1907) 71 J. P. 31—Div. Ct.

## IV. HABEAS CORPUS.

*And see EXTRADITION.*

29. *Conviction at Petty Sessions—Warrant of Commitment—Imprisonment—Release on Bail Pending Appeal—Conviction Amended—Need for New Commitment—False Imprisonment—Action against Clerk of the Peace—Action against Governor of Prison—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27.*—When a man, who has been convicted at Petty Sessions and sent to prison, is subsequently released on bail pending an appeal, and his appeal is dismissed, a new warrant of commitment should be obtained from the recorder, or chairman, or from a justice under sect. 27 of the Summary Jurisdiction Act, 1848.

The clerk of a Court of justice, not giving any independent order, but merely carrying out the directions of the Court, is acting in a purely ministerial capacity, and incurs no liability for his act.

*Dewes v. Riley* ((1851) 11 C. B. 434) followed.

The plaintiff, having been convicted of being a rogue and vagabond for indecent exposure, was sentenced by magistrates at

Petty Sessions to two months' imprisonment with hard labour, and the warrant of commitment was duly executed. He, however, gave notice of appeal, and was released on bail. On the hearing of the appeal he was convicted of being a rogue and a vagabond within sect. 4 of 5 Geo. 4, c. 83, for indecent exposure on December 9th, 1901, and on December 18th, 1901. The recorder remitted the hard labour to which he had been originally sentenced, and ordered him to be detained for the same term of two months in the second division, altering the original conviction in red ink to this effect and in the above-mentioned terms. This amended conviction and the original warrant of commitment were sent to Pentonville, and on these documents he was lodged in gaol by the governor of Pentonville Prison on April 18th, 1902.

A rule nisi having been obtained for a writ of *habeas corpus*.

HELD—that the operation of the original warrant of commitment was exhausted, and a fresh warrant therefore became necessary, to be obtained either from the learned recorder, or from a magistrate, pursuant to sect. 27 of the Summary Jurisdiction Act, 1848; and that the plaintiff must be discharged from custody.

Whether the conviction was bad as alleging two offences, *quære*.

Thereupon the plaintiff brought an action against the clerk of the peace and against the governor of Pentonville Prison, for damages for assault and for false imprisonment. A special jury assessed his damage, if any, at £5.

HELD—that the action failed as against the clerk of the peace, as he had given no independent order, and the clerk of a Court acting in pursuance of and for the purposes of carrying out the order of a judge, is a ministerial officer and protected.

But that the action would lie against the governor, for the original conviction as amended, and the original warrant of commitment, which on the face of it had expired, did not separately or together constitute such a warrant as would protect him.

The order of Quarter Sessions, together with the recognisances into which the sureties entered when the plaintiff was released on bail that he should abide by and perform the order of the Court of Appeal, did not render any warrant other than the original unnecessary, as sect. 27 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), contemplates a fresh warrant being issued after the appellant is convicted on appeal; and, if the order of Quarter Sessions were sufficient, the gaoler would have to rely on a document not handed to him, and not referred to in the order handed to him.

REX v. GOVERNOR OF PENTONVILLE PRISON, [DEMER v. COOK AND ANOTHER, (1903) 67 J. P. 206; 88 L. T. 629; 19 T. L. R. 327; 20 Cox C. C. 444; 20 Cox C. C. 353—Div. Ct. and Lord Alverstone, C. J.]

**Habeas Corpus—Continued.**

**30 Jurisdiction of Court—Writ to Person out of the Jurisdiction—Power to Issue**—The Court has no power to order the issue of a writ of *habeas corpus* directed to a person who at the time of the order is out of the jurisdiction.

REX v. PINCKNEY, [1904] 2 K. B. 84; 73 [L. J. K. B. 448, 68 J. P. 361; 52 W. R. 513, 90 L. T. 468; 20 T. L. R. 363—C. A.]

**31 Prisoner—Witness—Order on Governor of Prison**—Where a plaintiff moved *ex parte* for an order on the governor of a prison to produce a prisoner in Court at the trial, but the time of hearing was uncertain, the Court made the order in the form given in "Seton," 5th edit., p. 89, but directed that the same should not be drawn up until the case was in the paper for trial.

JENKS v. DITTON, (1897) 18 Cox C. C. 608, 76 [L. T. 591—Stirling, J.]

**V. MANDAMUS.**

See HIGHWAYS, 60, 61; INTOXICATING LIQUORS, 7, 11, 35, 40.

**32. Application for by Counsel or in Person—Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5**—A writ of *mandamus* can only be moved for by counsel, and the same practice applies in the case of a motion under the Justices Protection Act, 1848, s. 5, for a rule in the nature of a *mandamus* to justices.

*In re Lewis* ((1888) 21 Q. B. D. 191; 57 L. J. M. C. 108; 52 J. P. 773, 37 W. R. 13, 59 L. T. 338—Div. Ct.) no authority on this point.

EX PARTE WALLACE, [1902] 2 K. B. 488; 71 L. J. [K. B. 788, 50 W. R. 678; 18 T. L. R. 740—C. A.]

**33. When Granted—Action for Mandamus.**—The Court will not ordinarily grant the prerogative writ of *mandamus* where an action for *mandamus* can be brought.

EX PARTE PAGE, (1898) 14 T. L. R. 61—C. A.

**34 When Granted—Public Body—Inferior Court—Effective Alternative Remedy—Discretion.**—It is now well established that if a body who are charged with the performance of a public duty do not discharge it, a *mandamus* will lie to compel them to discharge it; or if an inferior Court does not entertain a case which it ought to entertain, a *mandamus* will lie to compel it to entertain it. It is equally clear that if there is an effective alternative remedy, the Court has a discretion as to whether or not it will grant a writ of *mandamus*; and, as a rule, the Court does not grant the writ where there is a sufficient alternative remedy.

REX v. STEPNEY CORPORATION, [1902] 1 K. B. [317 at p. 321; 71 L. J. K. B. 238 at p. 242; 50 W. R. 412; 86 L. T. 21 at p. 22; 13 T. L. R. 98—per Lord Alverstone, C.J.]

**35. When Granted — No Other Specific Legal Remedy—Guardians Failing to Appoint Vaccination Officer—Power of Local Government Board to Appoint—Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 7—Vaccination Act, 1871 (34 & 35 Vict. c. 98), ss. 5, 16**—The guardians of Leicester failed for more than twenty-eight days after receipt of a requisition from the Local Government Board to appoint a vaccination officer, and the latter body, instead of appointing the officer themselves, applied to the Court for a *mandamus*.

HELD—that, as there was no other specific legal remedy for the neglect of duty of which the guardians had been guilty, there was no means of compelling them to fulfil their duty except by *mandamus*, and that an appointment by the Local Government Board of a vaccination officer would be no remedy for the neglect of their duty by the guardians.

REG. v. LEICESTER GUARDIANS, [1899] 2 Q. B. [632; 68 L. J. Q. B. 945; 81 L. T. 559; 15 T. L. R. 511—Div. Ct.]

**36 Previous Request—Form of Request**—In order to lay the foundation for an application for a *mandamus* to some inferior Court, it is not necessary to request such Court to make any specific order, provided it is requested generally to exercise its jurisdiction in the matter.

REX v. CORNWALL JJ., [1903] 2 K. B. 178; 72 [L. J. K. B. 622, 67 J. P. 290; 51 W. R. 285, 88 L. T. 775, 1 L. G. R. 605—Div. Ct.]

**38 Equal Division of Votes at Quarter Sessions—Adjournment—Discretion — Petty Sessions.**—In discretionary applications to quarter sessions, where there is an equal division of opinion among the justices, and they decline to make the order sought, and refuse to adjourn and re-hear the matter, the King's Bench will not compel them by *mandamus* to do so.

*Semble* (per Gibson, J.)—that the same principle applies to complaints under the Petty Sessions Act.

REX v. TIPPERARY JUSTICES, [1903] 2 Ir. R. 108—[K. B. D.]

**39. Police Magistrate Stating Case—Decision Binding on Magistrate—"Erroneous in Point of Law or in Excess of Jurisdiction"—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33 (1).**—A magistrate decided against the London County Council on the ground that the point was decided in *Carritt v. Godson & Son*, [1899] 2 Q. B. 193; 68 L. J. Q. B. 799; 63 J. P. 644; 80 L. T. 771; 15 T. L. R. 400—Div. Ct. The magistrate declined to state a case for the same reason. It was admitted that the case before the magistrate was on all fours with *Carritt v. Godson & Son*.

HELD—that the magistrate was perfectly right, and it would have been wrong for



**Mandamus**—*Continued.*

him in the circumstances to state a case; his determination was not "erroneous in point of law or in excess of jurisdiction."

REG. v. SHIEL AND OTHERS, (1900) 82 L. T. 587;  
[16 T. L. R. 349—C. A.]

40. *Procedure—Peremptory Writ of Mandamus—Service of on Members of Corporation—Copy served with Order of Court to make Return to Writ.*—A peremptory writ of mandamus was duly served on ten members of a borough council in 1897, commanding the corporation to obey an order of the Local Government Board limiting a time for the carrying out of a sewerage scheme, pursuant to a local Act passed in 1885. The writ after service was left in the hands of one of the members, who lost it. In March, 1903, of the forty-eight members of the council only seven remained who were originally served in 1897, and in that month all forty-eight members were served with an order of the Court to make a return to the peremptory writ served in 1897, a copy of which accompanied the order. On a rule *nisi* to show cause why the return should not be taken off the file, and calling on the forty-eight individual members to show cause why writs of attachment should not issue against them for disobedience to the peremptory writ.

HELD—that under the circumstances, all forty-eight members were duly served with the peremptory writ in March, 1903. It was ordered that writs of attachment should issue against the seven members originally served, the writs to lie in the Crown Office until a certain date, leaving the *onus* on the seven members to satisfy the Court that the writ was obeyed. The matter was allowed to stand over as against the other forty-one.

REG. v. WORCESTER CORPORATION, (1904) 68 J. P.  
[130, 2 L. G. R. 51—Div. Ct.]

Subsequently, the Court, being satisfied that the work was being diligently carried on, ordered the writs to remain in the office for an unspecified period, the matter to stand over generally with liberty to apply.

REG. v. WORCESTER CORPORATION, (1905) 69 J. P.  
[296; 3 L. G. R. 468—Div. Ct.]

41. *Refusal to Produce Minutes of Burial Board to Ratepayer—Application not bonâ fide—Ulterior Motive—Burial Act, 1852 (15 & 16 Vict. c. 85), ss. 16, 17.*—By the Burial Act, 1852, sect. 16, the minutes of the burial board are to be entered in a book, and by sect. 17 "all such books are to be open to the examination of every . . . ratepayer . . . who may take copies," and if this is not permitted there is a penalty of £5. A ratepayer named Hatton made an application to the District Council of Wimbledon, being the burial board, for his solicitors to inspect and take copies of these minutes. Those solicitors were acting for a company,

who for another matter wished to obtain inspection of those books. The board refused to allow the solicitors to inspect, on the ground that the ratepayer alone was the person to whom they were bound to produce the books, and that the present application was not made *bonâ fide*, but for another purpose, that was indirectly obtaining inspection on behalf of the company for whom the solicitors were also acting.

HELD—that the Court would not in the exercise of their discretion make absolute this rule for a writ of mandamus, as the application was not made *bonâ fide* for the purpose of the ratepayer, but for another purpose.

REG. v. WIMBLEDON URBAN DISTRICT COUNCIL, EX  
[PARTE HATTON, (1898) 62 J. P. 84, 77 L. T.  
599; 14 T. L. R. 146—Div. Ct.]

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## CRUELTY TO ANIMALS.

See ANIMALS.

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## CRUELTY TO CHILDREN.

See CRIMINAL LAW AND PROCEDURE.

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## CUSTOM OF THE COUNTRY.

See AGRICULTURE, 10.

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## CUSTOMS AND USAGES.

See AGENCY, 21, 48; BANKERS. 24;  
BANKRUPTCY, 223, 225; BILLS OF  
EXCHANGE, 30, 32, 33; BUILDERS,  
ETC., 2, 9, 28, CARRIERS. 15; STOCK  
EXCHANGE, 1—9, TRADE, 2, 3.

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## CUSTOMS DUTIES.

See REVENUE.

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## DAIRIES AND COWSHEDS.

See PUBLIC HEALTH.

## DAMAGES.

### I. CLASSIFICATION OF DAMAGES.

- (a) General or Nominal . . . 859
- (b) Penalty or Liquidated . . . 859
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*See also* BANKERS AND BANKING; BANKRUPTCY AND INSOLVENCY; BUILDERS; CONTRACT; HIGHWAYS, 67; MASTER AND SERVANT, 455; SALE OF GOODS; SHIPPING AND NAVIGATION.

### I. CLASSIFICATION OF DAMAGES.

#### (a) General or Nominal.

1. *General or Nominal—Agreement to Purchase Debentures — Damages.*—The defendants agreed with the plaintiff syndicate to purchase debentures of the plaintiff syndicate. The defendants failed to carry out the agreement.

**HELD**—that the plaintiff syndicate was entitled to recover from the defendants general, and not merely nominal damages, for the defendants' breach of contract.

**WALLIS CHLORINE SYNDICATE, LD. v. AMERICAN [ALKALI Co., LD., (1901) 17 T. L. R. 656—Grantham, J.]**

#### (b) Penalty or Liquidated.

*And see* ACTION, 2; BUILDERS, 19.

2. *Breach of Contract—Wrongful Dismissal.*—The plaintiff claimed £1,000 under an agreement between him and the defendant company which provided that if at any time during a certain term the company should by notice determine the engagement of the plaintiff without assigning any reason, the company should pay the plaintiff "by way of compensation and in full discharge of his rights and claims the sum of £1,000." The plaintiff was dismissed for a bad reason which was equivalent to "no reason."

**HELD**—that the £1,000 was liquidated damages.

**THOMAS v. LONDON SEWING MACHINE Co. (1898) [14 T. L. R. 38—Mathew, J.]**

3. *Deposit—Sum deposited to be forfeited on Breach of any one of several Stipulations—Stipulations of varying Degrees of Importance.*—Where in a contract a sum of money is made payable upon the happening of one of several possible breaches of different significance or importance, the general rule is that such a sum is to be treated as a penalty and not as liquidated damages; but the Court is entitled to take into consideration the whole of the circumstances in which the document came into existence, with the

view of ascertaining the intention of the parties, and where it appears that one of the parties has deposited with the other a sum of money and agreed that it should be forfeited as and by way of liquidated and ascertained damages on the breach by him of any of several stipulations of varying degrees of importance, the Court will give effect to the plain meaning of the contract by treating the sum deposited as liquidated damages and not as a penalty.

**PYE v. THE BRITISH AUTOMOBILE COMMERCIAL [SYNDICATE, LD., [1906] 1 K. B. 425; 75 L. J. K. B. 270; 22 T. L. R. 287—Bigham, J.]**

4. *Intention — Non - delivery of Coal Abroad.*—By a contract between the plaintiff, who was a coal owner carrying on business abroad, and the defendants, who were coal exporters in England, the latter agreed to sell to the former about 10,000 tons of coal as follows:—About 2,000 tons of screened coal at 13s. 10d. per ton, c.i.f., to be shipped in January, about 900 tons of screened steam coals at 13s. 10d. per ton, c.i.f., to be shipped in March, and about 1,100 tons of small steam coals at 8s. 4d. per ton, c.i.f., to be shipped in March, and the rest in subsequent months; "penalty for non-execution of this contract by either party, 1s. per ton on the portion unexecuted and the amount of proved loss, if any, on freight actually arranged." The defendants did not ship the March instalment of 2,000 tons, and the plaintiffs claimed £320 damages for breach of the contract. The defendants, who had themselves drawn up the contract, contended that the damages were assessed by it at 1s. per ton on the amount not delivered, and that they were not liable for damages beyond that amount, namely, £90.

**HELD**—that, though the word "penalty" was used, the parties intended the 1s. per ton on the portion unexecuted to be liquidated damages for non-delivery, and that therefore that was the measure of the damages.

**DIESTAL v. STEVENSON & Co., [1906] 2 K. B. 345; [75 L. J. K. B. 797; 22 T. L. R. 673; 9 C. L. T. 10; 12 Com. Cas. 1—Kennedy, J.]**

5. *Penalty Clause—Waiver.*—The Spanish Government in expectation of war with the United States ordered from the appellants four torpedo-boat destroyers, the last to be delivered within seven and three-quarter months, with the proviso that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." The vessels were delivered and accepted many weeks late and were paid for; but the purchasers now sued for penalties.

**HELD**—(1) that the £500 per week was to be regarded as liquidated damages and not a penalty, and could be recovered; (2) that the claim to damages had not been waived by paying the price in full without reservation.

**Classification of Damages—Continued.**

Decision of Ct. of Sess. ([1903] F. 1016) affirmed.

CLYDEBANK ENGINEERING AND SHIPBUILDING CO.,  
[LD., AND OTHERS v. YZQUIERDO CASTANEDA  
AND OTHERS, [1905] A. C. 6; 74 L. J. P. C. 1;  
21 T. L. R. 58—H. L.

**6. Retention Moneys on Non-completion of Railway—Actual Cost.]**—The criterion of whether a sum—whether it is called penalty or liquidated damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage, if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.

A contract for constructing a railway provided that in the event of non-completion the contractor should forfeit to the Government certain deposited moneys and certain retention moneys "as and for liquidated damages sustained by the said Government for non-completion of the said line," and that the Government might take possession of the incomplete line, and pay the balance due in respect of its actual cost. The line not being completed,

HELD—(1) the Government was not entitled to the moneys as liquidated damages, and (2) the term "actual cost" did not include interest on the expenditure

THE COMMISSIONER OF WORKS (CAPE OF GOOD  
[HOPE] v. HILLS, [1906] A. C. 368; 75  
L. J. P. C. 69; 94 L. T. 833; 22 T. L. R. 589—  
P. C.

**7. Several Provisions.]—Prima facie**, where there are a number of stipulations in a contract and a sum is payable on the breach of any of them, such sum is a penalty and not liquidated damages.

The defendant failed to carry out a contract by which he agreed, *inter alia*, to buy from the plaintiff a public-house and fittings, and the plaintiff agreed to assign the licences and not to carry on a rival business within a mile. The contract contained a provision that, "if either of the said parties should neglect to perform, or refuse to comply with any part of this agreement, £25 should be payable "as, or in the nature of, liquidated damages "

HELD—that the £25 must be regarded as a penalty.

BRADLEY v. WALSH, (1903) 88 L. T. 737—  
[Div. Ct.]

**(c) Consequential.**

**8. Contract—Supply of Mechanism—Injury to Servant through Mechanism breaking down.]**—A. contracted to supply B. with a piece of mechanism. After delivery the

mechanism broke down and caused injury to a servant of B. B. was found liable to the servant in damages by verdict of a jury.

HELD—that B. in suing A. for breach of contract was entitled to include as damages the sum which he had been found liable to pay his servant, together with the costs of defending the action in which that claim had been constituted.

BAXTER v. BOSWELL, 1899 (O. H.), 6 S. L. T. 351.

**9. Warranty — Sub-contract — Charter-party—Warranty as to Fitness of Vessel—Personal Injuries to Stevedore.]**—A charterer, having been compelled in an action to pay damages to a stevedore for personal injuries sustained by reason of the defective condition of the vessel.

HELD—entitled to recover from the persons from whom he chartered.

SCOTT v. FOLEY & Co., (1899) 16 T. L. R. 55—  
[Bigham, J.]

**10. Fatal Accident—Loss of Child's Services—Funeral Expenses—Travelling Expenses of Father—Fatal Accidents Act, 1846 9 & 10 Vict. c. 93.]**—A child, aged 11, who lived with her father and performed certain household services, met her death owing to negligence on the part of the defendants. The result of her death was that a servant had to be employed. The father brought an action under the Fatal Accidents Act, 1846, and claimed, as special damages, £5 travelling expenses, incurred by the father, and £10, cost of the child's funeral, and also general damages.

HELD—that as the father, a householder, was bound to reverently bury the body of his daughter, and the costs of the child's funeral were damages directly arising from the death of the child, he was entitled to recover the amount awarded for funeral expenses; but that he could not recover the item in respect of travelling expenses.

BEDWELL v. GOLDING & SONS, (1902) 18 T. L. R.  
[436—Phillimore, J.]

Not followed in No. 21, *infra*.

See also under IV. ASSESSMENT.

**II. MEASURE OF DAMAGES.**

And see BAILMENT, 7; BUILDERS, 8, 27.

**11. Breach of Contract to allot Shares.]**—The measure of damages on breach of a contract to allot shares "concurrently with the first issue of shares" is the difference between the price on the day when the plaintiff first discovers the breach of contract and the price which he would have had to pay for the shares if they had been allotted to him.

WILSON v. LONDON AND GLOBE FINANCE CORPORATION, (1898) 14 T. L. R. 15—C. A.

### Measures of Damages—Continued.

12. *Breach of Contract—Agreement to Distribute Profits and Bonus*—[In March, 1902, the I. company offered a bonus to those who would enter into exclusive relations with it. The defendant company issued in reply a bonus scheme, and on May 24, 1902, the plaintiff signed it. By this contract the plaintiff agreed not to sign the I. bonus scheme, or any other similar scheme "containing any condition which would prevent him from buying, displaying, selling, or distributing Ogden's goods or the goods of any other manufacturer." The defendant company on its part undertook for four years to distribute among such customers as purchased direct from the company its entire net profits on the goods sold by it in the United Kingdom, and in addition to distribute during the four years commencing April 2, 1902, the sum of £200,000 per annum.]

The defendant company, besides cutting prices very much, commenced trading in an extravagant way, with the result that in nine months the company made a trading loss of nearly half a million sterling.

On September 27, 1902, the defendant company sold its business to the I. company, and then went into voluntary liquidation.

In December, 1902, after this purchase, the plaintiff signed a bonus agreement of the I. company which differed from their bonus agreement of March, 1902, in that it contained no clause limiting the plaintiff in his choice of manufacturers, and his signing did not violate any term of the defendant company's bonus scheme. Under this scheme of December, 1902, the plaintiff received £520, £62 of which was in respect of O.'s goods sold by the I. company.

HELD—that the plaintiff could not recover damages under the head of a loss of a share of the net profits, but that he was entitled to damages for the failure to distribute the £200,000 per annum, and that the amount he received from the I. company under their scheme of December, 1902, ought not to be taken into consideration in assessing them except as to the £62.

NATHAN v. OGDENS, LD., (1906) 95 L. T. 453—  
[Lawrence, J.]

13. *Breach of Contract—Loss and Expenditure—Loss of Business Generally—Matters within Reasonable Contemplation of Parties*.—[A claim arose out of a contract for the supply by the defendants to the plaintiff of steel plates which the defendants knew were wanted by the plaintiff for building certain barges which were then at such stages of construction that delivery of the plates in strict accordance with the provisions of the contracts was of the utmost importance to the plaintiff. There was, however, no evidence to show that the defendants had any knowledge of the size of the plaintiff's premises, or as to the state of his contract-book, or whether he had any other contracts on hand. The jury found that

there had been a breach of contract by the defendants in not delivering the plates at the proper time, and that the plaintiff could not have got any similar plates elsewhere.]

HELD—that (1) the loss and expenditure occasioned in connection with the barges were matters which might be reasonably contemplated as resulting from a breach of the contract, and damages might be given in respect of such matters, (2) the loss of business generally was far outside the region of damages as recognised by law. Such a claim was purely speculative, and could not be said to have been within the contemplation of the parties, for the defendants had no knowledge as to what contracts the plaintiff had or could have had at the time in question.

WATSON v. GRAY AND OTHERS, (1900) 16 T. L. R. 308—Kennedy, J.

14. *Breach of Contract—Sale of Growing Timber—Loss of Profits*.—[An action was brought for specific performance of an agreement for the sale of timber growing on the lands of the defendant, and an inquiry as to damages was directed at the hearing instead of a decree for specific performance. The defendant was a timber merchant, and was aware that the plaintiff bought the timber to dispose of in the ordinary way of his trade. It was shown that similar timber was not procurable in the market, and that the plaintiff would have realised a considerable profit on the sale of the timber.]

HELD—that the measure of damages was the difference between the contract price of the timber plus the expenses which would be incurred in cutting, removing and making it marketable, and the amount which the plaintiff would have realised by the sale of the timber.

M'NEILL v. RICHARDS, [1899] 1 Ir. R. 79—M.R.

15. *Contract to Subscribe for Debentures and Breach*.—[In an action by a company for breach of contract to subscribe for its debentures, the measure of damages was held to be not the amount of money which the defendant had promised to lend, but only the difference between the rate of interest which the company had offered for the money, and the rate which the company would have to pay in order to put it in the same position as if the defendant had performed his contract. But in measuring the damages, it must be assumed that when the company applied elsewhere for an advance it still remained a company with ordinary credit. If, by reason of circumstances, the company had fallen into disrepute and bad financial odour, the defendant was not responsible for that.]

THE BAHAMAS (INAGUA) SISAL PLANTATION, LD.  
[v. GRIFFIN (1898) 14 T. L. R. 139—  
Bigham, J.]

16. *Interdict—Interdict Recalled—Action for Wrongous Interdict*.—[The respondents

**Measure of Damages—Continued.**

had obtained an interim interdict against the appellants, a mineral company, who owned a large shale and limestone mineral field and also large works for extracting and refining oils. The interdict restrained the appellants from working and winning the seams of shale and other minerals within forty yards of the respondents' water-pipes. The interdict was in force for eleven months, when it was recalled. During the eleven months shale to keep the works going could have been obtained from other sources, but only at prohibitive expense. The appellants' capital in hand was limited, and prices in the oil trade were at the lowest point. In these circumstances they closed their works, with the result that their machinery deteriorated, their business connections were lost, and it was found impossible to restart the works after the recall of the interdict.

In an action for damages for wrongful interdict, the First Division of the Court of Session gave the pursuers judgment for £27,000 damages out of a claim for £137,000.

**Held**—that the pursuers were not entitled to recover as damages their total loss, and that, so far as could be judged from the evidence, the damages were not insufficient.

Decision of Ct. of Sess. ((1906) 8 F. 831) affirmed.

**CLIPPENS OIL CO., LD. v. EDINBURGH AND DISTRICT WATER TRUSTS**, [1907] A. C. 291; 76 L. J. P. C. 79—H. L. (Sc.).

**17. Misrepresentation—Advance out of Funds of Company on Fraudulent Misrepresentations of Director—Insufficient Security—Difference between Advance and Value of Security.**—The directors of the plaintiff company were induced by the fraudulent misrepresentations of the defendant, one of their number, to make an advance out of the funds of the company on the security of a second debenture issued by another company in which the defendant was personally interested. The debenture proved to be an insufficient security, so that loss was occasioned to the plaintiff company.

**Held**—that the measure of damages was the difference between the money advanced and the value of the debenture at the date of issue.

*Peek v. Derry* ((1889) 14 A. C. 337; 58 L. J. Ch. 864; 38 W. R. 33; 61 L. T. 265—H. L.) applied.

**EXPLORING LAND AND MINERALS CO., LD. v. KOLCKMANN**, (1906) 94 L. T. 234—C. A.

**18 Subsidence—Risk of further Subsidence—Depreciation in Value of Land.**—Where damage to land and buildings has been caused by the working of the minerals underneath, in assessing the damages recoverable from the mineral owner the depreciation in the market value of the land and buildings attributable to the apprehension of further subsidence caused by the past

working cannot be taken into account. Such further subsidence, if and when it occurs, gives a fresh cause of action to the surface owner.

In an action for damages for injury to cotton mills arising from subsidence occasioned by the past working of coal mines underneath the site of the mills, both parties consented to judgment directing an inquiry to ascertain the amount of the damages, which inquiry was referred, pursuant to sect. 13 of the Arbitration Act, 1889, to an official referee, who assessed the necessary repairs at a certain amount, and the depreciation of the premises at a further amount, which latter amount the colliery owners disputed on the ground that the official referee, in estimating that amount, had taken into consideration the risk of future damage.

**Held**—that he ought not to have done so.

Decision of C. A. ([1906] 2 Ch. 22; 75 L. J. Ch. 512; 94 L. T. 715, 22 T. L. R. 521) reversed.

**TUNNICLIFFE & HAMPSON, LD. v. WEST LEIGH [COLLIERY CO., LD.]**, (1907) 24 T. L. R. 146—H. L. (E.).

**19. Trespass by Local Authority.**—The defendant council wrongfully entered upon the plaintiff's land and demolished a wall that he had built thereon. In an action to recover damages for trespass the learned judge directed the jury that the measure of damages was the out-of-pocket expenses to which the plaintiff had been put by reason of the defendant council's wrongful act.

**Held**—that the jury had been misdirected, and that the defendant council were liable to punitive damages, and therefore that the jury should have been directed to take into consideration facts which aggravated the wrong inflicted upon the plaintiff.

**DAVIS v. BROMLEY URBAN DISTRICT COUNCIL**, [(1903) 67 J. P. 275; 1 L. G. R. 668—C. A.]

**20. Trespass—Unintentional Trespass—Corporation—Waterworks—Compulsory Acquisition of Land—Underground Heading—Encroachment beyond Boundary of Acquired Lands—Injunction or Damages.**—The defendant corporation, in course of constructing a reservoir at a depth of 123 feet below the surface, inadvertently carried a heading 18 feet by 6 feet for a distance of 42 feet beyond their own boundary into the plaintiffs' land. The excavation was made for the purpose of stopping a fissure in the soil, which might have caused a leak in the reservoir, and it was filled up with concrete and brickwork, the surface of the plaintiffs' land being in no way interfered with. The plaintiffs claimed a mandatory order against the defendants to restore the land to its former condition. The cost of doing this would have amounted to £1,000. Before action the defendants offered to pay £100 by way of damages, and before delivery of the defence paid £10 into court.

**Measure of Damages—Continued.**

**HELD**—that the Court had a discretion to give damages in lieu of an injunction; that this was a case for damages, and that the proper amount to be awarded was £100.

There is no rule that the measure of damages in such a case is the amount which it would cost to restore the land to its former condition.

*Shelfer v. City of London Electric Lighting Co.* ([1895] 1 Ch. 287; 61 L. J. Ch. 216, 72 L. T. 34; 43 W. R. 238—C. P.) followed.

*Mayfair Property Co. v. Johnston*, ([1894] 1 Ch. 508, 63 L. J. Ch. 399, 70 L. T. 485—North, J.) explained.

*RILEY v. HALIFAX CORPORATION*, (1907) 71 J. P. 1428; 97 L. T. 278, 23 T. L. R. 613; 5 L. G. R. 909—Joyce, J.

**III. WHEN DAMAGES NOT RECOVERABLE.**

**21. Fatal Accident to Daughter—Negligence—Loss of Daughter's Services—Funeral Expenses—Shock—Fatal Accidents Act, 1846** (9 & 10 Vict. c. 93).—A master cannot recover damages in respect of an injury which causes the immediate death of one of his servants.

A father cannot recover under the Fatal Accidents Act, 1846, the funeral expenses of his unmarried daughter who was living with him at the time when she was killed owing to the negligence of the defendants.

*Osborne v. Gillett* ((1873) L. R. 8 Ex. 88; 42 L. J. Ex. 53, 28 L. T. 197) approved.

*Bedwell v. Golding* ((1902) 18 T. L. R. 436—Phillimore, J., No. 10, *supra*) not followed.

Decision of *Darling, J.* (92 L. T. 691; 21 T. L. R. 505) reversed.

*CLARK v. LONDON GENERAL OMNIBUS CO., LD.*, [1906] 2 K. B. 648, 75 L. J. K. B. 907; 95 L. T. 435; 22 T. L. R. 691—C. A.

**22. Nervous Shock from Fright—Premature Birth—Idiot Child—Damages—Remoteness**—The plaintiff was behind the bar of her husband's public-house, she being then pregnant, when the defendants, by their servant, negligently drove a pair-horse van into the public-house. The plaintiff in consequence sustained a severe shock, and was seriously ill, and gave premature birth to a child, and in consequence of the shock sustained by the plaintiff the child was born an idiot.

**HELD**—that the plaintiff had a good cause of action for damages, but no damages could be claimed in respect of the child being born an idiot.

*Victorian Railways Commissioners v. Coultas* ((1888) 13 App. Cas. 222; 57 L. J. P. C. 69; 52 J. P. 500; 37 W. R. 129; 58 L. T. 390—P. C.) not followed.

*DULIEU v. WHITE & SONS*, [1901] 2 K. B. 669; [70 L. J. K. B. 837; 50 W. R. 76; 85 L. T. 186; 17 T. L. R. 555—Div. Ct.

**23. Riot—Persons Riotously and Tumultu-**

**ously Assembled Together—Riot (Damages Act, 1886** (49 & 50 Vict. c. 38), s. 2.])—There are five necessary elements of a riot: (1) number of persons, three at least; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another, by force if necessary, against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

Therefore, these five elements must be proved in order to obtain compensation under sect. 2 of the Riot (Damages) Act, 1886, for the destruction of a building by persons riotously and tumultuously assembled together.

*FIELD AND OTHERS v. RECEIVER FOR METROPOLITAN POLICE DISTRICT*, [1907] 2 K. B. 853; 76 L. J. K. B. 1015; 71 J. P. 494; 23 T. L. R. 736, 5 L. G. R. 1121—Div. Ct.

See also title BAILMENT, 10.

**IV. ASSESSMENT.**

**24. Personal Injuries—Acceptance of Sum of Money in full Satisfaction and Discharge—Claim for further Compensation for subsequent Disablement—Question for Jury.**—The plaintiff was injured in a railway collision, and he afterwards signed a receipt in the following terms:—"Sept. 26, 1899. Received of the Great Northern Railway Co., per W. B. James, Esq., the sum of £190, in full satisfaction and discharge of all claims, legal and medical charges included, in respect of injuries sustained by Mr. T. E. J. Ellen, near Babworth Crossing, Retford, on the 16th of March, 1899." He returned to his work, but, after an interval, his sight began to fail, and he became totally blind and destitute. He claimed compensation in addition to the sum he had already been paid.

**HELD**—that it was a question for the jury whether the plaintiff intended, at the time he signed the receipt and agreement, to debar himself from claiming for any subsequent disablement arising out of the accident.

Decision of *Bucknill, J.* ((1901) 49 W. R. 395; 17 T. L. R. 338), affirmed.

*ELLEN v. GREAT NORTHERN RAILWAY CO.*, (1901) [17 T. L. R. 453—C. A.]

**25. Trial—New Trial—Libel—Excessive Damages.**—The defendant, in a letter addressed to the Local Government Board, asking for an inquiry into the conduct of the plaintiff as solicitor for the borough of S., accused the plaintiff of forging a certificate of taxation, and of obtaining the amount of a bill of costs by false pretences; and, when sued in libel, pleaded privilege. The jury found a verdict for the plaintiff for £150. The evidence showed that the accusation was made maliciously and with-

**Assessment—Continued.**

out any foundation whatever. On a new trial motion,

**HELD**, by the Queen's Bench Division, and on appeal by the Court of Appeal—that the damages awarded “not being so large that twelve sensible men could not reasonably have given them,” the verdict could not be disturbed.

*M'CARTHY v. MAGUIRE*, [1899] 2 Ir. R. 802—  
[Q. B. 812—C. A.]

**26 Contract—Sale of Coal—Sub-contract—Costs of Reasonably Defending Action—Solicitor and Client Costs—Party and Party Costs.**—The plaintiff, a coal merchant, entered into a contract with shipowners for the supply of bunker coals to ships over a certain period, and, in order to carry out his contract, the plaintiff entered into a contract with the defendants, who carried on business in the same place, for the supply of coals to the ships for the same period. The defendants having made default in the supply of coals, one of the ships was detained in dock, and the shipowners brought an action against the plaintiff to recover damages for the detention arising from the breach of contract. The plaintiff gave notice of the claim to the defendants, who repudiated liability. The plaintiff accordingly defended the action and paid a sum of money into Court. At the trial it was held that the amount paid into Court was sufficient to satisfy the shipowners' claim, and judgment was entered for the shipowners for the amount so paid into Court, with costs up to the time of the payment into Court, the plaintiff to have the costs of the action subsequent to that time. The plaintiff thereupon sued the defendants for breach of contract, claiming as damages (1) the sum recovered by the shipowners in the former action, (2) the costs paid to the shipowners, and (3) the difference between the plaintiff's costs of the action, taxed as between solicitor and client, and the party and party costs subsequent to the time of the payment into Court which he had received from the shipowners.

**HELD**—that as the plaintiff had, in these circumstances, acted reasonably in defending the former action, he was entitled under the rule in *Hadley v. Baxendale* ((1854) 9 Ex 341, 23 L. J. Ex. 179; 18 Jur. 358; 2 C. L. R. 517) to recover, in addition to items (1) and (2), the difference between the solicitor and client costs of the action, taxed upon the footing that another person was going to pay them, and the party and party costs subsequent to the payment into Court.

*Hammond & Co. v. Bussey* ((1887) 20 Q. B. D. 79; 57 L. J. Q. B. 58) followed.

*Baxendale v. London, Chatham and Dover Ry. Co.* ((1874) L. R. 10 Ex. 35; 44 L. J. Ex. 20; 23 W. R. 167; 32 L. T. 330) discussed.

*AGIUS v. GREAT WESTERN COLLIERY COMPANY*, [1899] 1 Q. B. 413, 68 L. J. Q. B. 312; 47 W. R. 403; 80 L. T. 140—C. A.]

See also CONSEQUENTIAL DAMAGES I. (c).

**DANCING.**

See THEATRES, ETC.

**DEAD FREIGHT.**

See SHIPPING AND NAVIGATION.

**DEATH DUTIES.**

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II. LEGACY DUTY . . . . .	905
III. PROBATE DUTY . . . . .	908
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And see LUNATICS, 24; WILLS, 242.

**I. ESTATE DUTY.**

**1 Agricultural Property—Principal Value—Land in the Occupation of a Tenant—Policies of Insurance—No Part of the Premiums Paid by the Deceased—Property Passing on the Death—Finance Act, 1894** (57 & 58 Vict. c. 30), ss. 1, 2, sub-s. (d); s. 7, sub-s. 5.]—In estimating, for the purposes of estate duty, the principal value of agricultural land in the occupation of a tenant, where no part of such principal value is due to the expectation of an increased income, the proviso to sect. 7, sub-s. 5, of the Finance Act, 1894, applies, and the tenant is entitled to have the principal value limited, as therein provided, to “twenty-five times the annual value, as assessed under Sched. A. of the Income Tax Acts, after making such deductions as have not been allowed under that assessment, and are allowed under the Succession Duty Act, 1853, and, making a deduction for expenses of management, not exceeding 5 per cent. of the annual value so assessed.”

R., upon the occasion of his marriage in 1843, assigned four policies of insurance, and his wife assigned a sum of £3,500 to trustees. Under the provisions of the settlement the policies were kept up, and the annual premiums paid, exclusively out of the income of the moneys of the wife, until the death of R. in 1898, when the moneys secured by the policies became payable.

**HELD**—that the moneys payable under the policies were liable to estate duty under sect. 2, sub-sect. (d), of the Finance Act, 1894, as being an “interest purchased or provided by the deceased, either by himself alone, or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased,” and therefore property “deemed to pass” within the meaning of the section.

*ATTORNEY-GENERAL v. ROBINSON*, [1901] 2 Ir. R. [67.

**Estate Duty—Continued.**

2. *Annuity*—"Full Consideration in Money or Money's Worth"—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (b), s. 3, sub-s. 1.]—In 1862 the defendant inherited under a settlement a life interest in estates in Lincolnshire, subject to a jointure rent-charge of £400, he also inherited a life interest in estates in Dorsetshire. In 1870 he sold the Lincolnshire estates, subject to the jointure rent-charge, investing part of the purchase-money in the name of trustees on trusts to indemnify the purchasers against the rent-charge.

In 1883 an arrangement was made by which the rent-charge owner released the Lincolnshire estates from the payment of the rent-charge, in consideration of which, and in consideration of the money invested in the name of trustees being released from the trusts for indemnity, the defendant charged his life interest in the Dorsetshire estate and certain policies on his life with the payment of an annuity of £400.

Upon the death of the annuitant the Commissioners of Inland Revenue claimed estate duty from the defendant in respect of the benefit which accrued or arose to him as the tenant for life of the Dorsetshire estates upon the cesser of the annuity.

HELD—that the annuity was not granted by the defendant for "full consideration in money and money's worth" paid to him "for his own use or benefit," so as to exempt from the payment of duty by virtue of sect. 3, sub-sect. 1, of the Finance Act, 1894.

ATTORNEY-GENERAL v. SMITH-MARRIOTT, [1899] 2 [Q. B. 595; 69 L. J. Q. B. 59; 74 J. P. 54; 48 W. R. 12; 81 L. T. 359; 15 T. L. R. 497—Div. Ct.]

3. "*Annuity*"—*Money Paid to Charitable Society—Agreement by Society to Pay Donor an Annuity—Reservation of Benefit—Bonâ fide Sale—Succession Duty Act, 1853* (16 & 17 Vict. c. 51), ss. 7 and 16—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (c); s. 3, sub-s. 1, 2; s. 15—*Customs and Inland Revenue Acts, 1881* (44 & 45 Vict. c. 12), s. 38; and 1889 (52 & 53 Vict. c. 7), s. 11.]—A person during his life-time paid to a charitable society the sum of £500 "in lieu of a legacy," and in consideration thereof the society agreed to pay the sum of £25 per annum during his life and during his wife's life, if she should survive him. The £25 a year was paid to the donor during his life, and then to his wife who survived him. Upon her death the Crown claimed that estate duty on the £500 became payable by the society upon the donor's death under sect. 2, sub-sect. 1 (c), and succession duty, under sects. 7 and 16 of the Succession Duty Act, 1853, on the death of the wife.

HELD—that the transaction was a gift of £500 to the society with a reservation of a benefit to the donor, and was not a purchase of an annuity of £25 by the donor, and that therefore estate duty and succession duty be-

came payable on the £500 without any deduction in respect of the value of the annuity.

Judgment of Phillimore, J. ([1902] 1 K. B. 416, 71 L. J. K. B. 187, 66 J. P. 323; 50 W. R. 366; 86 L. T. 296; 18 T. L. R. 233), reversed.

ATTORNEY-GENERAL v. JOHNSON, [1903] 1 K. B. [617, 72 L. J. K. B. 323; 67 J. P. 113; 51 W. R. 487, 88 L. T. 445, 19 T. L. R. 324—C. A.]

4 *Apportionment*—"Express Provision to the Contrary"—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 14 (1).]—Under the will of Earl Fitzhardinge, who died in October, 1857, by which he made a settlement of his estates, power was given to any tenant for life to charge on the estate a jointure, not exceeding £3,000 a year, for his widow, "free from all taxes and deductions, except property tax and legacy or succession duty."

HELD—that this was an "express provision to the contrary" to the enactment of sect. 14 of the Finance Act, 1894, the testator's intention clearly being that £3,000 a year should be received by the jointress (subject to the deductions mentioned by him) free from any tax.

IN RE FITZARDINGE (LORD); LORD FITZARDINGE [v. JENKINSON, (1899) 80 L. T. 376; 15 T. L. R. 225—C. A.]

5 *Arrangement—Barring Entail—Settlement—Mortgage in Fee—Policies—"Interest Purchased or Provided by Deceased"—"To the Extent of the Beneficial Interest accruing or arising by Survivorship or Otherwise on Death"—Policy Moneys—Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 1, 2, 3.]—At the time when the transaction, afterwards referred to, was entered into the defendant (the tenant in tail) and his father (the tenant for life) were at arms' length, and the father was in bad health. The condition of the property and the relations between the defendant and his father were such that the defendant was entitled to deal with it. The father was in difficulties, in fact insolvent, and the defendant was desirous of getting some income for himself and was acting for his own interest. Between the two an arrangement was come to by which the entail was barred, and the fee mortgaged to secure advances to the father, and which, as regards the matters in dispute, invoked practically the inclusion in a settlement of the moneys arising from policies of insurance upon the father's life, coincidently with the disappearance from the settlement of the mortgaged property, the intention and effect of the arrangement being that, for the interest, whatever it might be, that would otherwise have passed to the son, there was practically a substitution of an interest in certain policies of assurance. On the death of the father the Crown claimed estate duty on the policy moneys.

HELD—that there was (whether it was called a settlement, or a family arrangement, or by any other name) that which, for the purposes of the Finance Act, 1894, and in



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the terms of sect. 2 (1) (d), of that Act, was an "interest purchased or provided by the deceased," and which was taxable "to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased"; it was not an assignment of the policies to the son, but was an arrangement by which an interest passed to the son in those policies under the terms of the settlement upon the death of his father—a succession—a valuable interest which accrued to him in consequence of his surviving his father, and estate duty was payable.

ATTORNEY-GENERAL *v.* HAWKINS, [1901] 1 Q. B. [285; 70 L. J. Q. B. 195; 64 J. P. 791; 49 W. R. 320; 83 L. T. 725; 17 T. L. R. 85—Div. Ct.

**6. Charge upon Land—Scottish Entail—Heir of Entail—Limited Owner—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 6 (8), 8 (4), 9 (6), 23.]**—Where an heir of entail in possession in Scotland, who has a limited interest in land, pays the estate duty in respect thereof, he has *ipso facto* a charge upon the land by virtue of sect. 9, sub-sect. 2 of the Finance Act, 1894, though no entry in respect thereof appears on the records, and it is an asset of his estate, and upon his death estate duty is payable upon the amount thereof.

Decision of the Court of Session (6 Fraser 347; 41 Sc. L. R. 267) reversed, Lord Robertson dissenting.

LORD ADVOCATE *v.* COUNTESS OF MORAY AND [ANOTHER, [1905] A. C. 531; 74 L. J. P. C. 122; 93 L. T. 569; 21 T. L. R. 715—H. L. (Sc.)

**7. Colonial Bond to Bearer—Containing Charge on Property in the Colony—Bond situate in England.]**—A colonial bond to bearer, even though containing a charge on property in such colony, if negotiable by the law of such colony, is also negotiable in the country where such bond is physically situated. Therefore, as the bailee of such bond must get a good discharge before he can deliver it up, where such bonds are actually in England at the death of the deceased, estate duty is payable in respect of such bonds.

ATTORNEY-GENERAL *v.* GLENDINNING, (1905) 92 [L. T. 87—Phillimore, J.

**8 Foreign Bonds Payable to Bearer—Bonds situate in England.]**—Foreign Government bonds payable to bearer and negotiable in this country are, when actually in England at the death of the owner, liable to estate duty.

WINANS *v.* REX, (1907) 23 T. L. R. 705—Bray, J.

**9. Deductions—Debts—Covenants in Marriage Contracts to Pay Moneys to Trustees—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7.]**—A sum of money which a husband has by

his marriage contract covenanted to pay to the trustees thereof upon the usual trusts, in consideration of a similar covenant by the wife, does not create a debt incurred by him "for full consideration in money or money's worth wholly for the deceased's own use and benefit," within the meaning of sect. 7 (1) (a) of the Finance Act, 1894; and therefore such sum cannot be deducted in determining the value of his estate for the purposes of estate duty.

A similar covenant by a father contained in his son's marriage contract falls within the same principle.

INLAND REVENUE *v.* ALEXANDER'S TRUSTEES, [(1905) 7 F. 367—Ct. of Sess.]

**10. Deductions—Interest in Expectancy—Sale or Mortgage—Value of Property passing on Death—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21, sub-s. 3.]**—The petitioner, being then a tenant in tail in remainder, by indenture executed before the date of the Finance Act, 1894, created, for good consideration, an annuity or clear yearly rent-charge, charged upon and to issue out of the settled property, with power to enforce payment by entry, distress and sale. On the death of the tenant for life in 1896, the petitioner claimed (1) to deduct from the value of the property passing to him on the death the capitalised value of the annuity, on the ground that it represented the sale of an interest in expectancy, on which, by sect. 21, sub-sect. 3, of the Finance Act, 1894, no estate duty was payable; or (2), in the alternative, if the transaction was not a sale, but a mortgage, that, under the same section, estate duty was only payable on the value of the equity of redemption.

HELD—that the transaction could not be treated as a sale but was in the nature of a mortgage; that the Act was intended for the protection of persons who entered into relations for full consideration in money or money's worth, and not for the protection of those who as mortgagors or sellers had dealt with them, the sub-section does not protect a mortgagor but simply protects the mortgagee; and the petitioner was not entitled under sect. 21, sub-sect. 3, on the death of the tenant for life to exemption from estate duty.

IN RE VERNON, [1901] 1 Q. B. 297; 70 L. J. Q. P. [202, 49 W. R. 192; 64 J. P. 804; 83 L. T. 535; 17 T. L. R. 91—Div. Ct.]

**11. Deduction—Marriage Settlement—Bonâ fide Purchase—"Partial Consideration in Money or Money's Worth"—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3.]**—D. upon her marriage transferred to her husband shares worth £6,000; and he in consideration, partly of the marriage and partly of the shares, settled lands in trust for himself for life, with remainder to D. absolutely.

Upon the husband's death, the lands were worth £8,000.

HELD—that D. was entitled to deduct from

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this sum the £6,000, as being a "partial consideration in money or money's worth" within the meaning of sect. 3 (2) of the Finance Act, 1894, and was liable for estate duty only in respect of the balance.

IN RE LOMBARD, [1904] 2 Ir. R. 621—K. B. D.

**12. Exemption—Probate Duty Paid before 1894 on Settled Personalty—Now Invested in Realty—Finance Act, 1894** (57 & 58 Vict. c. 30), s. 21 (1)—D, who died in 1849, by his will left personalty upon trust for investment in land for two life tenants in succession with remainder to the defendant in tail. Probate duty was paid on the personalty. On the death of the second life tenant in 1900 estate duty was claimed under the Finance Act, 1894, in respect of the land in which the personalty had been invested.

**HELD**—that the duty was not payable. The material time to consider was the date of the settlor's death: at that date the settled property was personalty, and probate duty was paid on it as such: therefore it fell within the exemption contained in sect. 21 (1), viz., personal property settled by the will of a person dying before 1894 on which probate duty has been paid.

Decision of Channell, J. ([1904] 1 K. B. 749; 73 L. J. K. B. 503; 91 L. T. 52; 20 T. L. R. 336) reversed.

**ATTORNEY-GENERAL v. EARL OF LONDESBOURGH**, [1905] 1 K. B. 98, 74 L. J. K. B. 81, 53 W. R. 147; 92 L. T. 39, 21 T. L. R. 36—C. A.

**13. Exemption—Reverter of Property to Disposer—Settlement of Wife's Property Reserving an Annuity of £100—Trusts for Issue—"Other Interests"—Finance Act, 1896** (59 & 60 Vict. c. 28), s. 15.—By her marriage settlement C. M. S. assigned certain funds to trustees, reserving to herself an annuity of £100 a year upon trust for her husband for life with the usual trusts in favour of the issue of the marriage with an ultimate trust for C. M. S. There was no issue of the marriage. On the death of the husband, C. M. S. claimed that estate duty was not payable under sect. 15 of the Finance Act, 1896.

**HELD**—that estate duty was payable.

**ATTORNEY-GENERAL v. PENRHYN**, (1900) 64 J. P. [552; 83 L. T. 103; 16 T. L. R. 464—Div. Ct.

**14. Foreign Donor Domiciled Abroad—Property Situate Abroad—Gift to English Limited Company of the Property on Trust for Donor for Life and after his Death to Unascertained Aliens—Finance Act, 1894** (57 & 58 Vict. c. 30), s. 2—**Succession Duty Act, 1853** (16 & 17 Vict. c. 51), ss. 2, 7, 8, 16.—In 1891, Baron de H. was a domiciled Austrian, without children, and had a permanent residence in Paris and a temporary residence in London. He conceived the idea of ameliorating the condition of certain Jews, and for that purpose determined to make

and did make in the first instance a donation of £2,000,000 of money. To carry out his project he then brought out and formed in this country a limited company under the provisions of the Companies Act, 1862, which company was incorporated upon 10th September, 1891, and registered under the name of the Jewish Colonisation Association, which was the defendant company. The memorandum of this company showed in detail the object for which it was incorporated, viz., that it might hold and administer the donation of £2,000,000 of money, which was then handed by the Baron to the company for the benefit of the Jews, and also that it might hold and administer any other donations it might receive towards promoting the welfare of the Jews. There was a clause in the memorandum—the 7th—which provided that in the event of the company being wound up or dissolved, if any property then remained, it should not be distributed amongst the members of the company, but be transferred to some institution with objects similar to that of the company, and in default of selection of such an institution by the members, a Judge of the High Court of Justice, that is, an English Judge, should make the selection. The registered office of the company always was at the offices of the English solicitors of the defendant company in the city of London. The defendant company had, besides its registered office, offices in Paris, with branches at St. Petersburg and Buenos Ayres. All the general and extraordinary meetings of the company were held in London. By the articles of association the affairs and business of the company were to be under the general control of a council of administration, the meetings of which council were to be held at such places in Europe as the council should determine. The whole of the business of the company was transacted by the council in Paris.

**HELD**—that the Baron deliberately and intentionally submitted his scheme to English law, and indelibly stamped it as being an English scheme, that the £2,000,000 of money having been given by the Baron absolutely to the English company for the benefit of the Jews, no question of succession arose thereon upon the death of the Baron.

In the year 1892 the Baron, to increase his benefactions to the Jews, gave to the English company a further sum of £7,000,000 of money. He did this by an English deed made between himself of the one part and the defendant company of the other part. By the deed the company during the life of the Baron was to deal with the securities specified in the schedule thereto and held by banks in England and elsewhere in Europe as directed by the Baron; the company was to pay the Baron the income of the investments, i.e., during his life; after the death of the Baron the company was to apply the securities subject to the provisions of the deed, for the benefit of Russian Jews. All the securities were upon foreign pro-

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perties. The Baron died in 1896 domiciled in Austria.

HELD—that the £7,000,000 of money was property within the Succession Duty Act, 1853, ss. 2, 16, and estate duty was payable under the Finance Act, 1894.

Judgment of Ridley and Darling, J.J. ([1900] 2 Q. B. 556; 69 L. J. Q. B. 692; 64 J. P. 426, 48 W. R. 59; 82 L. T. 679, 16 T. L. R. 383), affirmed.

ATTORNEY-GENERAL *v.* JEWISH COLONISATION [ASSOCIATION, [1901] 1 Q. B. 123, 70 L. J. Q. B. 101; 65 J. P. 21, 49 W. R. 230, 83 L. T. 561; 17 T. L. R. 106—C. A.

15. *Gift inter vivos—Settlement on Daughter—Interest Retained by Settlor—Surplus Income—Ultimate Contingent Interest—Settlement Estate Duty.*—By a settlement made two years before his death C. conveyed to trustees a sum of £15,000 invested on mortgage, and producing £675 per annum upon trust to pay out of the income a sum of £575 per annum to his daughter Mrs. D. for life, and after her death to hold the said sum of £15,000 in trust for such child or children as she should appoint, and in default of appointment for the children equally. There was power to Mrs. D. to appoint to her husband an annuity of £300 a year for his life in the event of his surviving her. If there should be no child who being a son should attain twenty-one, or being a daughter attain that age or marry, the trustees were to hold the trust funds after the death of Mrs. D. (but subject to the annuity to the husband) in trust for C. absolutely. During the life of Mrs. D. the trustees were to hold the balance of the income in trust for C. Upon C.'s death,

HELD—that neither the trust for C. of the surplus income, nor the ultimate contingent trust for C. of the *corpus* of the fund, rendered the gift one “of which *bonâ-fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise,” and that neither estate duty nor settlement estate duty was payable by the executors of C. in respect of such part of the £15,000 as was settled on Mrs. D., her husband, and issue.

IN RE COCHRANE, [1906] 2 Ir. R. 200—C. A.

16. *Gift inter vivos—Transfer of Possession—Funds in Hands of Trustees—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c).*—A lady some years before her death executed a deed of gift of her whole movable estate in favour of her daughter and her daughter's husband. After her death it appeared that certain funds in the hands of trustees, having fallen to her under the Thellusson Act, had really formed part of her estate during her lifetime, though that fact was unknown to her and also to the trustees. No formal intimation of the deed of gift had been made

to the trustees, but the daughter's husband was one of the trustees, and the solicitors who prepared the deed were also the solicitors to the trust.

HELD—that there was no assumption of possession of these trust funds by the donees within the meaning of sect. 2, sub-sect. 1 (c), of the Finance Act, 1894, and that consequently estate duty was payable in respect of them.

LORD ADVOCATE *v.* STEWART, (1906) 8 F. 579—  
[Ct. of Sess.]

And see No. 52 *infra*.

17. “*Gift*” within 12 months of Death—*Gift by Bridegroom's Father—Sum Settled by Bride's Father—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c)*—By an agreement made prior to the defendant's marriage, the bride's father agreed to settle on her £20,000 on condition that his father gave him £10,000. The £10,000 was paid and the settlement executed, and the marriage then took place, but within 12 months of the payment of the £10,000 the defendant's father died.

HELD—that estate duty was payable on the £10,000 as being a “gift” within the meaning of sect. 2 (1) (c) of the Finance Act, 1894.

ATTORNEY-GENERAL *v.* HOLDEN, [1903] 1 K. B. [832, 72 L. J. K. B. 420; 67 J. P. 135; 51 W. R. 685; 88 L. T. 729, 19 T. L. R. 385—  
Ridley, J.]

18. *Gift within a Year of Death—Gift Accepted in Satisfaction of Covenant to Bequeath—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (2)*—In 1892 a lady covenanted with the trustees of a charity that upon her death her executors should pay them for the charity £5,000 free of all duties and deductions.

Six months before her death she paid £5,000 to the trustees, who released her from her covenant.

HELD—that estate duty was payable upon the £5,000 as being a “gift” made within twelve months of her death.

ATTORNEY-GENERAL *v.* LORD COBHAM AND OTHERS, [1904] 90 L. T. 816; 20 T. L. R. 337—  
Channell, J.]

19. *Incidence—Annuity—Charge on Land—Specific Devise—Mixed Fund—Testamentary Expenses—Estate Duty—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 9 (1), 14 (1).*—The statement in Theobald on Wills that “a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable” is too wide; the effect of the gift must depend upon the construction of the particular will.

H. gave to his wife by will an annuity of £500, declaring that it should be a first charge on his freehold property at G. There was a residuary devise and bequest (under which the G. property passed) to trustees upon trust to sell and convert and out of

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the proceeds to pay funeral and testamentary expenses, debts and legacies and then to hold the residue on certain trusts.

**HELD**—that the wife's annuity was not a rent charge, but a personal annuity secured by a charge on the G. property, and that the executors must pay the estate duty on it as being a testamentary expense.

**IN RE TRENCHARD; TRENCHARD v. TRENCHARD**, [1905] 1 Ch. 82; 74 L. J. Ch. 135; 53 W. R. 235; 92 L. T. 205—Warrington, J.

**20. Bequest of Annuities—Portions for Grandchildren—Limitation by Way of Succession—“Settled Property”**—*Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-s. 1—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 5, sub-s. 1; s. 22, sub-s. 1.]—A testatrix by her will bequeathed annuities to two persons for their lives, and directed that a capital sum should be set aside to produce the annuities, and, subject thereto, she bequeathed all the residue to her sons in equal shares. Upon her death estate duty was paid upon the whole estate, and her trustee set apart a sufficient capital sum to produce the annuities and distributed the estate.

**HELD**—that settlement duty was payable upon the capital sum required and properly set apart for the payment of the annuities, as such sum was property “standing limited to or in trust for persons by way of succession” within the meaning of sect. 2 (1) of the *Settled Land Act, 1882*, and was, therefore, property “settled by the will of the deceased” within the meaning of sect. 5 (1) of the *Finance Act, 1894*.

A testator by his will bequeathed his residuary estate upon trust to pay the income to his wife for life, and after her death to pay annuities to each of his daughters for life, and after the death of each daughter to raise out of the residuary trust funds specific sums, each sum to be raised on the death of each daughter for the children of such daughter, if any, who being male should attain the age of twenty-one years, or being female should attain that age or marry, and he bequeathed the residue to his son absolutely.

**HELD**—that settlement estate duty was payable upon so much of the residuary estate as would be sufficient to provide these portions for the grandchildren, as the property was to that extent “settled property.”

**ATTORNEY-GENERAL v. OWEN; ATTORNEY-GENERAL v. COULSON**, [1899] 2 Q. B. 253; 68 L. J. Q. B. 779; 63 J. P. 611; 81 L. T. 121; 15 T. L. R. 381—Div. Ct.

**21. Incidence—Bequest of Money to Pay Estate Duty—Charge on Property in favour of Limited Owner—Finance Act, 1894** (57 & 58 Vict. c. 30), s. 3, sub-s. 4; s. 9, sub-s. 1, 6.]—A testator by his will made in 1899 bequeathed to his son “such a sum of money

as shall be sufficient to pay and discharge all the estate duty which may be payable by” his son “on the real estate, and on any money liable to be laid out in the purchase of real estate, passing on” the testator's death to his son under a settlement, and he bequeathed the residue of his personal estate to other persons.

**HELD**—that the legacy was not subject to a trust to pay the estate duty, and that consequently the testator's son, being a limited owner, was not precluded from obtaining a charge on the settled estates for the amount of the duty under sect. 9, sub-sect. 6, of the *Finance Act, 1894*.

Decision of the C. A. (86 L. T. 331) reversed.

**EARL OF MEXBOROUGH v. SAVILLE**, (1903) 88 [L. T. 131; 19 T. L. R. 287—H. L. (E.).

**22. Incidence—“Case in which Executor is not Accountable”—Pecuniary and Residuary Legatees.**]—A testator, after providing for some minor gifts, devised and bequeathed his residuary real and personal estate to trustees upon trust to pay his widow an annuity, and after her death to pay out of the trust funds legacies amounting to £9,000, and then to divide the residue amongst certain named persons.

Upon the widow's death estate duty became payable upon so much of the trust funds as represented proceeds of the testator's real estate under sect. 1 of the *Finance Act, 1894*, it being settled property in which she had an interest ceasing on her death; under sect. 21 (1) no estate duty was payable so far as the fund represented personal estate. The proportion of the fund representing real estate was ascertained to be twelve-seventeenths of the whole, and the duty on twelve-seventeenths of the £9,000 required to pay legacies came to about £220. The question now arose between the residuary legatees and the pecuniary legatees as to whether this sum must be paid out of the residue, or must be borne rateably by the recipients.

**HELD**—that this was property passing on the death of the deceased, in respect of which the executor was not accountable for the estate duty, within the meaning of sect. 8 (4); and that the duty on these legacies must be borne by the legatees in proportion to the amount of their legacies, and could not be thrown on the residue.

**HELD ALSO**—that in such a case there is a right of contribution if the residuary legatees, or the trustees, in the first instance pay all the duty out of residue; and *semble* the Crown might call upon them to do so.

Decision of Buckley, J. (72 L. J. Ch. 319; 51 W. R. 449; 88 L. T. 521), reversed.

**BERRY v. GAUKROGER**, [1903] 2 Ch. 116; 72 [L. J. Ch. 435; 51 W. R. 449; 88 L. T. 521; 19 T. L. R. 445—C. A.

**23. Incidence—Contingent Legacies and Annuities—Finance Act, 1894** (57 & 58 Vict.

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c. 30), ss. 5, 7, 9, 14, 22—*Finance Act*, 1896 (59 & 60 Vict. c. 28), s. 19—*Finance Act*, 1898 (61 & 62 Vict. c. 10), s. 14.]—A testator by his will gave certain contingent legacies and annuities, and directed that they should be primarily charged upon and payable out of his personal estate, but, if this was insufficient, he charged his real estate in aid, but not in exoneration of the personal estate; and after devising his real estate in strict settlement, he declared that, if his residuary personal estate should be insufficient for payment of funeral and testamentary expenses, debts, legacies and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits and not by raising a capital sum to provide for the same, and he charged the residuary personally with the payment of the legacies and annuities, and directed that the ultimate residue of the personality was to be invested and was to follow the limitations of the real estate. The executors had paid estate duty and settlement estate duty in respect of the contingent legacies and annuities, but there was a probability that the personality would be insufficient to pay the funeral and testamentary expenses, debts, legacies, and annuities.

HELD—that the contingent legacies were to be treated as settled, and that the settlement duty must be borne by the legatees, as in *In re Maryon-Wilson* ([1900] 1 Ch. 565, 69 L. J. Ch. 310; 48 W. R. 338, 82 L. T. 171, 16 T. L. R. 256—C. A., No. 33, *infra*); and that, as to annuities, the decision in *Attorney-General v. Owen* ([1899] 2 Q. B. 253; 68 L. J. Q. B. 779; 63 J. P. 611; 81 L. T. 121; 15 T. L. R. 381—Div. Ct., No. 20, *supra*), applied to personality, and therefore the annuitants must bear the proper proportion of the settlement estate duty, in accordance with the rule established in *In re Parker-Jervis, Salt v. Locker* ([1898] 2 Ch. 643; 67 L. J. Ch. 682; 47 W. R. 147; 79 L. T. 403—Kekewich, J., No. 68, *infra*.)

IN RE DUKE OF ST. ALBANS, *LODER v. DUKE OF ST. ALBANS*, [1900] 2 Ch. 873; 69 L. J. Ch. 863; 49 W. R. 74—Stirling, J.

24. *Incidence — Contingent Settlement — Finance Act*, 1894 (57 & 58 Vict. c. 30), s. 5, sub-s. 1 (a), s. 22, sub-s. (h), (i)—*Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 4—*Finance Act*, 1898 (61 & 62 Vict. c. 10), s. 14.]—The construction put on sect. 5 (1) of the *Finance Act*, 1894, in *Attorney-General v. Fairley* ([1897] 1 Q. B. 698; 66 L. J. Q. B. 454; 45 W. R. 589; 76 L. T. 526—Div. Ct.), viz., that a contingent settlement of property is a settlement within the meaning of the section, has been adopted by the Legislature in sect. 14 of the *Finance Act*, 1898, and will not now be questioned by the Courts

ATTORNEY-GENERAL *v.* CLARKSON, [1900] 1 Q. B. [156, 69 L. J. Q. B. 81; 48 W. R. 216; 81 L. T. 617; 16 T. L. R. 51—C. A.

25. *Incidence—Death of Testator before 1894—Passing on the Death—Finance Act*, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1.]—A testator (who died in 1892) by his will gave an annuity of £500 to his wife, and the residue of the income of his property during his widow's life to his eight children. On her death he gave £9,600 to the eight children, and the residue of his property equally between the eight children and a ninth person. The widow died in 1900.

HELD—that the testator's estate (save as to one-ninth, the excess above £9,600) subject to the widow's annuity, passed to his children upon his death, and that estate duty was consequently not payable on the death of the testator's widow.

IN RE TOWNSEND, DECEASED, [1901] 2 K. B. 331; [70 L. J. K. B. 764, 65 L. J. 344, 49 W. R. 600; 84 L. T. 714—Div. Ct.

26. “*Entailed Estate*”—*Money Directed to be Held in Trust to Purchase Land in Scotland or England at Option of Trustees—Finance Act*, 1894 (57 & 58 Vict. c. 30), s. 23, sub-ss. 14, 16.]—There is no conversion of land into money or of money into land if the trust for conversion is not imperative. A testator by his will directed his trustees to hold a sum of money for the purchase of land in Scotland to be strictly entailed, and by a codicil to his will he authorised his trustees, if in their discretion they should consider it desirable, to purchase land in England in place of in Scotland to be entailed according to English law. The money was not so invested.

HELD—that as the trustees had an option to purchase land in England, the money was not an “entailed estate” within the meaning of sect. 23, sub-sect. 16, of the *Finance Act*, 1894, and was not therefore liable to “settlement estate duty.”

Decision of the Court of Session ([1901] 3 F. 440) affirmed.

LORD ADVOCATE *v.* STEWART, [1902] A. C. 344; [71 L. J. P. C. 66, 50 W. R. 673, 86 L. T. 603, 18 T. L. R. 618—H. L. (Sc.).

27. *Incidence—Fund appointed by Will—“Testamentary Expenses”—Residuary Estate—Finance Act*, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.]—A fund appointed by will under a general power of appointment does not pass to the executors as such within the meaning of the *Finance Act*, 1894, and is therefore chargeable with estate duty in the absence of any direction to the contrary in the will. But as by the will the testamentary expenses were payable out of the residue, the estate duty fell within the description of testamentary expenses, and was therefore to be paid out of the residuary estate.

IN RE TREASURE; *WILD v. STANHAM*, [1900] 2 Ch. [648; 69 L. J. Ch. 751; 48 W. R. 696; 83 L. T. 142; 16 T. L. R. 542—Kekewich, J.

See No. 31, *infra*

**Estate Duty—Continued.**

**28. Incidence—Fund Appointed by Will—Property passing to Executors “as such”—Residue—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.]**—Where a general power of appointment by will over a fund has been exercised, apart from any special direction by the testator, the appointed fund does not pass to the executor “as such” within the meaning of that expression as used in sect. 9, sub-sect. 1, of the Finance Act, 1894, and estate duty is to be borne by the appointed fund and not out of residue.

*IN RE POWER, IN RE STONE, ACKWORTH v. STONE*, [1901] 2 Ch. 659; 70 L. J. Ch. 778; 49 W. R. 678; 85 L. T. 400; 17 T. L. R. 709—Byrne, J.

See No. 31, *infra*.

**29. Incidence—General Power of Appointment by Will—Fund Appointed—Property passing to Executor “as such”—Duty Payable out of Residue—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.]**—By sect. 9, sub-sect. 1, of the Finance Act, 1894, “a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable.”

A fund appointed by will pursuant to a general power of appointment is property which passes to the executor “as such” within the meaning of the Finance Act, 1894, s. 9, sub-s. 1, so that apart from a direction to the contrary in the will, the estate duty payable in respect of the fund is payable out of the general residuary estate of the deceased rather than out of the appointed fund.

*IN RE MOORE; MOORE v. MOORE*, [1901] 1 Ch. 691; 70 L. J. Ch. 321; 49 W. R. 373—Buckley, J.

**30. Incidence—General Power of Appointment—Personally—Residue—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.]**—Where a general power of appointment over personal property has been exercised by will, and the appointed property is received by the executors of the will, it passes to the executors “as such” within the meaning of sect. 9, sub-sect. 1, of the Finance Act, 1894, and the estate duty payable in respect thereof must be borne by the residue, and not by the appointed fund.

Where a will directs the executors to pay the “testamentary expenses,” and includes a residuary devise and bequest, estate duty payable on property appointed by the will under a general power is a testamentary expense, and must be paid out of the residue.

*In re Clemow* ([1900] 2 Ch. 182, 69 L. J. Q. B. 522; 48 W. R. 541; 82 L. T. 550—Kekewich, J., No. 44, *infra*), followed.

*IN RE FEARNSIDES; BARNES v. CHADWICK*, [1903] 1 Ch. 250; 72 L. J. Ch. 200; 51 W. R. 186; 88 L. T. 57; 19 T. L. R. 104—Swinfen Eady, J.

**31. Incidence—General Power of Appointment—Residue—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.]**—Where a general power of appointment over a fund is exercised by will, the estate duty in respect thereof is payable out of the testator’s general personal estate, and not out of the fund.

*In re Moore* ([1901] 1 Ch. 691; 70 L. J. Ch. 321; 49 W. R. 373—Buckley, J., No. 29, *supra*) and *In re Fearnshides* ([1903] 1 Ch. 250, 72 L. J. Ch. 200, 51 W. R. 186, 88 L. T. 57, 19 T. L. R. 104—Eady, J., No. 30, *supra*) followed. *In re Treasure* ([1900] 2 Ch. 648, 69 L. J. Ch. 751; 83 L. T. 142, 48 W. R. 696, 16 T. L. R. 542—Kekewich, J., No. 27, *supra*), *In re Power* ([1901] 2 Ch. 659; 70 L. J. Ch. 778; 85 L. T. 400; 49 W. R. 678; 17 T. L. R. 709—Byrne, J., No. 28, *supra*), and *in re Dodson*, No. 32, *infra*, not followed.

*IN RE ORLEBAR, WINTER v. ORLEBAR*, (1907) 24 [T. L. R. 42—Neville, J.

**32. Incidence—General Power of Appointment Exercised by Will—Whether Duty Payable out of Appointed Fund or Residue—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1)]**—A testator by will exercised a power of appointment over funds in the hands of trustees.

**HELD**—that in the absence of any direction to the contrary in his will the estate duty payable in respect of the appointed funds must be paid out of such funds, since they did not pass to the executor “as such.”

*In re Power* ([1901] 2 Ch. 659; 70 L. J. Ch. 778; 85 L. T. 400, 49 W. R. 678—Byrne, J., No. 28, *supra*) followed.

*IN RE DODSON; GIBSON v. DODSON*, [1907] 1 Ch. 284; 76 L. J. Ch. 182; 96 L. T. 254—Warrington, J.

**33. Incidence—Legacy by Testator in Satisfaction of Previous Covenant—Settlement of Legacy by Instrument Outside Will—Covenant to Pay “Without any Deduction”—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2, 5, 6, sub-s. 2; s. 8, sub-ss. 3, 4, ss. 9, 14, sub-s. 1—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19.]**—Settlement estate duty arising under sect. 5 of the Finance Act, 1894, is in all cases primarily payable, in the absence of indications of a contrary intention, out of the settled property.

*In re Webber* ([1896] 1 Ch. 914, 65 L. J. Ch. 544, 44 W. R. 489; 74 L. T. 244—North, J.) disapproved.

This primary incidence may, however, be shifted on to the residuary estate by the presence of clear indications of intention—*e.g.*, by a direction to pay “without any deduction.”

Decision of Kekewich, J. ([1899] 2 Ch. 489; 68 L. J. Ch. 580; 47 W. R. 635; 81 L. T. 73), reversed.

*IN RE MARYON-WILSON, WILSON v. MARYON-WILSON*, [1900] 1 Ch. 565, 69 L. J. Ch. 310; 48 W. R. 338; 82 L. T. 171; 16 T. L. R. 256—C. A.

**Estate Duty—Continued.**

**34 Incidence—Legacy Settled by Will—Residuary Estate—General Estate—“Express Provision to the Contrary”**—*“All the Duties Payable by Law out of My Estate”*—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 5, sub-s. 1 (a)—*Finance Act, 1896* (59 & 60 Vict. c. 28), s. 19, sub-s. 1.]—A testatrix, who died on September 2nd, 1899, by her will gave her marriage settlement trust funds upon certain trusts, and as to the rest of her estate, she directed as follows: “My debts and funeral and testamentary expenses, including all duties payable by law out of my estate, and including the duties on the annuities hereinbefore charged on the income of my said settlement trust funds, and all the duties on any other annuities, and on all legacies hereby or by any codicil hereto bequeathed duty free, shall first be paid thereout, and, subject as aforesaid, I direct that the following legacies shall be paid thereout all free of duty.”

**HELD**—that “the duties on the annuities hereinbefore charged on the income of my said settlement trust funds” should be paid out of the residuary estate; that “all the duties on any other annuities, and on all legacies hereby or by any codicil hereto bequeathed duty free” should be paid out of the general estate, that “all the duties payable by law out of my estate” did not include the duty payable in respect of the settled legacy, but that duty was payable out of the settled fund, and that there was no “express provision to the contrary” within sect 19 of the *Finance Act, 1896*.

**IN RE LEWIS; LEWIS v. SMITH**, [1900] 2 Ch. 176; [69 L. J. Ch. 406; 48 W. R. 426; 82 L. T. 291—Kekewich, J]

**35. Incidence—Option to take Specific Property in Lieu of Share of Residue—Direction to pay Funeral and Testamentary Expenses and Debts—Liability to pay Estate Duty—Finance Act, 1894** (57 & 58 Vict. c. 30), s. 9, sub-s. 1.]—Apart from a direction to the contrary in the will, a specific devisee must bear the estate duty in respect of the property which he takes under the devise.

An originating summons was taken out for the purpose of determining how the estate duty payable in respect of certain property taken by two of the testator's sons, under an option given to them by the will, in satisfaction of their respective shares in the residuary estate of the testator should be borne as between them and the other persons interested in the residuary estate. There was no express mention of estate duty in the will, but the trustees were directed to pay the funeral and testamentary expenses and debts.

**HELD**—that the effect of the option was to make the case the same as if the testator had devised his real and personal estate upon trust to sell everything except the property which was subject to the option, and there had been a specific devise to his two sons of

the equitable fee in the real property subject to the option, and therefore the charge created by sect. 9 (1) of the *Finance Act, 1894*, remained until the real property subject to the option came into the hands of the beneficiaries and the duty was discharged by them, i.e., that the estate duty in respect of the real estate comprised in the option was payable by the sons.

**IN RE JOLLEY; NEAL v. JOLLEY**, (1901) 17 T.L.R. [244—Joyce, J]

**36. Part of Residue Set Apart to Pay Annuities and Subject thereto to Divide Residue in Certain Proportions among Residuary Legatees—Finance Act, 1894** (57 & 58 Vict. c. 30), s. 5, sub-s. 1; s. 22—*Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-s. 1.]—A testator by his will gave all his property to trustees on trust for sale and conversion, and directed the proceeds to be dealt with in the following manner: After payment of certain legacies, the trustees were to set aside a sufficient amount of the residuary estate upon trust to pay a number of annuities. There was a further trust to divide the residue in certain proportions among residuary legatees, and there was a provision that the trustees might postpone conversion of the estate. The trustees carried out the direction given by the testator, and set aside an amount of the residuary estate which produced a sufficient income to cover the annuities.

**HELD**—that there was a settlement of the property in question within the meaning of sect. 2, sub-sect 1, of the *Settled Land Act, 1882*; that the interests of the annuitants and residuary legatees arose under limitations creating a succession; and that settlement estate duty was payable upon so much of the residuary estate as had been invested, in addition to the estate duty and succession duty upon the whole of the residuary estate and the annuities.

**IN RE CAMPBELL**, [1902] 1 K. B. 113; 71 [L. J. K. B. 160; 85 L. T. 708; 18 T. L. R. 86—C. A.]

**37. Incidence—Real Estate Devised in Strict Settlement—Previously Charged by Marriage Settlement—Finance Act, 1894** (57 & 58 Vict. c. 30), ss. 1, 7, 9, 14.]—H., an owner in fee, by his marriage settlement charged his estate with a sum of £10,000, to be held upon certain trusts. By his will he settled the same estate.

**HELD**—that under sect. 14 (1) of the *Finance Act, 1894*, the executor having paid estate duty on the real estate could recover a rateable part from the trustees of the settlement.

**IN RE HACKET; HACKET v. GARDINER**, [1907] 1 Ch. 385; 76 L. J. Ch. 249; 96 L. T. 420—Joyce, J.]

**38. Incidence—Settled Fund—Reversionary Interest—General Power of Appointment Over—Person Accountable—Executor—Charge on Fund—“Executor as Such”**—

**Estate Duty—Continued.**

*Direction to Pay Testamentary Expenses—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2, 6, sub-s. 2, s. 7, sub-ss. 6, 7; s. 8, sub-s. 4, s. 9, sub-s. 1; s. 22.*—By a marriage settlement the husband's trust fund was settled upon trust for the husband for life, then for his wife for life, and after the death of the survivor for such persons as the husband should by will appoint. The husband by will, in exercise of the general power of appointment, directed the trustees of the settlement to hold the fund, after his wife's death, upon trust for such persons as his wife should by will appoint, and in default of appointment upon trust to transfer the fund to the trustees of his will as part of his residuary estate. By his will he directed payment of his testamentary expenses out of his general estate. The question arose whether the estate duty of £924, payable in respect of the settled fund (being 7 per cent. upon £13,199 10s. 10d. the amount of the fund) was to be borne by the husband's trust fund or by the testator's general residue.

**HELD**—that it must be borne by the settled fund and not by the residue, because (1) the duty of £924 was not the duty, and did not include the duty or any part of the duty, in respect of the deceased's interest in the reversionary interest expectant upon his wife's death, but was the duty upon the settled fund of £13,199 10s. 10d., and this duty was a duty for which the widow, as tenant for life in possession, or the trustees of the settlement, and not the executor, was the person accountable under sect. 8, sub-s. 4 of the Finance Act, 1894, and it was a duty for which the person who paid it, whether he was the party accountable or the executor, at the request of the party accountable, would be entitled to a charge upon the fund, (2) it was immaterial that the reversionary interest of the testator was not a reversionary interest in property, but only a general power of appointment of a reversionary interest. If he had been entitled to the reversionary interest itself by way of property and not of power, the same result would have ensued, for the duty in dispute was not that in respect of the reversionary interest, but that in respect of the whole settled fund; (3) the question did not arise as to the meaning of the words "executors as such" in sect. 9, sub-s. 1, of the Finance Act, 1894; and (4) the testator did not cast this duty upon residue by the provision in his will for payment of his testamentary expenses out of his general estate.

**IN RE DIXON; PENFOLD v. DIXON, [1902] 1 Ch. [248; 71 L. J. Ch. 96; 50 W. R. 203; 85 L. T. 622, 18 T. L. R. 154—Buckley, J.**

**39. Incidence—Settled Property—Payment by Executor—Liability of Trustees to Repay—Finance Act, 1894 (57 & 58 Vict. c. 30).**—B., on the marriage of his son, in consideration of natural love and affection mortgaged certain property to secure £10,000 for the

benefit of such son. Subsequently, on his own second marriage, he agreed to settle property for the benefit of his wife.

After B.'s death, his executor had to pay estate duty on the property secured by the above-mentioned deeds.

**HELD**—that he was entitled to be recouped by the trustees of the respective settlements.  
**COPE v. BRESLIN, [1903] 1 Ir. R. 418—V. C.**

**40. Incidence—Settled Property—Residue—Executors—Trustees—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14.**—The holder of a policy of assurance on his own life for £5,000 by his marriage settlement assigned the policy to trustees upon trust to raise at his death £4,000 to be held upon certain trusts, and as to the residue of the trust moneys in trust to pay the same to his executors.

**HELD**—that sect. 14 of the Finance Act, 1894, was not intended to provide for the incidence of estate duty but was intended to protect the executor or other person, who as between himself and the reversioner was called upon to pay the duty; the estate duty on the moneys therefore must be borne by the residue remaining after payment thereof of the £4,000.

**WADE v. WADE, [1898] 2 Ch. 276; 78 L. T. 808; [47 W. R. 43—Kekewich, J.**

**41. Incidence—Specific Devise of Freeholds—Direction to pay "my duties."**—A testator devised certain freeholds upon trusts, and gave the rest of his estate in trust for sale and conversion, the clear residue to be divided after payment of "my testamentary expenses and duties" amongst specified persons.

**HELD**—a direction to pay out of residue the estate duty and settlement estate duty on the freeholds specifically devised.

**IN RE PIMM, SHARPE v. HODGSON, [1904] 2 Ch. [345; 73 L. J. Ch. 627; 52 W. R. 648; 91 L. T. 190—Farwell, J.**

**42. Incidence—Will Charging Residue with Death Duties payable on Property of which he was tenant-for-life—Heirlooms of National Interest exempted from Duty till in Possession of Persons competent to sell them—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20.**—A testator directed the trustees of his will to pay out of residue the estate and other death duties payable upon his death on all property of which he was tenant-for-life under a certain deed of resettlement. Under his deed he was tenant-for-life of certain heirlooms exempted from estate duty by a certificate of the Treasury under sect. 20 of the Finance Act, 1896, until they should come into the possession of some person competent to sell them.

**HELD**—that the trustees need not set aside a sufficient sum out of residue to meet the estate duty payable at some future time on the heirlooms.



**Estate Duty—Continued.**

Decision of Joyce, J. (89 L. T. 434, 20 T. L. R. 27), reversed.

IN RE LECONFIELD; WYNDHAM v LECONFIELD  
[1904] 90 L. T. 399, 20 T. L. R. 347—C. A.

*And see No. 100, infra.*

43. *Interpretation—“Estate Duty”—Includes Settlement Estate Duty.*—A testatrix, after devising certain real estates by her will (including the estate in question), declared that her trustees should stand possessed of her residuary personal estate upon trust for certain purposes, and amongst others to pay “the estate duty on the whole of the real and personal estate devised and bequeathed by this my will.” The question was whether the estate duty spoken of in the residuary gift included settlement estate duty as well as estate duty simply so called.

HELD—that the will must be construed in precisely the same way as if the testatrix had said, “Pay all the estate duty upon all my real and personal estate”, and that the settlement estate duty must be paid out of the residuary personality.

IN RE LEVERIDGE; SPAIN v LEJOINDRE, [1901] 2  
[Ch. 830, 85 L. T. 458; 71 L. J. Ch. 23; 50  
W. R. 205—Joyce, J.]

44. *Interpretation—“Testamentary Expenses”—Estate Duty—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, sub-s. 2.*—The expression “testamentary expenses” includes estate duty. A testator, after giving the income of his residue to his wife for life, directed his executors, after his widow's death, out of the residue to pay “my widow's funeral and testamentary expenses and debts.” The testator's wife survived him, and died, leaving what purported to be a will. B., one of the two next of kin of the widow, brought an action in the Probate Division for a grant of letters of administration of the widow's estate to him. The judge pronounced against the will, but made no order as to costs. Letters of administration were subsequently granted to Y., the other next of kin of the widow, with the assent of B. The widow's estate consisted entirely of personality. Upon summons to determine what costs and expenses ought to be allowed out of the testator's estate as testamentary expenses of the widow,

HELD—that costs and expenses properly incurred in the administration of the estate of the intestate widow were within the meaning of the term “testamentary expenses,” and that there must be allowed as such testamentary expenses the costs of B. of the probate action and also the estate duty payable on the death of the widow.

IN RE CLEWOW, YEO v. CLEWOW, [1900] 2 Ch.  
[182; 69 L. J. Q. B. 522; 48 W. R. 541; 82  
L. T. 550—Kewich, J.]

45. *Interest in Possession—Defeasible Interest—Real Effect of Deed—Conveyancing*

*Form—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (3)*—Under a settlement, H. took a vested legal estate as tenant in common in fee, with a limitation over on his dying under twenty-one, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout for his maintenance, &c., accumulating the surplus upon trust, if he should attain age, for him, but, if he should die under age, for the persons who should ultimately become indefeasibly entitled. H. in fact died before attaining twenty-one.

HELD—that, looking at the real effect of the settlement as distinct from the conveyancing form, H.'s interest had not become a beneficial interest in possession in the lands at his death, that, accordingly, sect. 5, sub-sect. 3 of the Finance Act, 1894, was applicable, and estate duty was not payable as on a property passing on his death.

ATTORNEY-GENERAL v. POWER, [1906] 2 Ir. R. 272  
[—K. B. D.]

46. *Life Policy—Settlement in Favour of Wife—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2, 3.*—By the Finance Act it is enacted that estate duty shall be payable upon property passing on the death of any person dying after the commencement of the Act, and by sect. 2 (1) (d) it is provided that property passing on the death of the deceased shall be deemed to include “any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.”

A. effected a policy of assurance on his own life, payable on his death to his wife, and in pursuance of an agreement on his marriage assigned the policy to the trustees of his marriage settlement upon trust to hold the proceeds thereof for the benefit of his wife for life, he, A., covenanting to keep up the policy and pay the premiums during his life.

HELD—that on A.'s death estate duty was payable under sect. 2 (1) (d) on the proceeds of the policy.

ATTORNEY-GENERAL v. DOBREE, [1900] 1 Q. B.  
[142; 69 L. J. Q. B. 223; 64 J. P. 24; 48  
W. R. 413; 81 L. T. 607; 16 T. L. R. 80—  
Div. Ct.]

47. *Life Policy on Life of a Son—Void for Want of Interest—Settled on Son's Marriage Settlement—Death of Son—“Interest Purchased or Provided by the Deceased in Concert or by Arrangement with any other Person”—Life Assurance Act, 1774 (14 Geo. 3, c. 18)—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (1) (d).*—A father effected a policy of insurance in his own name on the life of his son. The policy was to commence at the age of twenty-one, and ten premiums only were to be paid. The father, who had no insurable interest in the son's life, paid all the premiums, and on the son's marriage he, “with

**Estate Duty—Continued**

the approbation of" the son and of the son's intended wife, assigned the policy to the trustees of the marriage settlement, upon the trusts of the settlement. After the death of the son (who survived his father) the policy moneys were paid by the insurance company to the trustees of the settlement. Upon an information claiming estate duty on the policy moneys,

**HELD**—that, though the father had no insurable interest in the son's life, and the policy was therefore void under the Life Assurance Act, 1774, it was only void as between the insurance company and the father; and, as the moneys had been in fact paid by the insurance company, the liability to estate duty was not affected by the illegality of the insurance policy.

*Worthington v. Curtis* ((1875) 1 Ch. D. 419; 45 L. J. Ch. 259; 24 W. R. 228, 33 L. T. 828—C. A.) followed.

**HELD ALSO**—that sect. 2 (1) (d) of the Finance Act, 1894, covers moneys paid under a policy on the life of the deceased.

*Attorney-General v. Robinson* ([1901] 2 I. R. 67—Q. B. D., No 1, *supra*), approved.

**HELD**, however—that the sum paid under the policy was not an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of sect. 2 (1) (d) of the Finance Act, 1894, and therefore that estate duty was not payable thereon.

Decision of *Ridley, J.* (72 L. J. K. B. 408; 67 J. P. 133; 51 W. R. 572; 88 L. T. 474; 19 T. L. R. 379), reversed.

**ATTORNEY-GENERAL v. MURRAY**, [1904] 1 K. B. 165; 73 L. J. K. B. 66; 68 J. P. 89; 52 W. R. 258; 89 L. T. 710, 20 T. L. R. 137—C. A.

**48. Payment Out of Court—Estate Duty—Tenant for Life—Finance Act, 1900** (63 Vict. c. 7), s. 11.]—When payment out of Court is authorised of funds in which one of the petitioners had a life interest now released, the practice of the Court is to retain a sufficient sum of money to satisfy the amount of estate duty payable in the event of the death of the tenant for life within twelve months of the date of the release.

**TAYLOR v. PONCIA**, (1901) 49 W. R. 596—[Cozens-Hardy, J.]

**49. Property Passing on Death—Cesser of Annuity—Annuity Charged on Mortgaged Realty—Finance Act, 1894** (57 & 58 Vict. c. 30), ss. 1, 2, 7.]—Where an annuity is payable out of heritable property, the value of the benefit passing on the death of the annuitant is to be determined by capitalising the amount of the annuity on the basis of the proper number of years' purchase. No account is to be taken of the amount of bonds affecting the heritable property, unless they are so large as to imperil the annuity and so reduce its capitalised value.

**LORD ADVOCATE v. ANDERSON**, (1906) 7 F. 963—[Ct. of Sess.]

**50. Property Passing on Death—Devise to Son who died in Father's Lifetime, leaving a Daughter Living at Death of Father—Devise by Son including Devise to him by his Father—Son Compellent to Dispose—Wills Act, 1837** (7 Will. 4 & 1 Vict. c. 26), s. 33—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 1, s. 2, sub-s. 1 (a); s. 22, sub-s. 1 (1), sub-s. 2 (a).]—Upon 4th May, 1896, J. S., junior, made his will, whereby he appointed the petitioners his executors and trustees, and he devised and bequeathed to them all his residuary real and personal estate in trust, so far as is material, for his daughter, M. E. S., absolutely. Upon 22nd January, 1899, he died, and probate of his will was taken out, and all duties then payable upon his estate were thereupon paid by his executors to the Crown. His father, J. S., senior, died about four months after his son—namely, on 12th May, 1899—leaving a will dated 5th June, 1891, by which he devised to his son, J. S., junior, freehold property in this city of London of the value of £80,000. The estate was charged with estate duty, and the duty was paid. The Crown claimed estate duty over again upon the £80,000 as having also passed upon the death of J. S., junior, under his will.

**HELD**—that by sect. 33 of the Wills Act, 1837, the will of J. S., senior, took effect as if J. S., junior, had died immediately after J. S., senior, that was, that the son was competent to dispose of the £80,000 of property, and that if the appellants took the benefit of sect. 33 they must pay the estate duty chargeable thereon by virtue of sect. 1, sect. 2, sub-sect. 1 (a), and sect. 22, sub-sect. 2 (a), of the Finance Act, 1894.

Judgment of Divisional Court ([1900] 1 Q. B. 372; 69 L. J. Q. B. 121, 64 J. P. 25; 48 W. R. 205; 81 L. T. 610, 16 T. L. R. 110) affirmed.

**IN RE SCOTT**, [1901] 1 Q. B. 228; 70 L. J. Q. B. 166; 65 J. P. 84, 49 W. R. 178; 83 L. T. 613; 17 T. L. R. 148—C. A.

**51. Property Passing on Death—Policy of Insurance—"Interest Purchased or Provided by the Deceased"—Assignment of Policy by Deceased—Finance Act, 1894** (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (d).]—The deceased, who was equitable tenant for life of certain estates, and who had raised money upon the security of his life interest and of certain policies on his life, and his son, who was equitable tenant in tail, barred the entail: a sum of money was raised upon mortgage of the estates to pay off the charges on the deceased's life interest and on the policies, and the policies were assigned to the son; the estates were resettled upon trust to pay interest upon the mortgage, premiums on the policies and an annuity to the son, and subject thereto for the father for life with remainder to the son.

**HELD**—that the effect of this family arrange-

**Estate Duty—Continued.**

ment was that the son became the purchaser of the policies for full value, and that therefore estate duty was not payable on the death of the deceased, under sect. 2, sub-sect. 1 (d), of the Finance Act, 1894, on the amount received under the policies.

Decision of C. A. ([1905] 2 K. B. 323; 74 L. J. K. B. 710; 53 W. R. 645, 93 L. T. 4; 21 T. L. R. 573) reversed.

ATTORNEY-GENERAL v. LETHBRIDGE, [1907] A. C. [19; 76 L. J. K. B. 84; 95 L. T. 842; 23 T. L. R. 123—H. L. (E.).

52 *Property Passing on Death—Property “Deemed” to Pass—Fund to be Invested in Entailed Land—Settlement Estate Duty—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 2, 21, 23.*—A testator, who died prior to the passing of the Finance Act, 1894, and on whose estate inventory duty was paid, directed his trustees to hold and accumulate the residue of his estate till the death of O. M., when it was to be invested in land which was to be entailed. O. M. died in 1902.

HELD—that estate duty and settlement estate duty were payable on the residue of the testator's estate.

LORD ADVOCATE v. STEWART, (1906) 8 F. 579—[Ct. of Sess.

*And see No. 16, supra.*

53. *Property Passing on Death—Surrender of Life Estate to Remainderman—Merger—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2, sub-s. 1 (b).*—A tenant for life (who died in 1896), more than twelve months before her death, surrendered her life interest in certain trust property, so as to merge her life estate in the immediate reversioner, who then became absolutely entitled.

HELD—that upon the death of the tenant for life no property passed on her death within the meaning of sect. 2, sub-sect. 1 (b), of the Finance Act, 1894, and estate duty was not payable.

Decision of the Court of Appeal ([1898] 2 Q. B. 147; 67 L. J. Q. B. 585; 62 J. P. 371; 46 W. R. 435; 78 L. T. 584; 14 T. L. R. 380—C. A.) affirmed.

ATTORNEY-GENERAL v. BEECH, [1899] A. C. 53; [68 L. J. Q. B. 130; 63 J. P. 116; 47 W. R. 257; 79 L. T. 565; 15 T. L. R. 85—H. L. (E.).

54. *Property Passing on Death—Surrender of Life Estate to Remainderman—Death within Twelve Months of Surrender—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. (1) (c); s. 7, sub-s. 7.*—Where a tenant for life of settled property surrenders the life estate to the remainderman and dies within twelve months of the surrender, estate duty is not payable under the Finance Act, 1894, on the death of the tenant for life.

Decision of the Divisional Court ([1899] 2 Q. B. 238, 68 L. J. Q. B. 832; 81 L. T. 266, 15 T. L. R. 393) reversed.

ATTORNEY-GENERAL v. DE PREVILLE, [1900] 1 [Q. B. 223; 69 L. J. Q. B. 283; 48 W. R. 193; 81 L. T. 690; 16 T. L. R. 125—C. A.

55 *Property of Wife Settled on Husband—“Income”—“Capital”—Finance Act 1894 (57 & 58 Vict. c. 30), s. 21, sub-s. 5.*—Sub-sect. 5 of sect. 21 of the Finance Act, 1894, is confined in its operation to successive titles to the income of property as distinguished from titles to the property itself, and does not apply to a case where not merely the income of the property settled by the survivor, but also the *corpus*, reverts to the survivor.

Decision of the Divisional Court reversed.

ATTORNEY-GENERAL v. STRANGE, [1898] 2 Q. B. [39; 67 L. J. Q. B. 629, 78 L. T. 516; 14 T. L. R. 419, 46 W. R. 663—C. A.

56. *Property Passing on Death—Property Settled by Wife on Husband—Wife Surviving Husband—Exemption—Finance Acts, 1894 (57 & 58 Vict. c. 30), ss. 5 (3), 21 (5), and 1896 (59 & 60 Vict. c. 28), ss. 14, 15 (1).*—By a marriage settlement property, described as the “husband's fortune” and the “wife's fortune” respectively, was conveyed to trustees upon trust to pay out of the income thereof during the joint lives of husband and wife an annuity of £400 to the wife and the residue of the income to the husband, and after the death of the wife, if the husband survived, to pay the whole income to the husband for life, and after the death of the husband, if the wife survived, to pay the whole income to the wife for life, and after the death of the survivor, upon trust for children, and failing children, upon trust as to the husband's fortune for him absolutely and as to the wife's fortune for her absolutely. There was no issue, and the wife survived her husband. Upon the death of the husband the Crown claimed estate duty upon the principal value of all the property settled by the wife.

HELD—(1) that, although there never was any issue, the exemption contained in sect. 15 (1) of the Finance Act, 1896, did not apply, for there was “another interest created” by the settlement, (2) that the exemption contained in sect. 21 (5) did not apply, as upon the death of the husband the wife became entitled not only to the income, but also to the *corpus* of her own fortune, but (3) that as to so much of the *corpus* producing the £400 a year as was part of the wife's fortune, the husband's life interest contingent upon his surviving his wife having failed on his death, and a subsequent limitation under the settlement continuing to subsist, sect 5 (3) of the Finance Act, 1894, applied so as to exempt it from estate duty.

Attorney-General v. Penrhyn ((1900) 83 L. T. 103; 64 J. P. 552—Div Ct., No. 13, *supra*); Attorney-General v. Wood ([1897] 2 Q. B. 102; 36 L. J. Q. B. 522; 45 W. R. 663; 76 L. T. 654 — Div. Ct.); and Attorney-General v. Strange ([1893] 2

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Q. B. 39; 67 L. J. Q. B. 629; 46 W. R. 663; 78 L. T. 516—C. A., No. 55, *supra*, applied

Decision of Walton, J. ([1906] 1 K. B. 284, 75 L. J. K. B. 151, 54 W. R. 376, 94 L. T. 27; 22 T. L. R. 204), affirmed.

ATTORNEY-GENERAL *v.* GLOSSOP, [1907] 1 K. B. [163; 76 L. J. K. B. 199; 95 L. T. 823; 22 T. L. R. 103—C. A.

57. *Property Passing on Death—Liability under a Daughter's Marriage Settlement—Discharging Liability in Advance—Settlement Estate Duty—Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 2 (1) (c), 3.]—In 1899, A., on the marriage of his daughter, agreed to pay her £300 per annum during his life; on his death her trustees were to receive £15,000, but he was at liberty to pay off this sum or any part thereof during his life, and the annuity was to cease as soon as he had paid £10,000. The daughter abandoned all claims on her father's estate; by his own marriage settlement she was entitled to share with five brothers and sisters in a sum of £12,000, over which A. had a power of appointment. In 1900 A. paid £10,000 to the trustees, and died in six weeks.

HELD—that estate and settlement estate duty payable on this sum, for it was property “deemed to pass” on A.’s death, and there was no purchase and sale for good consideration in money or money’s worth.

Attorney-General *v.* Smyth ([1905] 2 Ir. R. 553, No. 67, *infra*), followed.

LORD ADVOCATE *v.* HEYWOOD, LONSDALE AND [OTHERS], (1906) 8 F. 724—Ct. of Sess.

58. *Property Situate Abroad—English Will—Trust for Conversion—Liability to Duty.*]—A testator domiciled in England, gave the residue of his estate, including a tea estate in Assam, to trustees in trust to convert it into money and invest the proceeds, and out of the income thereof to pay certain life annuities, and subject thereto and until the death of the last surviving annuitant to pay the surplus income to certain persons in equal shares and to the survivors or survivor of them. The will contained no gift over either of the income or of the corpus upon the death either of the last surviving annuitant or of the last surviving person entitled to the surplus income. The trustees were authorized by the will to work the tea estate until it was sold, and also to postpone the sale and conversion of any part of the estate as long as they thought it desirable, and in the meantime the annual produce of the unconverted part was to be applied in the same manner as if it were income arising from the proceeds of conversion. The trustees were resident in England, and the will was proved in England. The trustees postponed the sale of the tea estate, and while it still remained unsold two of the persons entitled to shares of the surplus income died.

HELD—that the amount by which the survivors’ shares of the surplus income were thus increased, was not, even so far as that increase was attributable to the profits of the tea estate, property situate out of the United Kingdom, and that succession duty, estate duty, and settlement estate duty were payable in respect of the increase so attributable to the tea estate.

ATTORNEY-GENERAL *v.* JOHNSON, [1907] 2 K. B. [885; 76 L. J. K. B. 1150—Bray, J.

59. *Residuary Legatee—Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 6 (2), (4), 8 (4), 9 (1)—*Rules Supreme Court, Ord. 55, r. 9c*]—Estate duty payable on death of tenant for life to be borne rateably by the shares into which the estate became divisible and by the residuary devise.

IN RE POWER; POWER *v.* HOWELL, (1899) 47 [W. R. 133—Kekewich, J.

60. *Reversionary Interest—Option to Defer Payment of Duty—Time for Calculating Value—Finance Act, 1894* (57 & 58 Vict. c. 30), s. 7 (6).]—Under sect. 7 (6) of the Finance Act, 1894, a person liable to pay estate duty in respect of an interest in expectancy may elect to defer payment until the interest falls into possession.

HELD—that in such a case the value of the interest must be calculated, not as at the date of the death of the deceased, but at the date when it has fallen into possession.

IN RE EYRE, [1907] 1 K. B. 331; 76 L. J. K. B. [227; 96 L. T. 236—Bray, J.

61. *“Settled Property”—Finance Act, 1894* (57 & 58 Vict. c. 30), s. 5.]—On the marriage of A. and B. trust funds were settled in trust as to the income thereof for B., the husband, for life, and, after his death, for A. for life, and after the death of the survivor, then in the event which happened of there being no children of the marriage, in trust as to the capital of the funds for such persons as A. should appoint.

A died in the lifetime of B. On the death of A. the Inland Revenue claimed and were paid estate duty on the value of her reversionary interest in the capital of the trust funds. On B.’s death they claimed estate duty on the actual amount of the capital.

HELD—that the duty paid on A.’s death was in respect of “settled property” within the meaning of sect. 5, sub-sect. (2) of the Finance Act, 1894, and that credit for it should be given as regards the duty, which would otherwise have been payable on the death of B.

Attorney-General *v.* Dodington ([1897 2 Q. B. 373; 66 L. J. Q. B. 634; 61 J. P. 644; 45 W. R. 657; 77 L. T. 299—C. A.) discussed and applied.

IN RE FINANCE ACT, 1894, AND STUDDERT, [1900] 2 [Ir. R. 231, 400—Q. B. Div. and C. A. Affirmed on appeal, *sub. nom.* INLAND REVENUE COMMISSIONERS *v.* PRIESTLEY; see No. 64, *infra*.)

*Estate Duty—Continued.*

62. *Settled Property—Interests in Property passing on Death—Mortgage in by Tenant for Life and Remaindermen—Indemnity by Remainderman to Tenant for Life against Mortgage Debt and Interest—Deduction in Respect of Incumbrance—Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 1, 2, sub-s. 1 (b), 7, sub-s. 7.]—On May 28th, 1888, the Ditton Estate stood limited to the Dowager Duchess of Buccleuch for her life, and then, subject to an overriding power of appointment, to Lord Montagu for life, with remainder to his eldest son for some estate of freehold. On May 29th, 1888, by an indenture to which the Duchess, Lord Montagu, and his son were parties as grantors, by conveyance of the Duchess' life estate, and by an appointment made by Lord Montagu and his son in exercise of the power of appointment, the estate was mortgaged to secure a sum of £27,000 and interest. The ordinary personal covenants for payment by the mortgagor or mortgagors were expressly made by Lord Montagu and his son only, and the power of redemption was given not to the Duchess but to Lord Montagu, who had a life estate in remainder, and his son, and the persons deriving title under them. By an indenture of even date Lord Montagu and his son covenanted personally to keep the Duchess indemnified in respect of the mortgage debt and interest, and to indemnify her if she should suffer loss in respect of the Ditton Estate; and they conveyed to trustees by way of further securing the Duchess certain sufficient interests which they had in other properties during her lifetime. In these circumstances the Duchess was never the sufferer during her life by the fact that she had joined in the mortgage, and had encumbered, as between herself and the mortgagees, her life estate in the Ditton Estate, and she died, as she lived, beneficially interested in the Ditton Estate to its full value. The question arose upon her death as to the measure of Lord Montagu's liability to estate duty.

HELD—that the substance, and not the form of the transaction must be considered: that the Duchess in spite of the mortgage enjoyed the whole property and its proceeds; and that, therefore, in calculating the value of the estate, the amount of the mortgage debt could not be deducted.

Decision of the C. A. ([1903] 1 K. B. 483; 72 L. J. K. B. 258; 67 J. P. 93; 51 W. R. 326; 88 L. T. 120; 19 T. L. R. 234) reversed

ATTORNEY-GENERAL v. LORD MONTAGU, [1904] [A. C. 316; 73 L. J. K. B. 707; 90 L. T. 726; 20 T. L. R. 523; 53 W. R. 115—H. L. (E.).

63. *Settled Property—Several Settlement—During the Continuance of the Settlement—“Competent to Dispose of”—Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 2 (1) (b), 5 (2), 22 (2).]—J. H. A. was a son of E. S. A., who was married in 1855. Upon her marriage there was an ante-nuptial settlement dated November 21st, 1855, and there was a further B.D.—VOL I.

settlement dated December 20th, 1856. J. H. A. became absolutely entitled in reversion expectant on the death of his mother to one equal ninth part of the moneys subject to the trusts of the said settlements. On his marriage in 1888 he settled this reversionary interest to himself for life, and then to his wife and children. E. S. A. died in October, 1891, and upon her death estate duty was paid in respect of the funds comprised in settlements of 1855 and 1856. J. H. A. died in 1897, leaving one child of his marriage. His wife predeceased him.

HELD—that J. H. A. was “competent to dispose of” the property—his said reversionary interest—within the meaning of sect. 5, sub-sect. 2, of the Finance Act, 1894, and estate duty on his death became payable.

ATTORNEY-GENERAL v. HAY, [1899] 2 Q. B. 245; [68 L. J. Q. B. 557; 80 L. T. 712; 15 T. L. R. 290—Div. Ct.

64. *“Settled Property”—Person “Competent to Dispose of”—Finance Act, 1894* (57 & 58 Vict. c. 30), s. 5, sub-s. 2.]—On the marriage of A. and B. trust funds were settled in trust as to the income thereof for B., the husband, for life, and after his death, for A. for life, and after the death of the survivor, then in the event which happened of there being no children of the marriage, in trust as to the capital of the funds for such persons as A. should by deed or will appoint.

A. died in the lifetime of B., having executed the power of appointment by will. On her death the Inland Revenue claimed and were paid estate duty on the value of her reversionary interest in the capital of the trust funds. On B's death they claimed estate duty on the actual amount of the capital.

HELD—that the funds were “settled property” within the meaning of the Finance Act, 1894, that under sect. 2 (a) of the Act taken in conjunction with sect. 1, estate duty became leviable in respect of the settled property as being property of which, at the time of her death A. was competent to dispose and the commissioners were entitled and bound to claim estate duty in respect of the settled property on A's death; that under sect. 5, sub-sect. 2, of the Act the commissioners were not entitled to claim estate duty once more in respect of the principal value of the settled property, as B. was not at the time of his death, nor had he been at any time during the continuance of the settlement, competent to dispose of the settled property.

Judgment of Rigby, L.J., in *Attorney-General v. Dodington* ([1897] 2 Q. B. 273; 66 L. J. Q. B. 684; 61 J. P. 644; 45 W. R. 657; 77 L. T. 299) approved.

Decision of Pallets, C.B. (sub nom *In re Finance Act, 1894, and Studdert*, [1900] 2 I. R. 400), affirmed; see No. 61, *supra*.

INLAND REVENUE COMMISSIONERS v. PRAISELEY, 30

**Estate Duty—Continued.**

[1901] A. C. 208; 70 L. J. Ch. 41; 49 W. R. 657, 84 L. T. 700; 17 T. L. R. 507; [1901] 2 I. R. 386—H. L. (Ir.).

65. *Settled Property—Mortgage by Tenant for Life and Remainderman—Annuity charged on Estate in favour of Remainderman—Value of Property passing on Death of Tenant for Life—Equity of Redemption—Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 1, 2 (1), 7 (5).—The equitable tenant for life of certain settled property, and his son, the equitable tenant in tail, barred the entail and re-settled the property, giving themselves a joint power of appointment over it, the limitation in default of such appointment being to the father for life with remainder to the son in tail. They then joined in creating a mortgage to a company whereby, in the exercise of their joint power of appointment, and by virtue of their respective estates, they jointly, in consideration of a loan to them of £230,000 and of certain mortgage debts charged on the estate by the father being paid off, conveyed to the mortgagees the whole of the settled property, it being further agreed that the mortgage debts so paid off should be transferred to the mortgagees, and continued on foot as subsisting charges on the life estate of the father by way of additional security for the loan of £230,000. Part of this last-mentioned sum was applied for the use of the father, and part for that of the son. Subsequently they executed a re-settlement of the estate by which it was charged with an annuity of £3,000 in favour of the son during the life of the father. On the death of the father in 1895 the Crown claimed from the son under the Finance Act, 1894, estate duty upon the gross value of the estates without allowing any deduction in respect either of the mortgage to the company or of the annuity which ceased on the father's death.

**HELD**—(a) that estate duty was payable on the equity of redemption, that being the only property which passed to the son; and (b) that no deduction was allowable in respect of the annuity.

Decision of Divisional Court ([1897] 2 Q. B. 47; 66 L. J. Q. B. 656; 61 J. P. 694; 45 W. R. 538; 76 L. T. 567) affirmed.

Decision of Court of Appeal ([1898] 1 Q. B. 355; 67 L. J. Q. B. 256; 62 J. P. 147; 46 W. R. 222; 77 L. T. 668; 14 T. L. R. 92) reversed.

*EARL COWLEY v. INLAND REVENUE COMMISSIONERS*, [1899] A. C. 198; 68 L. J. Q. B. 435; 63 J. P. 436; 47 W. R. 525; 80 L. T. 361; 15 T. L. R. 270—H. L. (E.).

66. *Settlement by Act of Parliament—Restriction against Alienation—Power of Jointuring—Power of Sale—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 58—*Finance Act, 1894* (57 & 58 Vict. c. 30), ss. 5, 22.—Estate duty payable under sect. 5 (5) of the Finance Act, 1894, on inalienable property is payable out of income and not out of capital.

A tenant-in-tail in possession of lands settled by Act of Parliament with a restriction

upon alienation is not rendered by sect. 58 of the Settled Land Act, 1882, a person "capable of alienating" such lands within the meaning of sect. 5 (5) of the Finance Act, 1894.

Lands were originally settled by statute on A. and E., two sisters, in tail as co-parceners with cross remainders between them, there being no power to alienate except by jointuring. Both moieties were now vested in one person.

**HELD**—that estate duty was payable on the whole under sect. 5 (5) on the death of each tenant in tail.

*IN RE BOLTON ESTATES ACT*, [1904] 2 Ch. 289; 73 [L. J. Ch. 688—Joyce, J.]

67. *Settlement made upon Son's Marriage—Death of Settlor within Twelve Months—Finance Act, 1894* (57 & 58 Vict. c. 30), s. 2.—Estate duty is payable upon the death of a settlor in respect of property settled by him, within twelve months of his death, in contemplation of his son's marriage, there being no consideration for such settlement in money or money's worth. This is so, although no estate in the property settled is reserved by the settlement to the settlor.

*ATTORNEY-GENERAL v. SMYTH*, [1905] 2 Ir. R. 533 [—K. B. D.]

68. *Settlement—Jointures—"Without any deduction whatsoever"—Valuation—Apportionment—Finance Act, 1894* (57 & 58 Vict. c. 30), s. 14 (1), sub-ss. 2 (1), 7 (7) (b), 9 (1) (6).

In 1861 donees of a power charged settled estates with a jointure of £1,000 per annum in favour of the wife of one of the donees "without any deduction whatsoever except in respect of income tax."

On the death of the surviving donee in 1896 the jointress became entitled to receive her jointure.

**HELD**—that estate duty in respect of the jointure must be borne by the inheritance, and was not payable by the jointress, as the words amounted to "an express provision to the contrary" within the Finance Act, 1894, s. 14 (1).

On the death of a settlor his widow became entitled to a jointure of £500 per annum charged by the settlor on settled estates.

**HELD**—that the rateable part of the estate duty payable in respect of the jointure must be assessed not on an actuarial valuation of the jointure, but on so much of the settled estates as might be ascertained to be required to produce £500 per annum; and that the jointress was entitled to a charge on the settled estates to meet the duty payable in respect of the jointure, paying thereon during her life interest at such rate as might be negotiated.

*IN RE PARKER-JERVIS; SALT v. LOCKER*, [1898] 2 [Ch. 643; 67 L. J. Ch. 682; 79 L. T. 403; 47 W. R. 147—Kekewich, J.]

69. *Settlement—Precatory Trust—Letter expressing Testator's Wishes—Finance Act,*

**Estate Duty—Continued.**

1894 (57 & 58 Vict. c. 30) ss. 1, 2, 5.]—A testator left all his property to his executors and trustees, giving them in a letter general instructions to provide for themselves and other members of the family, before his death they expressed their intention of carrying out all his wishes.

One of the executors took possession of the property as beneficial owner, and made various settlements upon members of the testator's family. He died within twelve months.

Held—that upon the true construction of the letter (which was “not in any way to fetter” him) no trust had been created; and that the settlements made by him were gifts made by him within twelve months of his death, and were liable for estate duty and settlement estate duty.

ATTORNEY-GENERAL v. CHAMBERLAIN AND OTHERS,  
[1904] 90 L. T. 581; 20 T. L. R. 359—  
Channell, J.

70. *Settlement—Reservation of Benefit—Finance Act, 1894* (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (c).]—Any gift *inter vivos* of property not involving the entire cessation of any interest therein by the grantor, and excluding his possession and enjoyment thereof, is sufficient to avoid the payment of estate duty under the Finance Act, 1894. The property so granted or assigned and existing at the death of the grantor will be deemed to have passed on his death, and therefore liable to estate duty.

A transfer of property reserving a rent-charge to the grantor and providing for the payment of the grantor's debts by the grantee, to the full exhaustion of the grantor's estate, is, therefore, ineffectual for the purpose of avoiding the said duty under sect. 2, sub-sect. 1 (c), of the Finance Act, 1894.

Decision of the Court of Appeal ([1898] 2 Q. B. 534; 67 L. J. Q. B. 947; 47 W. R. 37; 79 L. T. 235, 14 T. L. R. 585) affirmed.

EARL GREY v. ATTORNEY-GENERAL, [1900] A. C. 124; 69 L. J. Q. B. 308; 48 W. R. 383; 82 L. T. 62; 16 T. L. R. 202—H. L. (E.)

71. *Settlement Estate Duty—Direction to pay the “Death Duties payable out of my Estate”*—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (1).]—A direction in a will to pay out of a specific fund “the death duties payable out of my estate” is an “express provision” within sect. 19 (1) of the Finance Act, 1896; and, therefore, settlement estate duty on chattels settled by the will is payable out of that fund.

In *re Pimm* (No. 41, *supra*) followed.

In *re Lewis* ([1900] 2 Ch. 176, No. 34, *supra*) distinguished.

IN RE CAYLEY; AWDRY v. CAYLEY, [1904] 2 Ch. 781; 74 L. J. Ch. 31; 53 W. R. 144, 260; 91 L. T. 743—Eady, J.

72. *Settlement Estate Duty—Direction to pay “Testamentary Expenses”*—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (1).]—Settle-

ment estate duty on personalty is not a “testamentary expense,” although the executor is accountable for it.

Therefore it is payable out of the settled property notwithstanding an express direction in the will to pay out of residue “testamentary expenses.”

IN RE KING; TRAVERS v. KELLEY, [1904] 1 Ch. 363; 73 L. J. Ch. 210; 52 W. R. 230, 90 L. T. 281; 20 T. L. R. 187—Eady, J.

73. *Settlement Estate Duty—Direction to Set Apart a Fund*—“To Produce a Clear Yearly Sum” — Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19.]—Where a testator directs his trustees to set aside and invest so much of his estate as will produce a “clear” yearly sum of a specified amount, to be paid to some person for life, and directs that after such person's death the fund shall sink into and form part of residue, the settlement estate duty must be paid out of residue.

The words “clear sum” are “a provision to the contrary” within the meaning of sect. 19 of the Finance Act, 1896.

IN RE DYET; MORGAN v. DYET, (1903) 87 L. T. 744  
[—Eady, J.]

74. *Settlement Estate Duty—On what Fund Chargeable—Death occurring between passing of Finance Acts, 1894 and 1896*—Finance Acts, 1894 (57 & 58 Vict. c. 30), ss. 5, 22 (1), (a); 1896 (59 & 60 Vict. c. 28), ss. 19 (1), 24 (1), (a), (b), 39.]—Where a testator died after the passing of the Finance Act, 1894, but before the coming into force of the Finance Act, 1896, settlement estate duty payable under the will was held to be chargeable on the general residue of the testator's estate, and not out of the settled property.

*Re Webber; Gribble v Webber* (74 L. T. Rep. 244) applied.

IN RE GIBBS; THORNE v. GIBBS, [1898] 1 Ch. 625; 67 L. J. Ch. 282; 78 L. T. 289; 14 T. L. R. 317; 46 W. R. 477—Stirling, J.

75. *Settlement Estate Duty—Incidence of Duties and of Arrears of Interest—General Residue Insufficient—Annuities—Liability of Annuitants to Contribute*—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 5, sub-s. (1); 6, sub-s. (2); 9, sub-s. (1); 14, sub-s. (1)—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19, sub-s. (1).]—A testator who died in the year 1895, by a bequest held to be specific, bequeathed “all my moneys invested in and upon any stocks or funds, whether in or out of the United Kingdom, and all my railway stocks, shares, debentures, and bonds, and generally all and every my securities for money” to trustees upon trust during the life of his sister to pay three sums of £1,000, £500, and £500, annually respectively, and the residue and the remainder thereof to his brother W. during his life.

After the death of his sister the trustees were to hold the trust fund, as to two sums of £21,000 and £18,000, upon certain trusts

**Estate Duty—Continued.**

in favour of two of the testator's brothers respectively and their issue, and were to stand possessed of the residue of the trust fund, including the £18,000, in the event of his brother's death without issue upon trusts for life, with remainders over.

The testator bequeathed all the residue of his personal estate of whatever kind to W., subject to the payment of his personal and testamentary expenses and debts, and certain annuities. The residuary personalty being insufficient to pay the testator's debts and the estate duty and settlement estate duty upon his estate,

**HELD**—that the items composing the specific bequest of the trust fund passed to the executors as such, W. taking the residue of the specified fund bequeathed, subject to decrease or increment, according as the income of the fund was insufficient or more than enough to pay the three sums making £2,000 annually; that the residue of the *corpus* of the trust fund was in like manner settled on W. for life after providing for the £21,000 and the £18,000, and that he took the general residue with the benefit of the ordinary rules as to lapsed legacies and as to the provision of his brother's trust legacies; that, as regards the incidence of the burden of the estate duty and any interest thereon, as between W. as entitled to the general residue and those entitled to specific annuities, it being charged upon personal property which passed to the executors as such, and they being accountable for its payment, that duty must (subject to any question as to the incidence of duty on real estate in the United Kingdom) fall on W.'s residue in exoneration of the annuitants; and that, although in dealing with the settlement estate duty and interest thereon, which was not under the Finance Acts charged upon the settled fund, the Court was dealing with a different question, the two cases were governed by the same principles and authorities, and those taking partial interests in the settled funds ought not to bear any portion of them, but that they also fall upon W.'s residue.

*Champney v. Davey* ((1879) 11 Ch. D. 949; 40 L. T. 189—Hall, V.-C.) applied.

Decision of Kekewich, J. (92 L. T. 758) affirmed.

*DE QUETTEVILLE v. DE QUETTEVILLE*, (1905) 93 [L. T. 579—C. A.]

**76. Shares Subject to Restrictions on Transfer—Mode of Estimating Value.**—Where a testator leaves shares which can only be transferred to strangers subject to a right of pre-emption at a "fair value" by other shareholders, the value of the shares is not for the purposes of estate duty to be taken at the fair value as fixed by the articles of association, nor, on the other hand, are the restrictions on transfer to be ignored. The value is the price which they would fetch if sold in the open market on

the terms that the purchaser should take and hold them subject to the articles of association.

*ATTORNEY-GENERAL v. JAMESON*, [1905] 1 Ir. R. [218—C. A.]

**77. Tenant for Life—Payment by Installments—Power to Raise Interest on Installments—Charge on Settled Land—Finance Act, 1894** (57 & 58 Vict. c. 30), ss. 6, 9.]—A tenant for life has no power under sub-sect. 5 of sect. 9 to raise by mortgage of the inheritance the interest on the instalments of duty payable by the tenant for life.

*Per* Buckley, J.—The words "estate duty" in the first part of sub-sect. 5, and in sub-sects. 6 and 7 of sect. 9 of the Finance Act, 1894, are used to describe that which the revenue is entitled to demand, and does not mean the duty so distinguished from the interest.

*Per* Buckley, J.—The words "any interest properly paid by him" in sub-sect. 5 of sect. 9 refer to other persons than the tenant for life—viz., an executor or trustee who pays the duty, and is entitled to be recouped.

**HELD**, on appeal—that the decision and reasons of the learned judge were correct.

*IN RE EARL HOWE'S SETTLED ESTATES; EARL HOWE v. KINGSCOTE*, [1903] 2 Ch. 69; 72 L. J. Ch. 461; 51 W. R. 468; 88 L. T. 438; 19 T. L. R. 386—C. A.]

**78. Value of Property—"Incumbrances Incurred or Created Bonâ Fide"**—"Full Consideration in Money or Money's Worth"—"Wholly for the Deceased's Own Use and Benefit"—*Finance Act, 1894* (57 & 58 Vict. c. 30), s. 7, sub-s. 1 (a)]—In considering whether an encumbrance was created *bonâ fide* within the meaning of sect. 7, sub-sect. 1 (a), of the Finance Act, 1894, the motive with which the encumbrance was created is immaterial. In coming to a conclusion as to whether deeds were real and not sham deeds intended to have a real operation and creating real encumbrances, one of the elements for consideration may be motive; but once it is found that the encumbrances were real, intended to have full operation without any secret or covinous arrangement or reservation, the motive—e.g., to evade payment of estate duty, is immaterial.

The words in sect. 7, sub-sect. 1 (a), of the Act "for full consideration in money or money's worth wholly for the deceased's own use and benefit"—are satisfied by a tenant for life barring the entail of a Scottish estate and acquiring the fee simple, and giving a charge on the estate to the nearest heir, so long as he acquires the fee simple so that he can do what he pleases with it, and it is immaterial that he means to resettle it.

*ATTORNEY-GENERAL v. DUKE OF RICHMOND* (No. [1], [1907] 2 K. B. 923; 23 T. L. R. 739—Bray, J.)



## II. LEGACY DUTY.

**79. Annuitant to Pay "Legacy" Duty—Succession Duty substituted for Legacy Duty—Republication of Will after the Change—Effect of—Estate Duty—Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 21—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9.]**—A testator, by his will dated 1882, charged certain annuities on his real estate to be paid "without any deduction except for legacy duty and income tax;" viz., an annuity to his sister for her life, and after her death to her children. In 1888 "legacy duty" was abolished, and "succession duty" imposed. In a subsequent codicil testator "confirmed" his will, and in 1892 he died. Upon his sister's death in 1900 the question arose as to the incidence of the estate and succession duty payable in respect of the annuities.

**HELD—**(1) that estate duty was payable out of testator's residuary personal estate; (2) that succession duty must be borne by the annuitants. The effect of the codicil was to republish the will as from the date of the codicil, and at that date testator must be presumed to have known that there was no "legacy duty;" that it was a case of *falsa demonstratio* and he intended the annuitants to pay the corresponding duty.

*In re Champion* ([1893] 1 Ch. 101; 62 L. J. Ch. 60; 67 L. T. 694—North, J., and C. A.) followed.

*IN RE RAYER; RAYER v. RAYER*, [1903] 1 Ch. 685; 72 L. J. Ch. 230; 51 W. R. 538; 87 L. T. 712—Farwell, J.

**80. Assignment of Reversionary Interest—Liability for Legacy Duty on Interest falling into Possession—Assignee Liable, in absence of express Agreement—Covenant for further Assurance—Effect of.]**—Where a reversionary interest is assigned, the assignee, in the absence of an express agreement to the contrary, must bear the legacy duty which becomes payable on the interest falling into possession.

Where the owner of such an interest assigns to trustees a part of it (as distinct from a sum of money charged upon or to be raised out of it), the assignees must pay the duty on the part assigned out of it.

A covenant for further assurance in the assignment gives the assignees no right of indemnity against the assignor in respect of the duty.

*IN RE REPINGTON; WODEHOUSE v. SCOBELL*, [1904] 1 Ch. 811; 73 L. J. Ch. 533; 52 W. R. 522; 90 L. T. 663—Farwell, J.

**81. Domicil—Desire to Return to Native Land.]**—A subject of the United States came into this country many years before his death, and during that period took leases of various houses here, where he resided and at one of which he died, and also leases of shootings in Scotland. He often expressed his desire to go to Baltimore. He had a

partial interest in certain undeveloped property there.

**HELD—**that he was domiciled in this country at the time of his death so as to render his estate liable to legacy duty.

*Udny v. Udny* ((1869) L. R. 1 H. L. (Sc.) 441) and *Doucet v. Geoghegan* ((1878) 9 Ch. D. 441; 26 W. R. 825—C. A.) followed.

*ATTORNEY-GENERAL v. WINANS AND ANOTHER* [(1901), 65 J. P. 8, 83 L. T. 634; 17 T. L. R. 94—Div. Ct. Affirmed 65 J. P. 819; 85 L. T. 508; 18 T. L. R. 81—C. A.]

**82. Legacies Free of Duty—Deficient Estate—Abatement—Settled Legacy—Settlement Estate Duty—Will in 1893—Death in 1903—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1)—Finance Act, 1896 (59 & 60 Vict. c. 28) s. 19 (1)]**—By her will, dated 1893, a testatrix, who died in 1904, left numerous legacies "free of duty." She settled one of these duties. Her estate was insufficient to pay the legacies and duties in full.

**HELD—**(1) that the legacy duty on each legacy must be treated as an additional legacy and added to it for the purposes of abatement.

*Lord Advocate v. Miller's Trustees* ((1884) 21 Sc. L. R. 709—Ct. of Sess.) followed.

And (2) that the words "free of duty" covered the settlement estate duty in the case of the settled legacy, and that such duty must be treated as another additional legacy for purposes of abatement.

*IN RE TURNBULL; SKIPPER v. WADE*, [1905] 1 Ch. 726; 53 W. R. 440; 74 L. J. Ch. 433—Farwell, J.

**83. Legacies free of Legacy Duty—Legacies given by Codicil "in addition to those already bequeathed"—The latter Legacies also free of Legacy Duty.]**—A testatrix by her will gave a great number of legacies, and she directed that "all the legacies and bequests given in this my will be paid and given free of all deduction for legacy or other duty." By a codicil she said, "I give and bequeath the following legacies in addition to those named in my will." Then she enumerated a number of legacies to legatees named in the will, and also a legacy to an uncle not named in the will.

**HELD—**that the legacy to the uncle was free of legacy duty, as the words "this my will" meant both will and codicil, and solicitors' charges were mentioned; and that on the true construction of the words "in addition to those named in my will" she gave to the legatees of the codicil all the benefits of those of the will, and in addition to those of the will.

*IN RE SEALY; TOMKINS v. TUCKER*, (1902) 85 L. T. 451—Farwell, J.

**84. Power of Appointment—Whether Exercised or Not—Whether Funds Passed under it or under Donor's Will.]**—R. left half his estate to trustees upon trust to pay

**Legacy Duty—Continued.**

the income thereof to his sister, so long as she remained unmarried, and on her death unmarried to pay the capital "to the person or persons to whom she may bequeath the same by any will," and, failing any direction by her, to pay it to certain specified legatees. The sister survived R. and died unmarried. By her will, after reciting the provisions of R.'s will, she declared that "it is my wish and desire that the capital shall be divided among the legatees appointed by him" under his will; and then, after reciting that she now desired to "settle my own proper means and estate," went on to dispose of her whole property to trustees for certain purposes. The Crown claimed legacy duty on the half of R.'s estate life-rented by her, on the plea that she exercised the power of appointment, and that the fund was a bequest by her to the appointees.

HELD—that she had not exercised the power of appointment, and that the duty claimed was not payable.

LORD ADVOCATE *v.* ROUTLEDGE'S TRUSTEES, [1907]  
[S. C. 327—Ct. of Sess]

85. *Settled Heirlooms—Re-settlement—Liability of Trustees—Legacy Duty Act, 1796* (36 Geo. 3, c. 52), s. 14]—Where certain heirlooms were settled in such a way that ultimately the fourth Marquis of Ailesbury would have become entitled in possession, and he, before becoming entitled in possession, re-settled them and then became bankrupt and died, legacy duty was payable on these heirlooms at the date when the fourth Marquis would have become entitled in possession, and the trustees of the re-settlement were liable to pay the duty.

ATTORNEY-GENERAL *v.* BRUCE, [1901] 2 K. B. [391; 70 L. J. K. B. 767; 65 J. P. 329; 49 W. R. 519; 85 L. T. 114, 17 T. L. R. 475—Div. Ct.]

86. *Payment out of Court—Settled Estate Legacy—Legacy Duty—Tenant for Life—Whether there should be Reservation for Future Duties—Legacy Duty Act, 1796* (36 Geo. 3, c. 52), s. 19]—A sum of money invested in Consols standing to the credit of an account in an action entitled, "Account of the Settled Estate Legacy Subject to Duty," was ordered to be paid out of Court to trustees on the trusts of a will, under which the present Earl of Strathmore was tenant for life with remainders over. Under the Legacy Duty Act, 1796, s. 19, the legacy duty had to be calculated by way of annuity on the various life interests until some person should become absolutely entitled. The duty had been assessed on the Earl's life interest, payable in four instalments, of which one had been paid. The Registrar was of opinion that a sum should be retained out of the fund to pay the three remaining instalments, and to provide for the duty payable on the death of the Earl.

HELD—after consultation with other judges, that all duty presently payable having been paid or provided for, the order should be drawn up without providing for future duties.

IN RE BOWES; STRATHMORE *v.* VANE, [1907]  
[W. N. 198—Neville, J.]

87. *Solicitor-Trustee—Profit Costs—Power Under Will to Make Professional Charges*]—Where a will gives a solicitor-trustee power to make professional charges, any profit-costs are a legacy and subject to legacy duty.

IN RE WHITE, PENNELL *v.* FRANKLIN, [1898] 2 Ch. [217; 67 L. J. Ch. 502; 78 L. T. 770, 14 T. L. R. 503; 46 W. R. 676—C. A.]

**III. PROBATE DUTY.**

88. *Improper Transfer of a Foreign Deceased's Shares by an English Company—Executors de son tort—Liability of Company to Probate Duty and Penalties—Stamp Act, 1815* (55 Geo. 3, c. 134), s. 37—*Crown Suits Act, 1865* (28 & 29 Vict. c. 104), s. 57—*Customs and Inland Revenue Act, 1881* (44 Vict. c. 12), s. 40]—Upon the death of a shareholder in an English company, the company are not justified in transferring the shares of the deceased to persons purporting to be his executors, unless English probate or administration has been, or is intended to be, taken out; and, if the company transfer them, they become executors *de son tort* of the shares as transferred, and are liable to pay probate duty in respect of them.

Decision of the Court of Appeal ([1898] 1 Q. B. 205; 67 L. J. Q. B. 86; 62 J. P. 132; 46 W. R. 193; 78 L. T. 61; 14 T. L. R. 119) affirmed.

NEW YORK BREWERIES COMPANY *v.* ATTORNEY-GENERAL, [1899] A. C. 62; 68 L. J. Q. B. 135; 63 J. P. 179; 48 W. R. 32, 79 L. T. 568; 15 T. L. R. 93—H. L. (E)]

89. *Share of Estate in Jamaica—English or Foreign Asset.*]—A testator, domiciled in England, by his will devised and bequeathed a plantation in Jamaica to trustees upon trusts for the benefit of certain persons for life and their issue, and, upon the deaths of those persons and failure of issue, upon trust to sell the plantation and divide the proceeds amongst several persons therein named. One of the trustees, who was domiciled in the United Kingdom, proved the will in England, and, acting as trustee in this country, held the plantation upon the trusts of the will.

Upon the trusts for sale ultimately taking effect, the proceeds of sale of the plantation became divisible amongst the several persons named in that behalf in the will, or their legal personal representatives. One of these persons died, domiciled in England, while the persons entitled for life were in existence.

Upon a petition for the distribution of the

**Probate Duty—Continued.**

funds subject to the trusts of the will, the question arose whether probate duty was payable in England on the death of this person in respect of his interest under the will.

**HELD**—that the case was governed by the principles of the decision in *Lord Sudeley v. Attorney-General* ((1897) A. C. 11), and that the interest under the will was an English asset on which probate duty was payable.

IN RE SMYTH, LEACH v. LEACH, [1898] 1 Ch. 89; [67 L. J. Ch. 10; 77 L. T. 514; 14 T. L. R. 77; 46 R. W. 104—Romer, J.

**IV. SUCCESSION DUTY.**

*See also PRACTICE AND PROCEDURE (PAYMENT OUT OF COURT).*

90. "*Predecessor*"—*Life Policy—Marriage Settlement—Payment of Premiums by Third Person—Succession Duty Act, 1853* (16 & 17 Vict. c. 51), s. 2.]—In 1853 A. in contemplation of his second marriage effected and assigned to trustees a policy of insurance for £4,000 on his own life. By a contemporaneous marriage settlement, C. (the mother of his first wife), who was entitled for her life to the interest upon certain securities representing £3,500 and A., who was entitled to the interest on the same securities for his life from the death of C., joined in assigning their interest in these securities during the life of A. to the same trustees upon trust during the life of A. to pay out of the annual proceeds thereof the premiums on the said policy of insurance. The settlement also contained a personal covenant by A. with the trustees to pay the annual premiums upon the policy. The premiums were accordingly paid by the trustees. A. died in 1876, leaving a widow and children of the second marriage, and C. died in 1880, a stranger in blood to these children.

**HELD**—that C. was not a "*predecessor*" within the meaning of sect. 2 of the Succession Duty Act, 1853, and the succession duty at the rate of £10 per cent. in respect of a moiety of the proceeds of the said policy of insurance, as upon a succession from C., was not payable under sects. 2 and 13 of the same Act.

ATTORNEY-GENERAL v. RIALI, [1906] 2 Ir. R. 122 [—K. B. D.

91. "*Predecessor*"—*Settlor—Marriage Portion.*]—B., a lady who was contemplating marriage, owned forty-five bank shares which had been presented to her by her step-father. She transferred these shares to her brother at the request of her step-father, who told her that he had left her much more than their value, and her step-father gave her a "*marriage portion*" of £5,000, which was put in settlement. The step-father died shortly after the marriage, and by his will, which was made some months before the marriage, he left to B. a legacy of £5,000. In a former suit it was

held that this legacy was not adeemed by the marriage portion of £5,000, and upon the death of B.'s husband the Crown claimed from the eldest son of the marriage, who was the successor, succession duty, under the Succession Duty Act, 1853, at the rate of 10 per cent. in respect of the £5,000 put in settlement, upon the ground that the predecessor was the step-father, a stranger in blood. The eldest son contended that it was his mother who settled the £5,000, and that she was the predecessor.

**HELD**—that before and at the time of the settlement the £5,000 belonged to the step-father and not to B., and that he was the predecessor.

ATTORNEY-GENERAL v. BIGGS, [1907] 2 Ir. R. 400—K. B. D.

92. *Purchaser for Valuable Consideration—Trustees of Marriage Settlement—Statute of Limitations—Succession Duty Act, 1853* (16 & 17 Vict. c. 51), s. 17—*The Customs and Inland Revenue Act, 1889* (52 Vict. c. 7), s. 12, sub-ss. 1, 2, 3.]—In 1857, on the death of A., lands became the subject of succession duty. B., the successor, died in 1867, having by will, made in 1863, charged the lands with £5,000 in favour of C. In 1872, C., on his marriage, assigned the charge of £5,000 to the trustees of his settlement on the ordinary trust of a marriage settlement. The lands were afterwards sold at the suit of an incumbrancer, and the Commissioners of Inland Revenue claimed to have the succession duty, which became payable in 1857, satisfied out of the proceeds of the sale in priority to the trustees of the marriage settlement in 1872.

**HELD**—(affirming the decision of Ross, J.)—that the trustees of the marriage settlement were purchasers for valuable consideration within the meaning of sect. 12 of the Customs and Inland Revenue Act, 1889, that as against them the succession duty was barred after the lapse of twelve years, and that they were accordingly entitled to priority over the Inland Revenue Commissioners.

IN RE DONELAN'S ESTATE, [1902] 1 Ir. R. 109—[C. A.

93. *Settlement by Act of Parliament—No Power to Alienate Except for Jointure—Succession Duty Act, 1853* (16 & 17 Vict. c. 51), ss. 2, 4.]—Lands were originally settled by Act of Parliament on co-parceners in tail with cross-remainders between them; there was power to jointure by will. Both moieties were now vested in one person.

**HELD**—that a widow, to whom a jointure had been granted by will, was not liable for any succession duty thereon, in respect of either moiety thereof.

IN RE BOLTON ESTATES ACT, [1904] 2 Ch. 289; [91 L. T. 259—Joyce, J.

94. *Acceleration of Succession—Settlement Containing Power to Appoint—Settled*

**Succession Duty—Continued.**

*Estate—Execution of Power—Extinction of Estates Limited by Settlement—New Title under Appointment—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 15.*—The subject is not to be taxed without clear words for that purpose.

By an indenture dated October 26th, 1883, and made in view of the marriage of Viscount Wolmer (afterwards the second Earl of Selborne) with Lady Maud Cecil, the first Earl of Selborne conveyed to trustees an estate called the Blackmoor estate to hold the same on such trusts as the first Earl of Selborne and Viscount Wolmer should jointly appoint, such appointment during the joint lives of Viscount Wolmer and Lady Maud Cecil to be subject to her consent in writing, and in default of or until such appointment to the use of the first Earl of Selborne for life, and after his decease to the use of Viscount Wolmer in fee simple in case he should survive the Earl of Selborne; and if Viscount Wolmer should die in the lifetime of the Earl of Selborne, and should leave a son or sons who should have attained or should attain the age of twenty-one years, then to the use of the son of Viscount Wolmer who should first or alone attain that age; but if Viscount Wolmer should die in the lifetime of the Earl of Selborne, and leave no son who should have attained or should attain the age of twenty-one years, then to the use of the Earl of Selborne in fee simple.

By an indenture dated September 29th, 1894, in the exercise of the power of appointment, the Earl of Selborne and Viscount Wolmer, with the consent of Lady Maud Wolmer, jointly appointed the estate in question (except the capital mansion and certain other lands mentioned in the Schedule to the first deed) to Viscount Wolmer in fee. On an information claiming succession duty:

**HELD**—that the effect of the execution of the power in 1894 was that the estates limited by the settlement of 1883 in default of appointment ceased and were defeated, and the estates limited under the power took effect from the time of the execution of the power in the same manner as if they had been contained in the deed creating the power; that the execution of the power, therefore, could not have the effect of accelerating the succession created by the settlement of 1883, since its effect was to annul and defeat that succession altogether, and substitute for it the estate created by the execution of the power; that Lord Wolmer did not take the fee as upon an acceleration of the estate conferred by the settlement, but by a new title under the appointment; and that the second Earl of Selborne was not under sect. 15 of the Succession Duty Act, 1853, liable to pay succession duty in respect of the Blackmoor estate comprised in the deed of October 26th, 1883, and afterwards dealt with by the indenture of September 29th, 1894.

Judgment of Divisional Court ((1901) 65 J. P. 342; 17 T. L. R. 481) reversed.

**ATTORNEY-GENERAL v. SELBORNE (EARL OF),** [1902] 1 K. B. 388; 71 L. J. K. B. 289; 66 J. P. 132; 50 W. R. 210; 85 L. T. 714; 18 T. L. R. 111—C. A.

**95. Alienation — Succession created by Alienee—"Become Vested by Alienation or by any Title not Conferring a New Succession in any Other Person"—Double Duty—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 15.**—In 1867 certain estates stood limited by a settlement dated 1817 to the sixth Duke of Northumberland for life, with remainder to his eldest son in tail male. In 1868 the sixth Duke and his eldest son executed disentailing deeds giving them a joint power of appointment. Under this power a portion of the settled estates was in 1870 conveyed to Lord James Murray in fee. In 1874 Lord James Murray died, having devised his estates to his wife, who died in 1888, having devised them to her daughter, Miss Murray. Both appointors were then alive, but Miss Murray paid succession duty under 16 & 17 Vict. c. 51, s. 10, and 51 & 52 Vict. c. 8, s. 21, at the rate of 1½ per cent. on the value of her mother's interest (considered as an annuity) in this particular portion of real estate; it was now contended by the Crown that upon the death of the sixth Earl in 1899, she became liable to pay succession duty upon the same property.

**HELD**—that this was a case of property becoming "vested by alienation or by any title not conferring a new succession in any other person," and that Miss Murray must pay duty calculated upon the actuarial value of her interest.

**Solicitor-General v. Law Reversionary Interest Society** ((1873) L. R. 8 Ex. 233; 42 L. J. Ex. 146; 23 L. T. 769) followed.

**In re Cooper v. Harlech** ((1876) 4 Ch. D. 802; 46 L. J. Ch. 133; 25 W. R. 301; 35 L. T. 890—Jessel, M.R.) overruled.

Decision of C. A. ((1904) 1 K. B. 762; 73 L. J. K. B. 418; 90 L. T. 630; 20 T. L. R. 391) affirmed.

**NORTHUMBERLAND (DUKE OF) v. ATT.-GEN.,** [1905] [A. C. 406; 74 L. J. K. B. 734; 54 W. R. 31; 93 L. T. 88; 21 T. L. R. 639—H. L. (E)]

**96 Annuity—Gift inter vivos — Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 10, 14, 15, 21.**—A succession once created cannot, by the act of the successor, cease to exist and another succession be substituted for it. A person who has once been a successor does not cease to be so if, prior to the time of the succession becoming an interest in possession, he has alienated it.

A gift *inter vivos* of an interest subject to a life estate does not create a succession on the death of the tenant for life.

By a deed of family arrangement the widow and coheirresses-at-law of a deceased peer agreed (*inter alia*) to pay an annuity to the appellant, who had succeeded to the title, to be charged upon an agreed part of

**Succession Duty—Continued.**

the residuary estate during the lifetime of the widow, who was tenant for life of the residuary estate, and after her death to be charged upon the whole residuary estate. The coheiresses had paid legacy duty upon the residuary estate.

**HELD**—(reversing the judgment of the Court of Appeal), that the appellant was not liable to pay succession duty on the annuity on the death of the tenant for life.

*Re Cooper and Allen* (4 Ch. Div. 802) and *Attorney-General v. Lord Eustace Cecil* (L. R. 5 Ex. 263) discussed and distinguished.

*WOLVERTON v. ATTORNEY-GENERAL*, [1898] A. C. 535; 62 J. P. 708; 67 L. J. Q. B. 829; 79 L. T. 58; 14 T. L. R. 519; 47 W. R. 97—

H. L. (E.)

**97. Father and Son—Instrument of composite Character—Partnership and Settlement—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21.]**—A father and son entered into partnership for a term of five years. The son brought no capital or money of his own into the partnership, but the father was credited with two-thirds of the capital, and the son was credited with one-third of the capital, and profits were to be divided accordingly; and it was arranged that if the father died during the term of five years the son was to have the entire business, and was to pay £10,000 to his father's executors. The father died before the expiration of the five years. The Crown claimed succession duty on the value of the share which passed to the son on his father's death of the assets of partnership, less the £10,000.

**HELD**—that the father was actuated by the desire to provide, in the event of his death, for his son, and consequently the son must be liable to pay duty, because it was his father's provision in the nature of a settlement for him, although in the same deed there were provisions *bonâ fide* intended to regulate the contractual relations between the parties.

Decision of the Court of Appeal (62 J. P. 19; 46 W. R. 145; 77 L. T. 591; 14 T. L. R. 73) affirmed.

*BROWN v. THE ATTORNEY-GENERAL*, (1899) 79 [L. T. 572; 15 T. L. R. 109—H. L. (E)]

**98. Foreign Donor Domiciled Abroad—Property Situate Abroad—Gift to English Limited Company of the Property on Trust for Donor for Life and after his Death to Unascertained Aliens—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (e)—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 7, 8, 16.]**—Baron de H. was domiciled in Austria, and made a gift in 1892 by deed to the Jewish Colonization Association having its registered office in London. The effect of the deed, together with subsequent transactions between the baron and the association, was that a large number of stocks, shares, bonds, and investments (for the most part representing property in foreign countries)

were transferred to the association and became their property. This property the association held as trustees for the benefit of a number of unascertained aliens of the Jewish race. The same deed secured to the baron during his life the entire income of the association to be derived from the property he had so given them. Four years afterwards, in 1896, the baron died, and the property was then held by the association upon the trusts for the benefit of the classes of persons indicated in the deed. Clause 3 of the memorandum of association showed that the baron desired "to assist and promote the emigration of Jews from any parts of Europe or Asia, and principally from countries in which they may for the time being be subjected to any special taxes or political or other disabilities." He further, in the event of the association being dissolved and in the last resort, entrusted to a judge of the High Court of Justice in England the selection of some other institution to benefit by his bounty. The council of administration of the association was accustomed to meet in Paris, and the association transacted most of its business in offices there. It appeared by the minute of the council of administration, dated January 15th, 1892, that this was done because the baron had offices in Paris and desired to have the business of the association conducted in those offices.

**HELD**—that in these circumstances duty under the Finance Act, 1894, and Succession Duty Act, 1853, became payable by the Jewish Colonization Association upon the death of Baron de H. in respect of the value of the stocks, shares, bonds, and securities specified in the schedule to the deed of 1892.

*ATTORNEY-GENERAL v. JEWISH COLONIZATION [ASSOCIATION]*, [1901] 1 Q. B. 123; 70 L. J. Q. B. 101; 65 J. P. 21; 49 W. R. 230; 83 L. T. 561; 17 T. L. R. 106—C. A.

**99. Incidence—Appointment—Stock "sufficient to raise" a "net" sum.]**—A tenant for life under a marriage settlement, in exercise of a power of appointment in favour of the children of the marriage, by deed appointed "that so much of the stock, funds, shares and securities" then subject to the trusts of the settlement "as shall be sufficient to raise the net sum of £2,000" should, subject to the life interest therein of the appointor, "henceforth belong and be vested in" S., and be held in trust for him, his executors, administrators and assigns.

**HELD**—that the appointee took the £2,000 clear of all charges including succession duty.

*Banks v. Braithwaite* (8 L. T. Rep. 80) considered.

*IN RE SAUNDERS, SAUNDERS v. GORE*, [1898] 1 Ch. 17; 67 L. J. Ch. 55; 77 L. T. 450; 46 W. R. 180—C. A.

**100. Incidence—Will charging residue with Succession Duty payable on Testator's death—Timber sold by Successor.]**—A testator

**Succession Duty—Continued.**

directed the trustees of his will to pay out of residue all such succession duty as should become payable upon his death in respect of certain settled estates.

The next tenant at once cut timber, and became liable for succession duty on the proceeds of the sale.

**Held**—that the trustees must provide for such duty out of residue.

Decision of Joyce, J. (89 L. T. 434; 20 T. L. R. 29) reversed.

**IN RE LECONFIELD; WYNDEHAM v. LECONFIELD**, [1904] 90 L. T. 399, 20 T. L. R. 347—C. A.

*And see* No. 42, *supra*.

*See also* ATTORNEY-GENERAL v. JOHNSON, *ante*—ESTATE DUTY, No. 3.

**DEATH, PRESUMPTION OF.**

*See* EVIDENCE.

**DEBENTURES.**

*See* COMPANIES.

**DEBTORS ACT, 1869.**

*See* BANKRUPTCY AND INSOLVENCY

**DECEIT.**

*See* MISREPRESENTATION AND FRAUD.

**DECLARATIONS.**

*See* EVIDENCE.

**DEEDS AND OTHER INSTRUMENTS.**

*See also* CONTRACT; EVIDENCE, LANDLORD & TENANT; MISREPRESENTATION & FRAUD; PRACTICE, 189-193.

1. *Alteration — Immaterial Alteration — Date—Validity.*—The rule laid down in *Pigot's Case*, (1614) 11 Rep. 26 b., is qualified by the decision in *Aldous v. Cornwell*, (1868) L. R. 3 Q. B. 573; 37 L. J. Q. B. 201, and only applies to material alterations in a deed.

A deed conveying the advowson of a church was, in October, 1899, signed, sealed, and delivered by all the parties to it but the Bishop of E. It was intended that the

deed should bear the date upon which it was executed by the Bishop of E. In the engrossment the day and month were left blank, but eighteen hundred and ninety-nine was written.

The deed was sent to the Bishop of E. on the 4th November, 1899, but he executed it on the 26th January, 1900, and the date of his execution was inserted in the deed, and "eighteen ninety-nine" altered to nineteen hundred.

**Held**—that the deed was valid, as the alteration was only intended to carry out the intention of the parties.

**BISHOP OF CREDITON v. BISHOP OF EXETER**, [1905] 2 Ch. 455; 74 L. J. Ch. 697; 93 L. T. 157; 54 W. R. 156—Eady, J.

2. *Alteration—Material or Immaterial—Statutory Declaration—Sole Surviving Mortgagee a Married Woman—Reconveyance as Feme Sole—Trustee Act, 1893* (56 & 57 Vict. c. 53), s. 16.]—It is established that a material alteration in a written instrument does, and an immaterial alteration does not, avoid it.

A mortgage of freehold property purported to be made to three persons—trustees—one of them being described as William Gray, whereas he ought to have been described as Edward Thomas Gray. He and the other two persons named were parties of the third part, and throughout the rest of the deed those parties were always referred to as the parties of the third part, and William Gray was never mentioned again. But later, without any intention of fraud or anything of that kind, "William" was erased and "Edward Thomas" was substituted. Statutory declarations were made that the name William Gray was inserted in the deed by inadvertence, and was meant for Edward Thomas Gray.

**Held**—that the alteration was not material; that the deed took effect from the moment of its execution; that whatever was the effect of the deed was so from the moment of its execution by the conveying parties, and it could not have been altered from that time forward; that who was William Gray could be solved by evidence; that the statutory declarations cleared that up completely, and that the vendor had sufficiently made out his right, and had a right to insist upon his title.

Upon payment of the mortgage debt, the property was conveyed by the sole surviving trustee, who was a married woman.

**Held**—that by sect. 16 of the Trustee Act, 1893, she could re-convey as if she were a *feme sole*.

**IN RE HOWGATE AND OSBORN'S CONTRACT**, [1902] 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180—Kekewich, J.

3. *Ambiguity — Conveyance — Parcels — Survey—Misdescription in Deeds—Title.*—The owner of two contiguous estates, one

**Deeds and Other Instruments—Continued.**

called Mont Lezard and one called Parc, in 1872 conveyed Mont Lezard to the plaintiffs, and soon afterwards certain steps were taken by the parties to ascertain the boundaries through a professional surveyor. In 1881 Parc was sold to satisfy a judgment against the owner, and through that sale the defendant derived title. In 1896 the defendant required a survey under the provisions of the Surveyors' and Boundaries' Settlement Ordinance. The surveyor appointed for that purpose made his report, with the effect of throwing into Parc some land occupied by the plaintiffs as part of Mont Lezard. The legal effect of that report was to put the plaintiffs to contest it within a year under peril of being bound by it. The plaintiffs therefore brought their suit to contest it.

**HELD**—that the title of the plaintiffs to the lands included in the conveyance to them as determined by the professional surveyor was not affected by the measurements in the deeds.

**BARNARD v. DE CHARLEROY**, (1899) 81 L. T. 497—P. C.

**4. Ambiguity—Grant of Farm—Description**—"as will further appear by the Diagram"—*Elucidation or Subordination of Text by the Diagram—Title.*—The description of a farm in the grant was as follows: "A piece of land containing 25·20 morgen, situated in the division of Stellenbosch Field Cornetcy of Hottentots, Holland, being the loan place, 'Kogel Baay' or 'Langgezocht,' extending west to the sea shore, south, south-east, and east to the mountains, and north to the Steenbrayem River, as will further appear by the diagram framed by the surveyor"

**HELD**—that, assuming that the diagram contradicted the unambiguous text of the title, it must give way to the text that the words in the grant which introduce the diagram were, "as will further appear by the diagram framed by the surveyor," and, as matter of construction, this was merely an appeal to the diagram for further elucidation of the text, and not a subordination of the text to the diagram; and that in a matter not requiring elucidation the diagram was repugnant to the text, that merely showed that the diagram was not exact, and afforded only a rough delineation of the farm.

It is true that, under arts. 8 and 13 of the Proclamation of August 6th, 1813, before a title can be granted there must be a diagram, in order that the Government may be fully certified before granting the title as to the land proposed to be granted complying with the requirements of the Proclamation. But, this condition having been fulfilled, the right of the grantee is to be expressed in his title, and it does not appear from the Proclamation that the title need even refer to the diagram or have it

attached. In short, the Proclamation gives to the diagram no independent authority as limiting the terms of the grant.

**HORNE v. STRUBEN**, [1902] A. C. 454; 71 [L. J. P. C. 88; 87 L. T. 1—P. C.

**5. Assignment—Undue Influence—Confidential Adviser—Sale to—Fiduciary Relation—Assignment set aside**—Facts showing that an assignor was an habitual drunkard, that the assignee had taken upon himself the office of adviser and manager of the assignor's affairs, and that the property assigned was largely undervalued, warrant the setting aside of the assignment.

**WRIGHT v. LONG**, (1898) 14 T. L. R. 434—C. A.

**6. Consideration—Parol Evidence of.**—Where a deed states a consideration, any other consideration may be proved by parol, if it does not contradict the deed; and mere proof of a consideration larger than that stated is not a contradiction

**FRITH v. FRITH**, [1906] A. C. 254; 75 L. J. P. C. 50, 54 W. R. 618, 94 L. T. 383; 22 T. L. R. 388—P. C.

**7. Construction—Release.**—A release contained in a deed, although couched in general terms, must, if possible, be so construed as not to defeat the purpose of the deed of which it forms part.

**IN RE PERKINS; POYSER v. BEYFUS**, [1898] 2 Ch. 183, 67 L. J. Ch 454; 78 L. T. 666; 5 Manson, 193; 14 T. L. R. 464; 46 W. R. 595—C. A.

**8. Interpretation—Ancient Document—Contemporaneous Usage.**—Where the parties interested have acted upon an agreement for more than forty years, and their conduct shows that they always understood it until lately as meaning what the defendants contend it does mean, the Court must be careful not lightly to come to the conclusion that the parties have been for many years labouring under a mistake. The agreement, however, cannot be regarded as an ancient document the language of which may not now convey the same meaning as it did when written, and the language of which may therefore be properly construed by the light of contemporaneous usage. The rights of the parties must be decided now as the Court would have decided them as soon as the agreement became binding, and before the parties had shown by their conduct how they understood it.

**Decision of C. A.** ([1899] 1 Ch. 656; 68 L. J. Ch. 315; 80 L. T. 217; 15 T. L. R. 247) affirmed.

**HASTINGS (LORD) v. NORTH-EASTERN RAILWAY**, [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325—H. L. (E.).

**9. Interpretation—Falsa demonstratio non nocet—Rectification.**—The doctrine of *falsa demonstratio non nocet* is only applied where a description is made up of more than one

**Deeds and Other Instruments—Continued.**

part, and one part is true, but the other false; then, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected, and will not vitiate the instrument. By an underlease rooms on the second floor of Nos. 13 and 14, Old Bond Street, were demised to the plaintiff "together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No. 13 to and from the demised rooms." There was a staircase in No. 14, but in No. 13 there was only a lift and no staircase.

**HELD**—that as the rejection of the words "of No. 13" would not leave a description applicable to the staircase in No. 14, the doctrine of *falsa demonstratio non nocet* did not apply; but that it was the intention of the parties that the plaintiff should have access over the staircase of No. 14, and that the underlease should be rectified accordingly.

Decision of *Romer, J.* ([1898] 2 Ch 551; 67 L. J. Ch. 695; 47 W. R. 29; 79 L. T. 348) affirmed.

*COWEN v. TRUEFIT*, [1899] 2 Ch. 309, 68 L. J. [Ch. 563; 47 W. R. 661; 81 L. T. 104—C. A.]

**DEED OF ARRANGEMENT.**

See **BANKRUPTCY AND INSOLVENCY**, 64-70, **COMPANIES**

**DEED OF ASSIGNMENT.**

See **CHOSSES IN ACTION**.

**DEFAMATION.**

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And see **COMPANIES**, 370; **EXECUTORS**, 49, 50, and under various headings.

**I. ADEN.**

1. *Court of Resident—Transfer of Action to Bombay High Court—Jurisdiction—High Court of Bombay Letters Patent, 1865, Clause 13—Aden Courts Act (II. of 1864).*—The Court of the Resident at Aden is subject to the superintendence of the High Court of Bombay, so as to enable that Court to remove a suit from the Court of the Resident at Aden into the High Court for the purposes of trial.

Decision of the High Court of Bombay (27 I. L. R. (Bom.) 575) affirmed.

*THE MUNICIPAL OFFICER AT ADEN v. HAJEE [ISMAIL, HAJEE ALLANA AND OTHERS, (1905) 22 T. L. R. 95—P. C.]*

**II. AUSTRALIA.****(a) Commonwealth.**

2. *Appeal to Privy Council—Retrospective Operation of Act Abolishing Appeal—Whether a Matter of Procedure only—Judiciary Act, 1903 (No. 6) ss. 38, 39.*—Section 39 of the Judiciary Act, 1903, which abolished the previously existing right of appeal from the Court of a State exercising federal jurisdiction to the Privy Council is not retrospective, and it does not operate to take away the right of appeal in an action commenced before the Act came into operation. The section was not declared to be retrospective and the abolition of a right of appeal, or its transfer to another tribunal, cannot be regarded as a mere matter of procedure.

*COLONIAL SUGAR REFINING CO., LD. v. IRVING, (1905) 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513—P. C.]*



**Australia—Continued.**

**3. Customs—Ships' Stores—Breaking Seals—Territorial Waters—Powers of Federal Legislature—Ultra vires—Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 5; Constitution, Arts. 51, 98; Customs Act, 1901 (1 Edw. VII. No. 6), ss. 31, 68, 127, 128, 129, 192.]—**A British ship arrived at the port of Sydney with ship's stores on board subject to customs duty. These stores were not entered for home consumption—that is, they were not treated as imported goods, and no duty was paid upon them, but they were placed under seal by an officer of the customs. The ship then left Sydney for Melbourne, and on her voyage thereto the seals were broken by the captain outside the three miles limit, and the stores were used by the passengers and crew and for the service of the ship, both on the voyage and within the port of Melbourne. The ship thus arrived at Melbourne with the seals broken, whereas according to the Customs Act they ought not to have been broken until after leaving the last Australian port. In an action to recover penalties under sects. 128 and 192 of the Customs Act, 1901, for having entered the port of Melbourne with the seals broken, and for having used the stores within the port,

**HELD**—that these sections are not beyond the powers of the Federal Legislature, and that, therefore, the penalties were recoverable.

**P. & O. STEAM NAVIGATION Co. v. KINGSTON**, [1903] A. C. 471; 72 L. J. P. C. 123; 89 L. T. 222; 19 T. L. R. 617; 9 Asp. M. C. 433—P. C.

**4. State's Legislative Power—Limits inter se of Powers of Commonwealth and State—Income Tax—Salaries of Commonwealth Officers—Appeal to Privy Council—Leave to Appeal—Commonwealth Act Taking away Right of Appeal—Ultra Vires—Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), Cl. 74—Commonwealth Judiciary Act (No. 6 of 1903), ss. 30, 38, 39.]—**The salary of a Commonwealth official who resides in the State of Victoria, the salary being earned and received there, is liable to income tax under the law of Victoria.

**Deakin v. Webb and Lyne v. Webb** (1 Commonwealth L. R. 585) disapproved.

The Supreme Court of Victoria has power to give leave to appeal to the Privy Council notwithstanding sects. 30, 38, 39 of the Commonwealth Judiciary Act, 1903.

**Decision of Supreme Court of Victoria (30 V. L. R. 463) affirmed.**

**WEBB v. OUTRIM**, [1907] A. C. 81; 76 L. J. P. C. [25]; 95 L. T. 850; 23 T. L. R. 147—P. C.

**5. Revenue—Excise Duty—Retrospective Operation—Discrimination between States—Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), ss. 51, 90—Excise Tariff, 1902 (No. 11 of 1902), ss. 4, 5—Customs Tariff, 1902 (No. 14 of 1902).]—On**

October 8th, 1901, the House of Representatives of the Parliament of the Commonwealth of Australia passed a resolution that duties of customs and excise should be imposed according to a tariff which included an excise duty on manufactured sugar, the produce of Australia, of 8s. per cwt. No duty was payable on sugar under the law of Queensland. On July 26th, 1902, the Excise Tariff, 1902, was passed, which imposed uniform duties of excise in accordance with the resolution of the House, to take effect from October 8th, 1901. On September 16th, 1902, the Customs Tariff, 1902, was passed, which imposed uniform duties of customs. The Collector of Customs claimed the duty of 8s. per cwt. on manufactured sugar produced in Queensland as from October 8th, 1901.

**HELD**—that the Parliament of the Commonwealth had power to make the operation of the duty retrospective so as to come into effect on October 8th, 1901, that sect. 90 of the Commonwealth of Australia Constitution Act, 1900, did not prohibit the imposition of duties of excise until uniform duties of customs had been imposed; and that the effect of sect. 5 of the Excise Tariff, 1902, which exempted from the duties thereby imposed goods on which customs or excise duties had been paid under State Legislation, was not illegal as discriminating between States within the meaning of sect. 51 of the Commonwealth of Australia Constitution Act, 1900.

**Decision of the Supreme Court of Queensland ([1903] St. R. Qd. 261) affirmed**

**THE COLONIAL SUGAR REFINING Co., LD. v. [IRVING]**, [1906] A. C. 360; 75 L. J. P. C. 54; 94 L. T. 387; 22 T. L. R. 405—P. C.

**(b) New South Wales.**

**6. Bankruptcy—Annulling Act of Bankruptcy—Powers of Judge.]—**By the law of New South Wales a judge may in his discretion refuse to follow up an act of bankruptcy by issuing a sequestration order, but the statutes give him no power to annul an act of bankruptcy, or to declare that it never was committed.

The 51st General Rule assuming to give that power is *ultra vires*.

**KING v. HENDERSON**, [1898] A. C. 720; 67 [L. J. P. C. 134; 79 L. T. 37; 14 T. L. R. 490; 47 W. R. 157—P. C.

**7. Bankruptcy—Priority of Crown in Administering Bankrupt's Estate.]—**Under the New South Wales Bankruptcy Law the Crown is entitled to priority over all other creditors in the administration of a bankrupt's estate.

**COMMISSIONERS OF TAXATION (NEW SOUTH WALES) v. PALMER & SONS**, [1907] A. C. 179; 76 L. J. P. C. 41; 96 L. T. 278; 23 T. L. R. 304; 14 Manson, 106—P. C.

**8. Civil Servant—Abolition of Office—Civil Service Act, 1884 (48 Vict. No. 24).]—**There

*Australia—Continued.*

is nothing in the Civil Service Act, 1884, of New South Wales to affect the right of the Crown to abolish a civil office; or to oblige the Crown to make compensation to a civil servant, whose office is abolished from no fault on his part, by giving him employment in some other public department.

Judgment of the Court below affirmed.

YOUNG v. WALTER, [1898] A. C. 661; 67 [L. J. P. C. 80; 78 L. T. 508; 14 T. L. R. 374—P. C.

9. *Civil Servant—Right of Crown to Dismiss—Civil Service Act, 1884* (48 Vict. No. 24)—*Public Service Act, 1895* (59 Vict. No. 25)—*Declaratory Act.*—The Public Service Act, 1895, of New South Wales, sect. 58, enacts. "Nothing in this Act or in the Civil Service Act, 1884, shall be construed or held to abrogate or restrict the right or power of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service."

HELD—(affirming the judgment of the Court below), that the Act was not retrospective, and that a person dismissed from the public service after the passing of the Civil Service Act, 1884, and before the passing of the Public Service Act, 1895, could only be dismissed in accordance with the provisions of the former Act.

An enactment declaratory in form is not necessarily retrospective in operation.

*Midland Railway Company v. Pye* (10 C. B. N. S. 179) approved.

YOUNG v. ADAMS, [1898] A. C. 469; 67 L. J. P. C. [75; 78 L. T. 506; 14 T. L. R. 373—P. C.

10. *Civil Servant—Superannuation Allowance—Service need not be Continuous—Civil Service Act, 1884* (48 Vict. No. 24), ss. 2, 43, 48.—Sect. 48 of the New South Wales Civil Service Act, 1884, provides for the following scale of superannuation allowances—"To any officer who shall have served fifteen years a superannuation allowance equal to one-fourth of his annual salary, with an addition of one-sixtieth part of such salary for each additional year of service. . . ." The years of service (whether the fifteen, or additional, years) need not be continuous. Therefore, a person who from 1857 to 1861, and again from 1880—1896, was a civil servant, and was superannuated in 1896, is entitled to an allowance as for twenty years' service, and not only for sixteen years, notwithstanding the fact that between 1861—1880 he was employed as a licensed surveyor. "Licensed surveyors" are not "officers" entitled to a superannuation allowance, and therefore the years between 1861—1880 must be ignored.

Judgment of the Supreme Court of New South Wales (1 S. R. 359) affirmed.

WALKER v. SIMPSON, [1903] A. C. 208; 72 [L. J. P. C. 58; 88 L. T. 306; 19 T. L. R. 350—P. C.

11. *Companies Act, 1874* (37 Vict. No. 19), s. 57—*Shares—Contract—Adoption—Paid-up Shares—Payment—Imperial Companies Act, 1867* (30 & 31 Vict. c. 131), s. 25.—The adoption by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company does not create any contractual relation whatever between the company and the other party to the contract, nor impose any obligation whatever on the company towards that party.

*In re Johannesburg Hotel* ([1891] 1 Ch. 119; 60 L. J. Ch. 391; 39 W. R. 260; 64 L. T. 61; 2 Meg. 409—C. A.) approved.

Where a sum is payable by a shareholder in cash to a company it is sufficient to satisfy the requirements of the 25th section of the Companies Act, 1867, if the company agrees with the shareholder to accept, as a set-off and discharge, a like sum then payable by the company to the shareholder.

*Spargo's Case* ((1873) L. R. 8 Ch. 407; 42 L. J. Ch. 488; 21 W. R. 306; 28 L. T. N. S. 153); *Ferrao's Case* ((1874) L. R. 9 Ch. 355; 43 L. J. Ch. 482; 22 W. R. 386; 30 L. T. N. S. 211), and *Larocque v. Beauchemin* ([1897] A. C. 358; 66 L. J. P. C. 59; 45 W. R. 639; 76 L. T. 473; 4 Manson, 263) approved.

*NORTH SYDNEY INVESTMENT AND TRAMWAY CO. v. [HIGGINS]*, [1899] A. C. 263; 68 L. J. P. C. 42, 47 W. R. 481, 80 L. T. 303; 15 T. L. R. 232; 6 Manson, 321—P. C.

12. *Crown Debt—Policy of Life Insurance—Maintenance of Insane Patient—Life, Fire, and Marine Insurance Act, 1902* (Act No. 49 of 1902), s. 4.—Sect. 4 of the Life, Fire, and Marine Insurance Act, 1902, which protects the proceeds of a policy of life insurance from any law relating to insolvency or bankruptcy or from being seized under the process of any Court, does not bind the Crown; and therefore a debt due to the Crown for the maintenance of an insane patient is payable out of such proceeds.

Decision of the Supreme Court of New South Wales, *sub nom. In the Estate of Andrew Mattson* (6 N.S.W., S.R., 11) reversed.

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES [v. THE CURATOR OF INTESSTATE ESTATES, [1907] A. C. 519; 23 T. L. R. 752—P. C.

13. *Land—Construction of Crown Grant—Claim by Crown against Registered Title.*—In 1826 the Crown by Charter incorporated certain Trustees and declared that glebe lands should vest in the Corporation upon the death or resignation of the incumbents. In 1828 the Corporation sold some glebe land to D., the incumbent having previously agreed to resign.

In 1829 the Crown granted to the Corporation certain glebe land, reserving all coast land within 100 feet of high water mark; the land now in question (part of that sold to D.) was within the terms of this grant and also of the reservation.

In 1830 the Corporation conveyed to D.

*Australia—Continued.*

the land bought by him in 1828, reciting the grant of 1829, and taking a mortgage for part of the purchase money.

In 1833 the Corporation was dissolved and its unsold property reverted to the Crown.

In 1840, D. paid off his mortgage to the Crown, and received a grant of the land comprised in the deed of 1830.

HELD—that the grant of 1840 was intended to clear up doubts as to the title to the land in question and was conclusive against the Crown.

*Quære*, whether the Crown could now dispute D.'s title which had been registered in 1837.

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. [DICKSON, [1904] A. C. 273; 73 L. J. P. C. 48; 90 L. T. 213—P. C.

14. *Land—Crown Lands—Adverse Possession—“Nullum Tempus” Act* (9 Geo. 3, c. 16).]—The English “Nullum Tempus” Act (9 Geo. 3, c. 16) is in force in the Colony of New South Wales, and applies to land which has never been granted out or dealt with by the Crown.

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. [LOVE, [1898] A. C. 460; 67 L. J. P. C. 36; 78 L. T. 272—P. C.

15. *Land—Crown Lands—Leasehold Area—Resumed Area—Crown Lands Act, 1895* (58 & 59 Vict. No. 18), ss. 5, 11.])—The plaintiff in 1895 applied for an original conditional purchase of Crown land in the Central Division of New South Wales, which was duly confirmed. This land was adjacent to a pastoral holding within the same division, which holding was divided into two parts, and the area contained in one of these parts was notified as the leasehold area of the pastoral holding. The tenant of the pastoral holding did not apply for the renewal or extension of his tenure, which expired in 1895; but he obtained from the Crown a preferential occupation licence, in virtue of which he continued to occupy the land after the termination of his lease. After the lease expired the lands which had been included in it were measured and sub-divided into farms to be let under settlement leases. On January 25th, 1896, the last-mentioned lands were notified in the Gazette as resumed areas.

HELD—that under the express enactments of sect. 5 of the Crown Lands Act of 1895, the lands in question continued to be leasehold area until they were declared to be resumed area by the Gazette notification of January 25th, 1896, and that the plaintiff, on the 23rd January, 1896, had no title to apply for a conditional lease of the area in question, which was then, and previously had been, appropriated to purposes which excluded any such application; and that sect. 11 of the same Act could not avail him.

COLLESS v. MINISTER FOR LANDS, [1899] A. C. [90; 68 L. J. P. C. 9; 79 L. T. 505—P. C.

*And see* No. 19, *infra*.

16. *Land—Crown Lands—Licence Fees—Re-appraisal—Forfeiture for Non-payment of Fees—Crown Lands Act, 1884*, s. 81 (2)—*Crown Lands Amendment Act, 1891*.])—Where the holder of an “occupation licence” has applied for a reappraisal to operate as from the end of the current year, and his application has been granted, a schedule of fees for the ensuing year subsequently issued does not affect him; *i.e.*, he need not pay such fees at the old rate pending the reappraisal, and he does not forfeit his licence by not paying them. He may wait until the new rate is fixed, even though this may not be done until after the commencement of the ensuing year.

*Semble*.—The grant of an occupation licence is a “contract for the purchase or leasing of Crown lands” within the meaning of the Crown Lands Amendment Act, 1891, and therefore under sect. 6 the Minister had power to waive the suggested forfeiture.

O’KEEFE v. MALONE, [1903] A. C. 365; 72 [L. J. P. C. 73; 88 L. T. 644; 19 T. L. R. 480—P. C.

17. *Land—Conditional Purchase of Lands—Forfeiture—Discretion of Minister of Crown Lands—Land Board—Crown Lands Acts, 1884* (48 Vict., No. 18), and 1889 (53 Vict., No. 21).])—The Crown Lands Act, 1889 (53 Vict., No. 21), of New South Wales does not take away from the Minister of Crown Lands the power to declare a forfeiture of a conditional purchase of land for non-compliance with the statutory provisions as to improvements, and compel him to refer the question back to the Land Board, after a finding of the board that the statutory provisions have not been complied with as a matter of fact.

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. [WALTERS, [1898] A. C. 460; 67 L. J. P. C. 36; 78 L. T. 272—P. C.

18. *Land—Crown Lands Act, 1884* (45 Vict., No. 18)—*Conditional Purchase—Forfeiture—Provisional Reversal—Crown Lands Act, 1889* (53 Vict., No. 21), s. 8, sub-s. 6—*Appeal—Special Case—Crown Lands Amendment Act, 1891*, s. 3.])—The provisional reversal under sect. 3 of the Crown Lands Amendment Act, 1891, of a forfeiture of a conditional purchase of lands under the Crown Lands Act, 1884 (though itself subsequently revoked), prevents the lands from being dealt with as Crown lands after the date of such provisional reversal till its revocation.

A decision of the Supreme Court upon a special case stated by the Local Court, on an appeal from a Local Land Board, under the Crown Lands Act, 1889, is final and conclusive, and the question cannot be re-opened in any subsequent proceedings between the parties.

Judgment of the Court below affirmed.

GAARNSEY v. FLOOD, [1898] A. C. 687; 67 [L. J. P. C. 131; 78 L. T. 803—P. C.

19. *Land—Crown Lands Act, 1884* (48 Vict.

*Australia—Continued.*

No. 18), s. 102—*Crown Lands Act, 1895, ss. 10, 11, 13—Conditional Purchase.*—In July, 1896, the land in dispute was reserved by notification for a public purpose. In January, 1897, that notification was revoked by a notification which added that the land was not to be sold until the expiration of sixty days from that date, as prescribed by sect. 102 of the *Crown Lands Act, 1884*. On the same day in the same *Gazette* it was notified that the land was set apart for homestead selections under sub-sects. 10 and 13 of the *Crown Lands Act, 1895*. On February 11, 1897, the respondent lodged an application to take the land as an additional conditional purchase.

Held—that the respondents were under two restrictions, one to endure for sixty days from January 9, 1897; the other avoidable for forty days after January 9, 1897, but afterwards to endure permanently.

*Colless v. Minister for Lands* ([1899] A. C. 90; 68 L. J. P. C. 9; 79 L. T. 505—P. C., No. 15, *supra*), followed.

MINISTER FOR LANDS *v.* HARRINGTON, [1899] A. C. 408; 80 L. T. 604—P. C.

20. *Land—Crown Lands Acts—Powers of Land Board—Appeal to and Jurisdiction of Land Appeal Court—Appeal to and Jurisdiction of the Supreme Court—Land Board Holding Sitzings outside its own District—Crown Lands Act, 1884 (48 Vict. No. 18), ss. 20, 26—Crown Lands Act, 1889 (53 Vict. No. 21), ss. 5, 8, sub-s. 6.*—The Supreme Court is not a Court of Appeal from a Land Appeal Court. Still less is it a Court of Appeal from a local Land Board.

The jurisdiction of the Supreme Court under the *Crown Lands Act* of 1889 is confined to giving a decision upon such questions of law as may be submitted to it by the Land Appeal Court. With questions of fact it is not concerned.

The investigation and decision of all questions of fact on a reference under the *Act* of 1884 is committed to the Land Board subject to an appeal to the Land Appeal Court, on which, by leave of the Court, fresh evidence may be admitted.

The decision of the Land Board if there is no appeal, or the decision of the Land Appeal Court on appeal, subject only to the opinion of the Supreme Court on questions of law arising in the case and submitted by the Land Appeal Court to the Supreme Court, is by statute made final and conclusive.

The Land Appeal Court is a Court of rehearing as well as a Court of Appeal, and unless the whole proceedings before the Land Board were a nullity from beginning to end, there would be no necessity for the Land Appeal Court or the Minister for Lands to remit the inquiry to the same or to another Land Board.

The meaning of sect. 5 of the *Crown Lands Act* of 1889 is that when any question arises

as to any land, wherever it may be situated, the Minister for Lands, if he thinks proper, may put aside the Land Board of the district which would in ordinary course be called upon to deal with the question, and refer the matter to any Land Board he may elect. When a Land Board is elected to try a question that has arisen outside his own district, it is to have the same power of dealing with that question as if the land were within the area of its local jurisdiction.

MINISTER FOR LANDS *v.* WILSON, [1901] A. C. 315; 70 L. J. P. C. 100; 84 L. T. 242; 17 T. L. R. 317—P. C.

21. *Land—Suspension of Pastoral Lease—Proclamation of Land as Goldfields—Effect of—Mining Act, 1874 (37 Vict. No. 13), s. 13*—The Mining Act, 1874, s. 13, confers upon the Governor power to suspend a pastoral lease so far as may be necessary for certain defined purposes which concern the safety and welfare of the public, or, rather, that portion of the public which flocks to proclaimed goldfields. The power of suspension is not confined to land uncultivated or unimproved, or to water flowing in a natural water-course. During the period of suspension, and so far as regards the portions of the land leased to which the suspension extends, all the rights of the lessee derived from the lease are in abeyance. The lessee has no longer any right to the occupation of the land. On the other hand, the rights of the lessor are no longer bound and fettered by the lease.

COOK *v.* RICKETSON AND OTHERS, [1901] A. C. 588; 70 L. J. P. C. 113; 85 L. T. 1; 17 T. L. R. 258—P. C.

22. *Local Government—Cattle Yards—Not Owned or Licensed by Corporation—Fees and Charges—Bye-law—Validity—Sydney Corporation Act, 1879 (43 Vict. No. 3) s. 139.*—The Municipal Council of Sydney have no powers under sect. 139 of the *Sydney Corporation Act, 1879*, to charge market fees on sheep or cattle brought by the owner to his own private yard in Sydney or within fourteen miles thereof, and slaughtered there.

Upon its true construction sect. 139 only contemplates the case of cattle brought by their owners to public yards to be there slaughtered, and only authorises the making of bye-laws in respect of such yards.

Decision of the Supreme Court of New South Wales (3 N. S. W. S. R. 420) affirmed.

THE MUNICIPAL COUNCIL OF SYDNEY *v.* THE AUSTRAL FREEZING WORKS, LD., [1905] A. C. 161; 74 L. J. P. C. 33; 92 L. T. 280, 21 T. L. R. 295—P. C.

23. *Local Government—Rates—Construction of Statutes—Sydney Corporation Act, 1879—Moore Street Improvement Act, 1890 (54 Vict., No. 30).*—The Sydney Corporation Act of 1879 authorised the municipal council to impose a city rate on all rateable property within the city, to be paid by the occupier,

**Australia—Continued.**

or in his default by the owner thereof for the time being.

The Moore Street Improvement Act of 1890 was passed to carry out certain improvements of Moore Street on "an equitable system," and provided that the cost thereof should be divided between the whole body of ratepayers liable to the city rate and those who were owners of property within the improvement area:

**HELD**—that owners of property within the improvement area meant owners for the time being, the intention being to create a charge on their property, and not a mere personal charge on the persons who happened to be owners thereof at the date of assessment.

**SYDNEY MUNICIPAL COUNCIL v. TERRY**, [1907]  
[A. C. 308; 76 L. J. P. C. 68, 97 L. T. 146—  
P. C.]

**24. Lunacy—Petition—Substituted Service—Service on Master in Lunacy—Lunacy Rule 13—Lunacy Act, 1898 (No. 45), ss. 102, 103, 106 (2), 110.**—There is power under sect. 106, sub-sect. 2, of the New South Wales Lunacy Act, 1898, to make an order allowing substituted service upon the Master in Lunacy of a petition under sect. 102 for a declaration that a person is of unsound mind, where it is satisfactorily proved that personal service is inexpedient. Sect. 106, sub-sect. 2 means that where personal service cannot be effected, or is inexpedient, the substituted service may be effected either in such manner as may be prescribed by rules of Court, or, in any special case where particular circumstances exist, as may be ordered by the Court.

The Court has jurisdiction under sect. 110 of the Act, upon the hearing of an application under sect. 102, to dispense with a personal examination of the alleged lunatic, but this jurisdiction should be exercised with great caution.

Decision of the Supreme Court of New South Wales (3 N. S. W. S. R., 388) affirmed.

**IN RE McLAUGHLIN**, [1905] A. C. 343; 74 L. J. P. C. 70; 92 L. T. 670; 21 T. L. R. 521—  
P. C.]

**25. Lunacy—Lunatic—Power of Committee—Removal to Asylum—Lunacy Act, 1898 (Act No. 45), ss. 16, 92, 172.**—The committee of the person of an Australian lunatic has power, without an order of the Court, acting under proper medical advice and with due care and without any excess of violence, to place the lunatic in the care and custody of a properly qualified medical man or of a properly constituted lunatic asylum, and therefore he and persons acting under his instructions in good faith are protected, although they are not specifically mentioned by the Lunacy Act, 1898.

Decision of the Supreme Court of New South Wales (4 S. R. 600) affirmed.

**McLAUGHLIN v. WESTGARTH AND ANOTHER**, (1906)  
[75 L. J. P. C. 117; 94 L. T. 831; 22 T. L. R. 594—P. C.]

**26. Military Forces—South African Contingent—Rate of Pay—Agreement by Colonial Government—Part Payment by Imperial Government—Military and Naval Forces Regulation Act (34 Vict. No. 19)—Military Contingent Act, 1899 (No. 12).**—The plaintiff was enrolled in New South Wales for service with the New South Wales contingent in South Africa, at 10s. a day, the rate of pay fixed by a general order. He served with the contingent in South Africa, and was paid 4s. 6d. a day by the Imperial Government. He claimed in addition the full rate of 10s. a day from the New South Wales Government.

**HELD**—that the plaintiff was in the service of the King, and it was immaterial by whom he was paid the 10s. a day, and that therefore he was not entitled to more than the balance after giving credit for the 4s. 6d. received from the Imperial Government.

Decision of the Supreme Court of New South Wales (2 N. S. W. S. R. 452) reversed.

**WILLIAMS v. HOWARTH**, [1905] A. C. 551; 74  
[L. J. P. C. 115; 93 L. T. 115; 21 T. L. R. 670—P. C.]

**27. Mines—Employment of Miners—Payment according to Actual Weight Gotten—Agreement for Payment according to the Yard of Excavation—New South Wales Coal Mines Regulation Act, 1896 (60 Vict. No. 12), s. 38, sub-s. 1.**—The respondent was convicted for failing to comply with the provisions of sect. 38, sub-sect. 1, of the Coal Mines Regulation Act of 1896, in that he did not pay certain persons employed in his mine according to the actual weight gotten by them of the mineral contracted to be gotten. The men worked in the mine under an agreement that they should receive payment by measurement for work done by them as miners at rates per lineal yard; i.e., the remuneration of the men depended on the yard of excavation, which went straight through the material encountered, taking everything that came on. The same wages were paid through stone or other material.

**HELD**—that the amount of wages paid to the men did not depend on the amount of the mineral gotten by them, that the Act of 1896 did not apply; and that the conviction was wrong.

Decision of Supreme Court ([1900] 21 N. S. W. L. R. (C. L.) 37) affirmed.

**HUMBLE v. HUMPHREYS**, [1902] A. C. 207; 71  
[L. J. P. C. 18; 85 L. T. 563; 18 T. L. R. 117—P. C.]

**28. Mines—Mining Disputes—Value of Property Required for an Appeal—Proof of the Amount Claimed or Involved in Appeal Court—New South Wales Mining Act, 1874 (37 Vict. No. 13), s. 115.**—Under the Mining Act, 1874, of New South Wales, all questions and disputes between miners in relation to mining on Crown lands are brought in the first instance before the Warden's Court, from which an appeal lies to the District Court sitting as a Court of Appeal in its

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mining jurisdiction. By sec. 115 of that Act if the amount claimed or involved by the decision shall not be less than £500 there may be an appeal to the Supreme Court of New South Wales.

**HELD**—that it need not be proved at the hearing before the District Court judge, and before his decision is given, that the property involved in the decision was of the value required for an appeal to the Supreme Court; and that the value having been proved in the Supreme Court to be above £500, the case must be remitted to the Supreme Court to be heard according to sect. 115 of the Mining Act, 1874.

*Scully v. Murn* ((1893) 14 N. S. W. R. 289) overruled.

**FALKNERS GOLD MINING CO., LD. v. MCKINNERY.**  
[1901] A. C. 581; 70 L. J. P. C. 116; 85 L. T. 361; 17 T. L. R. 713—P. C.

29. *Mines—Mining on Private Lands Act, 1894* (57 Vict. No. 32), ss. 8, 13—*Miner's Rights—Application for Lease—Injunction—Appeals in Matters of Peculiarly Local Import.*—A person who has duly obtained a miner's right and an authority under sect. 8 of the Mining on Private Lands Act, No. 32, of 1894, and has applied under the same Act for a lease of private land, whereof grants from the Crown contain no reservation of minerals other than gold, for the purpose of mining for gold thereon, is entitled before any lease has been granted to him to obtain an injunction to restrain the owner of such private land from mining thereon in any manner and for any purpose. The Judicial Committee are very cautious in examining decisions of Colonial judges upon matters which are of peculiarly local import and familiarity with which gives peculiar facilities for drawing right conclusions.

**CROUDACE v. ZOBELE,** [1899] A. C. 258; 68 [L. J. P. C. 47, 79 L. T. 602—P. C.

30. *Practice—Special Case—Power to State—Crown Lands Act, 1889 No. 21 of 1889*, s. 8, sub-sect. 6—*Rabbit Act, 1890* (No. 29 of 1890), s. 5, sub-ss. 1, 2, and 3.]—In proceedings under the New South Wales Rabbit Act, 1890, the Land Appeal Court has power to state a case, by way of appeal, for the opinion of the Supreme Court, in accordance with the provisions of the Crown Lands Act, 1889.

Judgment of the Court below reversed.

**HILL & Co. v. DALGETY & Co.,** [1898] A. C. 343; [67 L. J. P. C. 67; 77 L. T. 541—P. C.

31. *Public Works—Acquisition of Land—Part of a House—Land taken by Notification in Gazette—Public Works Act* (No. 26 of 1900), ss. 36, 41, 131.]—Sect. 131 of the Public Works Act, 1900, which provides that no person shall be required to sell to the constructing authority a part only of a house or building if he is willing and able to sell the whole, applies to the acquisition of land for public works by notification in the *Gazette*

as well as by notice to the parties interested in the land.

Decision of the Supreme Court of New South Wales (*sub nom. McLoughlin v. Walker*, 2 S. R. Eq. 237) affirmed.

**WILLIAMS AND ANOTHER v. THE PERMANENT [TRUSTEE COMPANY OF NEW SOUTH WALES, LD. AND ANOTHER,** [1906] A. C. 249; 75 L. J. P. C. 48; 94 L. T. 354; 22 T. L. R. 363—P. C.

32. *Public Works—Land Acquired by Government—Compensation—Title to—Real Owner Unknown—Possessory Title—New South Wales Lands Acquisition Act, 1880* (44 Vict. c. 16), s. 13.]—C. took possession of vacant land in New South Wales, fenced it substantially, and for ten years remained in undisputed possession, paying rates and taxes in respect thereof. The real owner was at all material times unknown. Upon the Government "resuming" the land for public purposes:

**HELD**—that C. was not a mere trespasser, but had a possessory title good as against everyone but the real owner, and about to become absolute even against him; and that, therefore, C. had a *prima facie* case for compensation within the meaning of sect. 13 of the New South Wales Lands Acquisition Act, 1880.

*Doe v. Barnard* ((1849) 13 Q. B. 945) doubted.

**PERRY v. CLISSOLD,** [1907] A. C. 73; 76 [L. J. P. C. 19; 95 L. T. 890; 23 T. L. R. 232—P. C.

33. *Public Works—Land taken by Government—Compensation—Notice to Owners of Valuation (or Offer)—Subsequent Notification of Increased Valuation—Informal Notification—Effect of—Public Works Act* (No. 26 of 1900) ss. 96, 99.]—Where the Government of New South Wales take land for public purposes they are required by sect. 96 of the Public Works Act, 1900, to serve upon the owner a notice in statutory form stating the value placed upon the land by their advisers. If the owner declines to accept such sum, and has the value assessed by a Court of Law, his right to costs depends upon whether he is awarded more or less than the valuation figure.

Some land owned by the plaintiff was taken for public purposes, and a formal valuation of £9,460 served upon him; he asked in an interview to have the matter reconsidered, and a letter (not in the statutory form) was written to him raising the figure to £9,900. This he refused to accept, but the Court awarded him the same amount.

**HELD**—that, under all the circumstances of the case, the plaintiff could not rely on the irregularity in the amended valuation as nullifying it, and forming a ground for giving him his costs of the assessment before the Court.

Decision of the Supreme Court of New South Wales (2 S. R. 309) reversed.

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MINISTER OF PUBLIC WORKS OF NEW SOUTH WALES *v.* HART AND ANOTHER, [1904] A. C. 259, 73 L. J. P. C. 55; 90 L. T. 104, 20 T. L. R. 213—P. C.

34. *Public Works—Lands Taken—Compensation Claim—Sum awarded by Jury Less than Sum Awarded by Arbitrators—Costs—Public Works Act, 1900 (No. 26), s. 116, sub-s. 2 (b).*—Where the verdict of a jury in a compensation claim under sect. 116 of the Public Works Act, 1900, is for a smaller sum than that awarded by the arbitrators, though it exceeds the sum previously offered by the constructing authority, the claimant must under sect. 116, sub-s. 2 (b), of the Act, bear the costs of the action and of the arbitration and award.

Decision of the Supreme Court of New South Wales (3 S. R., 465) affirmed.

THE PACIFIC CO-OPERATIVE STEAM COAL COMPANIES, LD. *v.* THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES, [1904] A. C. 795, 73 L. J. P. C. 86; 20 T. L. R. 718; 91 L. T. 540—P. C.

35. *Revenue—Income Tax—Assessment—Profits from the Business of Mining—Sales made in London or Melbourne—New South Wales Income Tax Assessment Act, 1895 (59 Vict. c. 15), s. 15, sub-ss. 3, 4.*—A joint stock company was formed and incorporated in accordance with the law of the Colony of Victoria, having its head office with a board of directors at Melbourne in that colony. It carried on "the business of mining" on leasehold lands held from the Crown at Broken Hill in the Colony of New South Wales, where the company had an office and a manager of the mine. A certain portion of the crude ore was sold in that state, but the greater part was treated by the company's concentrating plant at Broken Hill. The company made no contracts for sale in New South Wales. The sales of the company's products were made, and the purchase-money was received in London or in Melbourne. The company made net profits to a large amount from its business operations.

HELD—that the net profits were produced in the colony and were assessable under the New South Wales Income Tax Assessment Act, 1895, s. 15, sub-ss. 3, 4.

*In re Tindal* ((1897), 18 N. S. W. L. R. 378) overruled.

COMMISSIONERS OF TAXATION *v.* KIRK, [1900] [A. C. 588; 69 L. J. P. C. 87—P. C.]

36. *Revenue—Income Tax—Deductions of Fair Rent in respect of Crown Lease—New South Wales Land and Income Assessment Act, 1895 (59 Vict., No. 15), s. 28, sub-s. 1.*—The respondent held "Mara" station from the Crown under a lease for a term of twenty-eight years from August 5th, 1889, at a rent of £415 per annum, and carried on business as a grazier thereon.

HELD—that the respondent was not entitled to deduct or have deducted from the taxable amount of his income for the year 1899 "a sum representing the fair rental value of the said leasehold premises and improvements thereon for that year," as the same was not an outgoing, loss, or expense, within the meaning of sub-sect. 1 of sect. 28 of the New South Wales Land and Income Assessment Act, 1895.

COMMISSIONERS OF TAXATION *v.* ANTILL, [1902] [A. C. 422, 71 L. J. P. C. 81, 86 L. T. 783, 18 T. L. R. 644—P. C.]

37. *Revenue—Land and Income Tax—Duty to make Return—Assessment Conclusive—Regulations by Governor—Change in Form of Property—Land and Income Tax Assessment Act, 1895 (59 Vict. No. 15), ss. 30, 56, 57.*—Every person in the enjoyment of an income is bound to make a return for income tax purposes under the Land and Income Tax Assessment Act, 1895. If he makes default in doing so, the commissioners may assess him, and the assessment, if not appealed against, is conclusive.

Decision of the High Court of Australia (3 Commonwealth L. R. 221) reversed.

Upon the facts of the particular case, leave to appeal having been given on special terms, the assessment in question was reduced to a nominal amount and the successful appellants ordered to pay the costs.

COMMISSIONERS OF TAXATION *v.* MOONEY, [1907] [A. C. 342; 76 L. J. P. C. 64, 97 L. T. 189; 23 T. L. R. 670—P. C.]

38. *Revenue—Land and Income Tax Assessment Act, 1895 (59 Vict. No. 15), s. 17, sub-s. II., ss. 27, 28, sub-s. 1, and s. 68—Income Tax Act, 1895 (59 Vict. No. 17)—Deductions—Outgoings and Expenses.*—The words "in the production of his income"—that is, in the production of the income of the tax-payer entitled to the deductions mentioned in the Act—in their natural and ordinary meaning, apply to the income of the taxpayer as a whole.

HELD—that to arrive at the amount of their income chargeable with income tax the Australian Mutual Provident Society were entitled to deduct from their taxable income all the outgoings and expenses incurred in the production of their income, and not only so much of those outgoings and expenses as might be properly attributable to that portion of their income, which is taxable under the Act.

COMMISSIONERS OF TAXATION *v.* TEECE, [1899] [A. C. 254; 68 L. J. P. C. 8; 79 L. T. 601—P. C.]

39. *Revenue—Land Tax—"Lands occupied or used exclusively for or in connection with . . . public Charitable Purposes, Churches"—Glebe Lands let on Lease—Exemption—New South Wales Land and Income Tax Assessment Act, 1895 (59 Vict. No. 15), s. 11, sub-s. 5.*—By the New South Wales Land and Income Tax Assessment Act of

*Australia—Continued.*

1895, s. 11, and sub-s. 5, "lands occupied or used exclusively or in connection with . . . public charitable purposes, churches," are exempted from assessment for taxation.

Certain glebe lands, by Crown grant were vested in the respondents for parochial church purposes in connection with the Church of England. Pursuant to the power of the Crown grant, the glebe lands were subdivided into blocks for sale or to let on building leases. Some of the blocks were demised by the respondents on building leases, and the lessees had erected private dwellings thereon. Others of the blocks had been demised on building leases, but had not been built on, and the balance of the lands were waste lands and were not "physically occupied or used for any purpose."

HELD—that though the words of the Crown grant were not free from ambiguity, they were to be construed strictly, that only such lands as were directly or physically occupied or used for or in connection with a public charitable purpose were exempt from assessment under the sub-section; that the demise of the lands and the receipt and application of the rents thereof by the respondents were not an occupation or exclusive user of the lands, or any of them, for a public charitable purpose within the meaning of the sub-section; and that the possession of the waste lands was not an occupation or exclusive user of the waste lands for or in connection with public charitable purposes within the meaning of the sub-section.

COMMISSIONERS OF TAXATION *v.* TRUSTEES OF ST. MARK'S GLEBE, [1902] A. C. 416; 71 L. J. P. C. 99; 51 W. R. 33; 86 L. T. 629; 18 T. L. R. 620—P. C.

40. *Revenue—Probate Duty—Partnership—Share of Deceased Partner—Local Situation of Business—Stamp Duties Act (No. 27 of 1898), s. 49.*—Two persons, who were resident in England, carried on in partnership the business of graziers and sheep farmers in New South Wales by their agent, the assets of the partnership business consisting of lands, live stock, &c. Upon the death of one of the partners.

HELD—that the share of the deceased partner in the business was situated in New South Wales, the place where the business was carried on, and that therefore probate duty was payable in New South Wales upon that share.

Decision of the Supreme Court of New South Wales (6 N. S. W. S. R. 332) reversed.

COMMISSIONERS OF STAMP DUTIES *v.* SALTING, [1907] A. C. 449; 76 L. J. P. C. 87; 97 L. T. 225; 23 T. L. R. 723—P. C.

41. *Revenue—Probate Duty—Property subject to a Special Power of Appointment—Whether liable to Probate Duty on Appointor's Death—Stamp Duties Act, 1898, s. 49, sub-s. 2 A. (a).*—A special power to appoint property amongst a limited class of

persons is so different from a general power of disposition, that mere general language in a probate duty statute, applicable to the property of deceased persons and to property over which they have a general power of appointment, cannot reasonably be supposed to be intended to extend to property subject to such a special power. Such an intention must be clearly expressed.

Section 49 (2) (A.) (a) of the New South Wales Stamp Duties Act, 1898, extends to all property "which any person . . . has disposed of . . . under any authority enabling that person to dispose of the same by will or deed."

HELD—that, on a consideration of the whole statute, the section did not extend to property appointed under a special (as distinct from a general) power of appointment.

COMMISSIONER OF STAMP DUTIES *v.* STEPHENS, [1904] A. C. 137, 73 L. J. P. C. 9; 89 L. T. 511; 20 T. L. R. 63—P. C.

42. *Settlement—Interpretation—Yearly Rent-charge—Maintenance and Education—Interest in Land—Trustees barred by Limitation—Beneficiaries not so barred—New South Wales Real Property Act (26 Vict. No. 9), ss. 117, 122.*—By a settlement of December, 1883, certain land was conveyed to trustees upon trust during the life of Mrs. S., to raise an annuity or yearly rent-charge for her separate use. After her death, which happened on January 6th, 1890, the trustees during the lives of her children and the life of the longest survivor were to receive and take by and out of the rents, issues, and profits of the said hereditaments an annuity or yearly rent-charge, "the said annuity or yearly rent-charge to be applied by the said trustees or trustee for the maintenance and education of such children or child as aforesaid."

HELD—that the children took a joint interest in the annuity, but the shares of minors were to be applied for their maintenance and education, and that the interest of the children was an interest in land within the meaning of the New South Wales Real Property Act, s. 117.

F. McD., through some error or oversight on the part of the officials, obtained a certificate of title free from the incumbrance created by the settlement, but he went on paying the annuity to the trustees until his bankruptcy in 1897.

HELD—that the circumstance that the trustees were barred by limitation was no ground for holding that the beneficiaries were barred too, and that the beneficiaries were entitled to compensation under the provisions of the said Act out of the assurance fund established by the Act.

WILLIAMS *v.* PAPWORTH, [1900] A. C. 563; 69 [L. J. P. C. 129; 83 L. T. 184—P. C.

43. *Sydney Harbour Trust Act, 1900, s. 68—Construction—Right to Levy Wharfage Rates on Private Wharves.*—The commissioners of



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Sydney harbour have the right under sect. 68 of their Act of 1900 to levy wharfage rates on all wharves vested in them, whether private or public or private sufferance wharves, notwithstanding the fact that the Incorporated Wharfage and Tonnage Act of 1880 refers only to public and private sufferance wharves.

Lessees of crown wharves whose leases expired before the passing of the Act of 1900, but who had applied for renewals and remained in possession pending the result of their application, were not persons having an "interest" in the wharves at the time of the passing of the Act within the meaning of sect. 27 thereof.

Decision of Supreme Court of New South Wales (2 S. R. Eq. 152) affirmed.

LUKEY v. SYDNEY HARBOUR TRUST COMMISSIONERS, [1904] A. C. 382; 73 L. J. P. C. 66, 90 L. T. 743, 20 T. L. R. 532—P. C.

**(c) Queensland.**

44. *Succession Duty—Succession and Probate Duties Act, 1892—Succession and Probate Duties Act (1892) Amendment Act, 1895—How far Retrospective.*—The Queensland Succession and Probate Duties Act, 1895, is not retrospective, and therefore the personal property in Queensland of persons dying domiciled elsewhere before the Act came into operation is not subject to succession duty under the Succession and Probate Duties Act, 1892, s. 4, which is identical with sect. 2 of the English Succession Duty Act of 1853.

HARDING v. QUEENSLAND STAMPS COMMISSIONERS, [1898] A. C. 769; 67 L. J. P. C. 144; 79 L. T. 42, 14 T. L. R. 488—P. C.

**(d) South Australia.**

45. *Revenue—Succession Duties*—"With Intent to Evade Payment of Duty"—*Covenant to Pay a Large Sum of Money to Children—South Australian Succession Duties Act (No. 567 of 1893), ss 16, 27.*—The South Australian Succession Duties Act, 1893, superseded the previous Act of 1876, and imposed much heavier rates of duty.

The testator, W. K. S., died in December, 1897, domiciled in South Australia. On January 10th, 1896, the testator had executed a deed poll whereby he covenanted with his children to pay to them the sum of £200,000, such sum to be divided between them in equal shares with payment of interest in the meantime at £1 10s. per cent. per annum. The interest was paid regularly, but not any of the principal.

HELD—that having regard to the language of the Act of 1893, to its connection with the Act of 1876, and to the consequences of the two admissible constructions, there was a strong preponderance of probability that the law of 1893 had, as the previous law had, left people at liberty to dispose of their property during life so that it should not form part of their estates at death for the purpose of taxation or any other purpose,

and that the £200,000 was not subject to duty.

HELD FURTHER—that in sect. 27 of the Act of 1893, the phrase "with intent to evade the payment of duty hereunder," covers some arrangement, trust, or other device, whether concealed, or apparent on the face of the non-testamentary disposition by which what is really a part of the estate of the deceased is made to appear to belong to somebody else in order to escape payment of duty.

SIMMS v. REGISTRAR OF PROBATES, [1900] A. C. [323, 69 L. J. P. C. 51, 82 L. T. 433; 16 T. L. R. 331—P. C.

**(e) Victoria.**

46. *Book Debts—Assignment of Book Debts with Recitals and Covenants—Effect of Non-registration—Assignment Invalidated but not the Recitals and Covenants—Book Debts Act, 1896 (59 Vict. No. 1424), s. 3.*—A deed dated April 19th, 1898, was executed by a firm of contractors in favour of their bankers, but not registered, and a deed dated June 6th, 1899, was executed by the same firm in favour of the same bankers and registered as required by the law of the Colony of Victoria.

HELD—that assuming the moneys payable by the Government under the earlier deed and assigned to the bank to be a book debt within the meaning of the Victorian Book Debts Act, 1896, s. 3, the omission to register it only invalidated the assignment of that debt, and did not invalidate or in any way affect the recitals and covenant for payment contained in the deed, as the section merely says, "no assignment or transfer" of book debts shall be valid unless registered, and not the whole instrument which contains it; that the main consideration which induced the contractors to execute the second deed was to get rid of the burden imposed by the recitals and covenants in the first deed; and that the bank was willing to meet their views to that extent provided the bank preserved its hold on the fund assigned; and that the recitals and covenants in the first deed were got rid of by the second deed.

NATIONAL BANK OF AUSTRALIA v. FALKINGHAM [AND SONS, [1902] A. C. 585; 71 L. J. P. C. 105; 87 L. T. 90; 18 T. L. R. 737—P. C.

47. *Civil Service—Officer in Public Service—"Entitled to Quarters"—Deduction from Salary in respect of Rent of Quarters—Postmaster—Governor of Gaol—Victoria Public Service Acts, 1862 (No. 160), s. 52, and 1883 (No. 773), s. 89.*—Sect. 52 of the Victoria Public Service Act, 1862, provided that "Where any officer is allowed to use for the purpose of residence any building belonging to the Government, the Governor in Council may direct that a fair and reasonable sum as rent thereof be deducted from such officer's salary." The scope of this section must, however, be regarded as having been restricted by sect. 89 of the Act of 1883, which

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repealed the earlier section, and substituted the words, "If any officer not entitled to quarters is allowed, &c.," it had, in fact, not been the practice to charge rent against officers entitled to quarters, although sect. 52 was in its terms wide enough to include them.

**HELD**—that a person who undertakes to perform duties, which necessarily involve his residence in rooms provided for that purpose in the building, where such duties are performed, is "entitled to quarters," although there is no express provision to that effect in the terms of his engagement. A postmaster and a governor of a gaol were, therefore, held entitled to quarters, and to receive their salary without any deduction for rent.

Judgment of the Supreme Court of Victoria reversed.

**REX v. FISHER and REX v. BULL**, [1903] A. C. [158; 72 L. J. P. C. 45; 88 L. T. 74; 19 T. L. R. 242—P. C.

48 *Civil Service—Public Service Act, 1890*, ss. 3, 107—*Superannuation Allowance—Crown Prosecutor — "Prosecuting Barrister."*—Where an Act of Parliament, *ex majore cautela* or otherwise, excludes in plain language from the operation of the Act a class of persons to whom its provisions do not appear to be applicable, such exclusion cannot be held to apply to another class of persons not expressly named.

The appellant, a barrister, had for many years acted as "Crown prosecutor" in the colony of Victoria, and, on his retirement, claimed a superannuation allowance under sect. 107 of the Public Service Act, 1890, as the holder of an "office in the Public Service" within the meaning of the Act. By sect. 3 of the Act it did not apply to "any prosecuting barrister."

It was found that "Crown prosecutors" and "prosecuting barristers" were distinct classes of persons in the colony, the former acting as public prosecutors, the latter being the counsel holding briefs from time to time for the Crown in prosecutions at assizes or sessions.

**HELD**—(reversing the judgment of the Court below) that sect. 3 did not apply to "Crown prosecutors," and that the appellant was entitled to the allowance which he claimed.

**SMITH v. THE QUEEN**, [1898] A. C. 782; 67 [L. J. P. C. 129; 79 L. T. 199; 14 T. L. R. 559—P. C.

49. *Electric Lighting—Charge for Supply of Electricity — Preference — Alternative Rates—Electric Light and Power Act, 1896* (59 Vict. No. 1,413), ss. 38, 39, 52—*Electric Light and Power Act, 1901* (1 Edw. 7, No. 1,775), s. 3.—Undertakers are not prevented by sects. 38 and 39 of the Electric Light and Power Act, 1896 (Victoria), from having two alternative scales of charges for the supply

of electricity, customers being at liberty to choose under which scale they will be charged, and as between the several customers under each scale no preference being given to one customer over another.

*Attorney-General for Victoria v. Mayor, &c., of Melbourne* (27 Victoria L. R. 568) not followed.

Decision of the High Court of Australia (3 Commonwealth L. R. 467) affirmed.

**THE ATTORNEY-GENERAL FOR VICTORIA v. THE [MAYOR, &c., OF THE CITY OF MELBOURNE]**, [1907] A. C. 469; 76 L. J. P. C. 91; 97 L. T. 500; 23 T. L. R. 752—P. C.

50. *Licences for Tram Cars, Conductors and Drivers—Liability of a Tramway Company for—Melbourne Tramway and Omnibus Co.'s Act, 1883*, ss. 22, 54.—Upon the true construction of sect. 54 of the Melbourne Tramway and Omnibus Company's Act, 1883, and of the agreement thereto scheduled, the liability to pay for the licences required for tramcars, drivers and conductors is imposed upon the company and not upon the Tramways Trust created to carry into effect the agreement.

**MELBOURNE TRAMWAY AND OMNIBUS CO. v. [KIDNEY: SAME v. MELBOURNE CORPORATION]**, [1905] A. C. 358; 74 L. J. P. C. 66; 92 L. T. 584; 21 T. L. R. 425—P. C.

51. *Lunacy—Discharge—Jury—Victoria Lunacy Act, 1890*.—If a person is detained as a lunatic he can only be discharged, first, by *habeas corpus*, and, secondly, under sects. 22 to 27 and 98 to 105 of the Lunacy Act relating to discharge. Under none of those sections is there any right to a jury.

Under a *habeas corpus* the applicant is not entitled to have his sanity ascertained by a jury. The Court may come to a conclusion that the applicant is lawfully detained upon the evidence before it. The Court is not bound to direct an issue to be tried by a jury. The Court can always direct such an issue if the Court is of opinion that justice requires it.

**EX PARTE GREGORY**, [1901] A. C. 128; 70 L. J. [P. C. 19; 83 L. T. 441—P. C.

52. *Rates—Power of County Court to State Case for Supreme Court—Rateable Value—Tramway—Deductions of Interest and Sinking Fund—Separate Assessment of Engine-houses—Justices Act, 1890* (54 Vict. No. 1105), s. 139—*Local Government Act, 1890* (54 Vict. No. 1112), ss. 246, 276—*Local Government Act, 1891* (55 Vict. No. 1243), ss. 60, 61.—By the Justices Act of 1890, No. 1105, s. 139, a Court of general sessions may be required to state a case in all appeals, without any apparent exception of rate appeals, and by the Local Government Act of 1890, No. 1112, s. 277, an appeal is given to the Court of general sessions for any cause; the Court is to hear the appeal in a summary way, and its decision is to be final and conclusive on all parties.

By the Local Government Act of 1890, No.

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1112, s. 276, an appeal is given on the ground of unfairness or incorrectness occurring in valuations and assessments to the Court of petty sessions; and the judgment of that Court is to be final and conclusive.

By the Local Government Act of 1891, No. 1243, s. 60, all rate appeals, which then lay to general sessions, are to be made to the county court; the Court is to hear them in a summary way, and its decision is to be final and conclusive to all parties, and sect 61 enacts that all provisions of the Acts relating to such appeals to general sessions shall (subject to the provisions of No. 1243) apply to the appeals to the county courts. For that purpose county courts are to have all the powers and jurisdiction possessed by the Court of general sessions.

HELD—that the expressions of finality in No. 1243 must be taken as limited and qualified by the provisions of No. 1105, and that the Supreme Court had jurisdiction to grant a mandamus directing the county court to state a case for the Supreme Court's decision on an assessment.

The appellant company was incorporated in 1864, and obtained powers to construct tramways in various municipalities. It carried on its business in Melbourne, the city of Fitzroy, and other cities and towns in the neighbourhood thereof. The respondents assessed the value of the rateable property of the appellants. The question arose whether the judge was right in deducting from the gross profits of the company its payment for interest on loans and for sinking fund, items amounting to £110,000, and, whether the valuation of certain engine-houses had been rightly adjusted. The ownership of the land was in the Crown.

HELD—that the company was laid under the obligation of paying municipal rates, the land not falling within the exception in sect. 246 of the Act No. 1112; that the rate was leviable on nothing but the use of the tramway, and the use of the tramway was the occupation of the tramway; and that the test of the hypothetical tenant to property which is not subject to the competition of the market was the test to apply, and that the deductions were wrongly made.

*Pimlico, &c., Tramway Co. v. Greenwich Union* (1873) L. R. 9 Q. B. 9; 43 L. J. M. C. 29; 22 W. R. 87; 29 L. T. (N.S.) 605 approved.

Within the city of Fitzroy the company possessed three engine-houses, and a controversy arose how they should be rated.

HELD—that the right method was to deduct from the rating value of the whole concern the separate rating value of the engine-houses, and to distribute the remainder of the rating value of the concern among the rating areas on the mileage principle; and allot to a separate area the rate leviable on the engine-houses within it.

As security for the costs of the appeal bonds were executed by the appellant company in favour of the respondent city, and deposited by them with the prothonotary.

## HELD—valid.

MELBOURNE TRAMWAY AND OMNIBUS Co. v. FITZ-ROY CORPORATION, [1901] A. C. 153; 70 L. J. P. C. 1; 83 L. T. 442; 17 T. L. R. 30—P. C.

53. *Rates—Gas Mains—Sewered or Unsewered Property—Melbourne and Metropolitan Board of Works Acts, 1890* (No. 1, 197), ss. 122, 123, and 1897 (No. 1, 491), ss. 5, 8, 10.]—A gas company owned gas mains, which were connected with gas works, some of which were sewered, and the gas mains spread over various municipalities within the metropolis as defined by the Melbourne and Metropolitan Board of Works Act, 1890.

HELD—that as the gas mains did not abut on a street or part of a street in which the sewers were laid, they were, therefore, not "sewered property" within the definition in sect. 5, sub-sect. 1, of the Melbourne and Metropolitan Board of Works Act, 1897, and were not rateable as such under sect. 8 of the Act; but that they were rateable as "unsewered property," notwithstanding that they were not capable of being sewered.

Decision of the Supreme Court of Victoria (29 V. L. R. 340) varied.

THE MELBOURNE AND METROPOLITAN BOARD OF WORKS v. METROPOLITAN GAS CO., [1905] A. C. 595; 74 L. J. P. C. 120, 93 L. T. 114; 21 T. L. R. 648—P. C.

54. *Revenue—Duty on "Molasses Refined in Bond"—Customs Act, 1890* (54 Vict. No. 1081), s. 12.]—Molasses were imported by the appellants into Victoria and cleared there for home consumption after undergoing a treatment of straining and filtering at their works in a bonded warehouse approved under sect. 12 of the Customs Act, 1890.

HELD—that the molasses strained and filtered at the appellants' works could not properly be described as "refined molasses," and were not, in fact, "molasses refined in bond" within the meaning of that expression as used in the Customs Act, 1890.

COLONIAL SUGAR REFINING Co. v. ATT-GEN FOR [VICTORIA, [1901] A. C. 544; 70 L. J. P. C. 75; 84 L. T. 787, 17 T. L. R. 582—P. C.

55. *Revenue—Income Tax—Company "Trading" within the Colony—Investments—Mortgages—Victorian Income Tax Act, 1895* (No. 1374), ss. 2, 5, 10.]—Sect. 10 of the Income Tax Act, 1895 (Victoria), applies only to companies carrying on trade in Victoria, though not having their principal office or place of business there.

An insurance company had invested some of their money on mortgage and on lands acquired through foreclosure of mortgages in Victoria, but otherwise they did not effect insurances or carry on business there, nor have any part of their "receipts or assets and liabilities" within Victoria.

HELD—that the company did not "trade" there so as to come within sect. 10 of the Victorian Income Tax Act, 1895.

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*England v. Webb* ([1898] A. C. 758; 67 L. J. P. C. 120; 79 L. T. 131—P. C. *infra*) applied.

SCOTTISH PROVIDENT INSTITUTION v. COMMISSIONER OF TAXES, [1901] A. C. 340; 70 L. J. P. C. 50; 84 L. T. 241; 17 T. L. R. 320—P. C.

56. *Revenue—Income Tax—Income Tax Act, 1895, ss. 5 and 7—Exemptions—Society not Engaged in any Trade for the Purposes of Gain—Mutual Insurance Company.*—A mutual insurance company which grants assurances to persons who are not members of the company, and deals to some extent in reversions, is not exempt from income tax under sect. 7 (e) of the Victoria Income Tax Act, 1895, on its income from moneys lent on mortgage in the Colony of Victoria, as being a society or association not “engaged in any trade for the purposes of gain to be divided among the members thereof,” although such transactions are small in comparison with the strictly mutual business, and are not carried on in the colony.

*Seemle*—that the exceptions in sect. 7 only refer to bodies acting in or for the colony.

ENGLAND v. WEBB, [1898] A. C. 758; 67 [L. J. P. C. 120; 79 L. T. 131; 14 T. L. R. 558—P. C.

57. *Revenue—Probate Duty—Transfer of Property “with intent to evade the Payment of Duty”—Colourable Transaction—Specialty Debt in New South Wales liable to Duty in Victoria—Victorian Administration and Probate Act, 1890 (54 Vict. No. 1060), s. 115.*—Sect. 115 of the Administration and Probate Act of Victoria, 1890, by which, if any conveyance or assignment, gift, delivery, or transfer of property is made “with intent to evade the payment of duty” under the Act, the property comprised therein shall be deemed to form part of the transferor’s estate for the purposes of the Act, extends to and strikes at colourable transactions only.

*Simmis v. Registrar of Probates* ([1900] A. C. 823; 69 L. J. P. C. 51; 82 L. T. 433; 16 T. L. R. 331—P. C.) followed.

Though the gift may be perfected and the conveyance may fulfil all legal requisites, a manifest desire on the part of the donor to avoid payment of duty is enough to prove an intent to evade payment of duty within the meaning of the enactment.

The mortgage debtor as well as the testator resided in Victoria and were domiciled there, and the debt, though a specialty debt in New South Wales, was a simple contract debt in Victoria.

HELD—that that being so, the debt was an asset in Victoria, and recoverable under a Victorian probate, although it might well be that in order to discharge the mortgage, probate duty would also have to be paid in New South Wales, and the debt, if recovered in Victoria, might be retained in

Court until the mortgagees were in a position to discharge the mortgage.

PAYNE v. REX, [1902] A. C. 552; 71 L. J. P. C. [128, 87 L. T. 84, 18 T. L. R. 725; 51 W. R. 351—P. C.

58. *Trust—Authorised Investment—Money on Deposit—Trustee Act, 1890, ss. 383, 384.*—Sect. 384 of the Trustee Act, 1890, of Victoria enacts that any director, member, or officer of a trustee company who deals with any trust property otherwise than in accordance with the Act, and the law for the time being in force, shall be guilty of a misdemeanour. The section continues, “notwithstanding anything in this section contained,” any trustee company may deposit money under its control with any banking company under certain conditions.

The only authorised investments for trust funds in the hands of ordinary trustees were real or Government securities, and sect. 383 of the Act put companies in the same position.

HELD—(affirming the judgment of the Court below), that the section (384) did not authorise the placing of trust funds on deposit at interest with a bank fulfilling the conditions.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION [OF AUSTRALIA, LD. v. SWAN, [1898] A. C. 763; 67 L. J. P. C. 141; 79 L. T. 143; 14 T. L. R. 557—P. C.

59. *Trust—Breach of Trust—Trustee acting on Legal Advice—Acting “honestly and reasonably”—Relief—Trustee Company—Trusts Act, 1901 (1 Edw. 7, No. 1769), s. 3.*—It is no answer to an action against a trustee for breach of trust that the trustee acted upon competent legal advice.

*Doyle v. Blake* ((1804) 2 Sch. & Lef. 231, 9 R. R. 76) approved.

A trustee who has committed a breach of trust, but who acted both honestly and reasonably, is not entitled as of right to relief under sect. 3 of the Trusts Act, 1901. The Court must then consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances. In such an inquiry it is a very material circumstance to consider that the trustee is a limited joint stock company, formed for the purpose of earning profits for its shareholders; and its position is widely different from that of a private person acting as gratuitous trustee.

The Court refused to give relief to a trustee company for having committed a breach of trust in paying over a sum of money to the wrong person, as the Court would thereby be relieving the company from a loss incurred in the course of its business.

Decision of the Supreme Court of Victoria (29 V. L. R. 610) affirmed.

THE NATIONAL TRUSTEES, EXECUTORS AND AGENCY [CO. OF AUSTRALASIA, LD. v. THE GENERAL FINANCE AGENCY AND GUARANTEE CO. OF AUSTRALIA, LD., [1905] A. C. 373; 74 L. J. P. C.

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73, 54 W. R. 1; 92 L. T. 736; 21 T. L. R. 522—P. C

60. *Vermin Destruction—Vermin-proof Swing Gates across Road other than Main Roads—Local Government Act, 1890 (No. 1112), s. 428—Vermin Destruction Act, 1890 (No. 1153), ss. 57, 58, 59.*—Notwithstanding sect. 428 of the Local Government Act, 1890, vermin-proof swing gates can be lawfully put across roads other than main roads under the provisions of the Vermin Destruction Act, 1890, by owners of lands, whether adjoining owners or single owners, with the consent of the shire council, whether such lands are in special areas or not. The Act does not impliedly or otherwise authorise adjoining owners of lands out of special areas to put vermin proof swing gates across roads without the consent of the shire council.

KING v. CHEYNE, [1900] A. C. 622, 69 L. J. P. C. [136, 16 T. L. R. 544—P. C

*(f) Western Australia.*

61. *Land Transfer—Liability of Registrar of Titles—Wrongful Issue of Certificate of Title—Western Australia Land Transfer Act, 1874—Land Transfer Act, 1893, s. 211.*—By deed of 1841 certain land was conveyed to trustees in trust for M., her heirs and assigns, to hold unto the trustees, their heirs and assigns for ever, upon certain special trusts directed to secure M.'s separate enjoyment during coverture and her testamentary power of appointment.

HELD—that, on the true construction of this deed, the trustees took a legal estate in fee; that under the general trust M. took an equitable estate in fee, the special trusts not being in any way inconsistent with, but rather ancillary to it; and that after her coverture ceased M., being *sui juris*, was competent to convey it.

In a suit for damages against the Registrar of Titles by the appellant as trustee and beneficiary under a deed of marriage settlement executed in 1846 by M. in favour of her intended second husband for life, with remainders which, on his death, took effect, it appeared that one F. claimed title under what purported to be an absolute conveyance in 1848 of the land by the feoffor and feoffees of the deed of 1841 and their mortgagee, and by the then trustees of the deed of 1846 and by the husband, who covenanted for title as if he were vendor.

HELD—that the appellant was entitled to succeed, for the interests in remainder were not affected by the conveyance, and therefore F. had after the husband's death no beneficial interest in the fee;

And (3) that the trustee's right to sue only accrued on the husband's death.

SPENCER v. REGISTRAR OF TITLES, [1906] A. C. [503; 75 L. J. P. C. 100; 95 L. T. 316—P. C.

*62. Mining—Gold-Mining Lease—For-*

*feiture—Decision of Governor—Notification of Decision to Lessee—“Seven Clear Working Days after such Forfeiture”—Goldfields Act, 1886—Regulations of 1892, clauses 69, 70.*—Where a forfeiture of a gold-mining lease is decided upon by the Governor in Council, under sect. 12 of the Goldfields Act, 1886, and clause 70 of the Regulations of 1892, there must be an unequivocal expression of the Governor's will to avoid or cancel the lease which has been found to be voidable; the mere transmitting his decision to the warden is not such an act. It is immaterial that there is no provision in the regulations in force requiring the warden to give notice to the parties. So long as this decision lies dormant in the warden's office, and no notice is given to the lessee, and the land is not declared vacant by some other overt act of the Governor, it is not an unequivocal expression of the Governor's will, and, therefore, the seven clear days after the forfeiture, within which the miner who applies for a forfeiture has, under clause 69 of the Regulations of 1892, a preferent right to take possession of the land so forfeited, run from the date of such unequivocal act. If exercised before that date, the application is invalid and of no effect.

MINISTER OF MINES v. HARNEY, [1901] A. C. [347, 70 L. J. P. C. 38, 84 L. T. 369; 17 T. L. R. 374—P. C.

63. *Local Government—Municipality—Exercise of Statutory Powers—Street Improvement—Special Injury to Individual—Remedy—Municipal Institutions Act, 1895, (59 Vict. No. 10), s. 109.*—If persons acting in the execution of a public trust and for the public benefit do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.

The appellant municipality, acting under the provisions of the Municipal Institutions Act, 1895, s. 109, improved a street and altered the gradient opposite the plaintiff's house, though not more than was necessary. The result was that her house was left on the edge of a cutting with a drop of about six or eight feet to the road. This was a serious inconvenience to her. She brought her action against the appellants, claiming damages.

HELD—that the corporation was not liable for damages because the Act of Parliament made no provision for it.

EAST FREEMANTLE CORPORATION v. ANNOIS, [1902] A. C. 213; 71 L. J. P. C. 39; 85 L. T. 732, 18 R. P. C. 199; 67 J. P. 103—P. C.

64. *Patent—Letters of Registration—Common Knowledge—Prior User, or Prior Publication in Colony—Renewal Fees—Amendment of Specification—West Australian Patent Act, 1888 (52 Vict. No. 5), ss. 23, 49.*—By sect. 49 of the West Australian Patent Act,

*Australia—Continued.*

1888, holders of patents in Great Britain or any other country are enabled to obtain letters of registration in the Colony, and such letters of registration shall be deemed to be letters patent issued under the Act.

**HELD**—that common knowledge, prior user, or prior publication in Western Australia, subsequent to the date of British letters patent the holders of which had obtained letters of registration in respect thereof, affects such letters of registration, and that sect. 49 merely affords a machinery by which the holder of a foreign patent may obtain protection for his invention within the Colony without the formalities and delay necessary on an application for a patent, but subject to all the incidents and conditions to which letters patent would be subject.

**HELD ALSO**—that renewal fees charged by the 2nd schedule of the Act on letters patent are not payable in respect of letters of registration.

**HELD ALSO**—that the specification deposited with the application for, and referred to in the letters of registration is the "specification" within the meaning of sect. 23 of the Act, therefore after an amendment of a specification in London there ought to be an application to the registrar in the Colony for leave to amend the specification.

**AUSTRALIAN GOLD RECOVERY Co. v. LAKE VIEW**  
[CONSOLS, [1901] A. C. 142; 70 L. J. P. C. 14, 83 L. T. 541; 17 T. L. R. 124, 18 R. P. C. 105—P. C.]

**III. BRITISH SOUTH AFRICA.****(a) Bechuanaland.**

**65. Concession by Native Chief before 1891—Proclamations of 1889 and 1893—Power of Concessions Court to modify Concession.**—Prior to 1891 a Bechuanaland native chief granted a mining concession applicable to all minerals. The Concessions Court, established under a proclamation of February 1st, 1893, purported to approve the concession subject to a restriction imposed by a proclamation of April 25th, 1889. This restriction applied to precious metals, and, so far as such metals were concerned, practically destroyed the concession.

**HELD**—that the Court had power to thus modify the concession without entirely setting it aside.

**VILANDER CONCESSIONS SYNDICATE v. CAPE OF**  
[GOOD HOPE GOVERNMENT, [1907] A. C. 186; 76 L. J. P. C. 47; 96 L. T. 275; 23 T. L. R. 298—P. C.]

**66. Mining Claim—Forfeiture for Non-payment of Rent—Prospecting Licence—Certificate of Registration—Rules of Mining Company.**—The mining rights and privileges conferred by a certificate of registration under the rules of the appellant company depend upon contract only, and are not equivalent to a lease under Roman-Dutch law.

Under the rules and regulations of the appellant company the certificate of registration of a mining claim is liable to forfeiture upon non-payment of the rent payable in respect thereof; although the rules may not in express terms provide for forfeiture, yet in the case of such mining concessions, liability to forfeiture is the only practical sanction of all reservations and covenants, and may be implied from the general purport of the rules.

**THE TATI CONCESSIONS, LD. v. HIPPLE**, [1905]  
[A. C. 139; 74 L. J. P. C. 92; 92 L. T. 245; 21 T. L. R. 260—P. C.]

**(b) Cape Colony.**

**67. Act of State—Concessions made before Annexation—Declaration of Right—Jurisdiction of Municipal Courts—Crown Liabilities Act, 1888 (51 & 52 Vict. No. xxxvii.).**—Certain agreements or concessions were made by a native chief described as "paramount chief of Pondoland," granting certain privileges and rights to the appellants. The appellants never in fact obtained possession of the lands or exercised the rights which these documents purported to convey. Pondoland was in 1894 annexed to and became part of the British dominions.

**HELD**—that the statute (the Crown Liabilities Act, 1888) which gives a power to sue the prime minister does not involve the power of making any declaration of right against the Crown in such a case. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer.

*Secretary of State for India in Council v. Kamachee Boye Sahaba* ((1859) 13 Moo. P. C. 22) followed.

**COOK v. SPRIGG**, [1899] A. C. 572; 68 L. J. P. C. 144; 81 L. T. 281; 15 T. L. R. 515—P. C.]

**68. Construction of Document—Restraint on Alienation—Fidei commissum conditionale—Mortgage not a Breach of the Prohibition—Roman-Dutch Law**—A husband and wife, married in community, executed the following document—"On the 24th September, 1881, we declare to have bequeathed to our son W. G. M. one-sixth share in lot No. 53 of the farm A. . . . We bequeath the said share for the sum of £300 sterling with interest at 6 per cent. per annum, but after the death of the first dying the interest shall be decreased to 3 per cent. The said ground shall never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs. This bequest shall be attached to the deed of transfer." In March, 1882, the declaration required to be made by vendors and purchasers was made, the land was marked out, and W. G. M. took possession of a divided sixth share of the farm. On the father's death in 1890 his executors executed a formal transfer, reciting that he had sold the land in his lifetime, and that the price had been paid. In 1899

**British South Africa—Continued.**

W. G. M. died, leaving the land to his wife and children, and the present action was brought to determine their rights as against persons to whom W. G. M. had mortgaged the land after his father's death.

HELD—that the effect of the document of September 24th, 1881, followed by the deed of transfer, was to vest the property in W. G. M. subject to a prohibition against its alienation to any person not a member of his family; but that, no attempt having yet been made to enforce the mortgages against the property, there had been no breach of the condition.

Decision of the Supreme Court of the Cape of Good Hope affirmed.

JOSEF AND OTHERS v. MULDER AND OTHERS, [1903] A. C. 190, 72 L. J. P. C. 50; 88 L. T. 72—P. C.

69. "Flotation" of Block—Sale to Company of Blocks—British South Africa Company's Mining Ordinance, 1890, ss. 26, 27, 28 ] —The respondent was to receive from the appellants syndicate the sum of £250 "on flotation" by the syndicate of every block of ten claims pegged by him. In the course of his service he pegged off 330 claims under licences procured by the syndicate and sold to the Chartered Goldfields, Limited.

HELD—that it was clear from sect. 28 of the Mining Regulation of 1890, that "the flotation of a block" may be "into either a joint-stock company or into a syndicate to further test the mine," and that there had been a flotation of claims, and that the fulfilment of the requirements of sects. 26, 27, and 28 of the British South Africa Company's Mining Ordinances, 1890, did not enter into the definition of flotation and was not a condition precedent to the flotation contemplated by the agreement.

TORVA EXPLORING SYNDICATE v. KELLY, [1900] [A. C. 612, 69 L. J. P. C. 115; 83 L. T. 34; 16 T. L. R. 495—P. C.]

70. Land held on Perpetual Quit Rent—Land taken by Government for Railway Purposes—Holder's Right to be Compensated—Proclamation of August 6th, 1813—Act No. ix. of 1858, ss. 10, 11, 12—Act No. xix. of 1874, s. 3 ] —It is a recognised canon of construction that an intention to take away a person's property without compensation, unless expressed in unequivocal terms, is not to be imputed to the Legislature.

Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co. ((1882) 7 App. Cas. 178, 51 L. J. P. C. 43; 46 L. T. 351), dictum of Lord Watson, approved.

The true construction of sect. 11 of Act No. ix. of 1858 is not to enlarge and apply to the other purposes mentioned in that section the right of taking land and materials for the purpose of making and maintaining roads, which had, so far as quit-rent lands are concerned, been reserved to the Government by the proclamation of August 6th,

1813. It is merely a transfer section, transferring the existing powers of the Government to the newly-constituted commissioners. Therefore, sect. 3 of Act xix. of 1874, which provided for the construction of a railway from Worcester to Beaufort West, and gave to the Government the same right of taking land and materials therefor as they had under the Act of 1858 for the making and repairing of roads and purposes connected therewith, only conferred the powers originally reserved by the proclamation of 1813; and the holder of a quit-rent farm is entitled to compensation in respect of land taken for purposes connected with the railway, other than the construction and maintenance thereof.

COLONIAL GOVERNMENT OF THE CAPE OF GOOD HOPE (or SMART) v. LOGAN, [1903] A. C. 355; 72 L. J. P. C. 91; 88 L. T. 779; 19 T. L. R. 545—P. C.

71. Martial Law—Jurisdiction to Review Martial Law Sentences—Memorandum recording such Sentences.]—Martial law sentences passed in Cape Colony cannot be reviewed by the Supreme Court of the Colony.

A deputy administrator of martial law, who was also a resident magistrate, by mistake recorded martial law proceedings and sentences upon forms with captions appropriate only to his magisterial jurisdiction.

HELD—that as the convictions were in fact made under martial law, and no "record" was really necessary, the erroneous memoranda did not invalidate the sentences or furnish any ground for quashing them.

ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE [v. VAN REENEN AND SMIT, [1904] A. C. 114, 73 L. J. P. C. 13; 89 L. T. 591; 20 T. L. R. 90 P. C.]

72. Tramways—Electric Traction—Storage of Electricity—Escape of Electricity—Leak—Disturbance to Submarine Cable—Cape of Good Hope Statutes, 1895, 1896 (53 & 59 Vict. c. 22), s. 4; (59 & 60 Vict. c. 29), s. 4.]—The principle of *Rylands v. Fletcher* ((1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. (n.s.) 220), which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as showing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain.

The doctrine of *Rylands v. Fletcher* (supra) is not inconsistent with the principles of the Roman Law, upon which the law of Cape Colony is based.

The respondents carried on the business of the construction, equipment, and working of tramways in Cape Town and its suburbs. A short piece of tramway line was con-

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structed and maintained by them without express statutory authority, but with the consent of the authority in whom the roads were vested. Disturbances in the working of the appellants' submarine telegraph cable at Cape Town took place. Such disturbances were caused by electricity which had been stored by the respondents and used in propelling their tramcars—run by the overhead trolley system—in Cape Town and its suburbs, but from time to time had left the tramway system and found its way to the appellants' cable in the sea near Cape Town, and pecuniary losses resulted to the appellants. None of the apparatus of the appellants was damaged. The difficulty was completely got over by laying a twin-core cable for several miles out, the two wires rectifying one another's action.

**HELD**—that so far as the respondents' liability was governed by the Common Law, the appellants' claim was not maintainable; that the language of both the statutory undertaking and of the condition seemed to point to some defect in apparatus not contemplated as a condition of the working of the system, but the departure of the electricity from the rails arose from no defect, but from the necessary condition of things, if the tramcars were to run and the rails to be used as a return; that the event which had occurred was not a "leak" within the undertaking and condition, but was a natural incident of the operations legalised under the statutes, and did not impose any liability on the respondents.

**EASTERN AND SOUTH AFRICAN TELEGRAPH CO. v. [CAPE TOWN TRAMWAYS COMPANIES, LD., [1902] A. C. 381; 71 L. J. P. C. 122; 50 W. R. 657; 86 L. T. 457, 18 T. L. R. 523—P. C.**

**(c) Natal.**

**73. Fraud—Actio Doli—Other Remedies—Fraud not Discovered Within Prescribed Time—Roman-Dutch Law.**—Even assuming that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman law, nevertheless, if the same fraud which induced the contract also operated to deprive the plaintiff of his other remedies, he will have his *actio doli*, i.e., if the plaintiff discover the fraud more than a year after the bargain, the *actio doli* is open to him; and in Roman-Dutch law the Roman rule that the *actio doli* is itself limited to two years has been departed from in favour of the general prescription of thirty years, and there is no reason to question this conclusion.

**DOUGLAS v. SANDER & CO., [1902] A. C. 437; 71 [L. J. P. C. 91; 50 W. R. 676; 86 L. T. 633; 18 T. L. R. 630—P. C.**

**74. Husband and Wife—Community of Goods—Post-nuptial Contract—Registration—Natal Law No. 22 of 1863 (26 & 27 Vict. No. 22), s. 7.]**—Mr. and Mrs. Sturrock were

married in 1875 at Lydenburg, in the South African Republic. The law attaching to them at the time of their marriage was the ordinary Roman-Dutch law of community of goods.

By Natal Law No. 22 of 1863, s. 7, community of goods, or any of the liabilities or privileges resulting therefrom shall not attach or exist or be deemed to have attached or existed if the spouses shall by an instrument in writing express and signify their wish, desire, or intention to be brought within the provision of this law, and such instrument shall be capable of being registered by the registrar of deeds.

In 1892 Mr. and Mrs. Sturrock executed a post-nuptial contract, by which they each expressed and signified a desire and intention to be brought within the provisions of the Law No. 22 of 1863, and made other dispositions of their properties.

On the same day the husband executed a bond by which he declared himself debtor to the trustees of the post-nuptial contract for £6,223 10s.—a moiety of the estate of the debtor and his wife—payable five years after date, as trustees of his wife. The post-nuptial contract was never registered.

**HELD**—that the post-nuptial settlement, not having been registered, was not binding on anybody, that no trust was created for the wife, and that the trustees never acquired the characters in which alone the bond was given to them.

**TAYLOR v. B. STURROCK, W. STURROCK v. B. [STURROCK, [1900] A. C. 225, 69 L. J. P. C. 29; 82 L. T. 97—P. C.**

**75. Land—Unregistered Transfer—Registered Transfer set aside on the Ground of *dolus malus*.**—There is not much difference between the Roman-Dutch law, which requires proof of *dolus malus* to set aside a later completed purchase in favour of an earlier contract, and the English law relating to similar questions in a locality where the system of registration prevails. Five lots of land were purchased and registered in the name of E. S., who sold them to the plaintiff, who paid the price and received the title-deeds. E. S. executed a power of attorney authorising the plaintiff, or his substitute, to make the proper transfer in the register. Plaintiff appointed B. to be his substitute, and transmitted all the documents to him. B. omitted to register the plaintiff's title, and he handed all the documents over to H. B. paid the transfer duty and lodged the declarations necessary for the transfer. No notice of these important matters appeared on the register of title. H. made no use of the land. He put it into the hands of a caretaker, and awaited his opportunity of selling. E. S. died. One Blackburn employed G. to discover the owner and buy the land. G. communicated with the S. family and procured the appointment of the defendant as executor dative and an order of Court for sale by private contract. The land was sold to Blackburn, who



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and the sale duly registered. The plaintiff brought an action to reclaim the land.

**HELD**—that a private sale by an executor is only authorised in exceptional cases, and it is the executor's duty to give the Court the fullest information of everything bearing on the question, and that Blackburrow and G. having tried to circumvent the substantial obstacle of the interest represented by H.: namely, the plaintiff's claim to have the land against the heirs of E. S., the case fell within the narrowest definition of *dolus malus*.

**CROWLEY v. BERGTHEIL**, [1899] A. C. 374; 68 [L. J. P. C. 81; 80 L. T. 428—P. C.

**76 Licensing Officer—Appeal to and from Town Council—Academical Questions—Law 13 of 1897, ss. 5 and 6.**—No appeal lies from the decision of the town council, to whom alone, by sects. 5 and 6 of Natal Law 13 of 1897, an appeal is given from the decision of the licensing officer appointed under that law. A summons for a writ of review under sect. 8 of Law 39 of 1896 is an appeal properly speaking and cannot be treated as a proceeding in the nature of a writ of certiorari.

It is not the province of the judicial committee to debate or resolve academical questions.

**VAUDA v. MAYOR AND COUNCILLORS OF NEW-CASTLE**, [1899] A. C. 246; 68 L. J. P. C. 39; 79 L. T. 600—P. C.

**77. Lunatic—Mortgage Bond—Act done before Curator Appointed—Person dealing with Lunatic in Ignorance of Lunacy.**—By the law of Natal, where the Roman-Dutch law prevails, a contract by an insane person is void, even though made before he is judicially declared to be insane and a curator appointed over him; and the fact that the other party to the contract was not at the time aware of the insanity is immaterial.

The Roman-Dutch law, however, recognises the equity of allowing a person who has in good faith expended money on behalf of a lunatic to have his legitimate expenses recouped to him.

**MOLYNEUX v. THE NATAL LAND AND COLONISATION Co., LD.**, [1905] A. C. 555; 74 L. J. P. C. 108; 93 L. T. 59; 21 T. L. R. 645—P. C.

**78. Mines—Crown Land—Coal Mine—Royalties—Coal Mine worked before 1899—Natal Mines Act, 1899 (No. 43), ss. 25, 41, 42.**—The owners of a coal mine, owned and worked by them before the passing of the Natal Mines Act, 1899, are not liable under that Act to pay royalties to the Crown in respect of coal raised by them since that date

**DUNDEE COAL Co., LD. v. MINISTER OF AGRICULTURE FOR NATAL**, [1906] A. C. 571; 75 L. J. P. C. 90; 95 L. T. 316; 22 T. L. R. 745—P. C.

**79. Will—Interpretation—Bequest to Children as Heirs—Fidei-commissary Substitu-**

**tion—Direct Substitution.**—The law of Natal (differing in this respect from English law, but following Roman law) that where a parent has appointed children (or remoter descendants) as heirs, and directed that upon their death their share should go over either to a stranger or to another child, then the going over or substitution is subject to the tacit condition implied by law that the deceased child left no issue, is confined to the case of fidei-commissary substitutions, and is inapplicable to direct substitution.

By his will a testator, after giving a life interest in his estate to his wife for the benefit of herself and his children, directed that after her decease the estate should be equally divided among his children, or such of them as might then be alive.

**HELD**—that the effect of the direction was virtually to institute the children as heirs on the death of their mother, and to substitute the survivors for such children as might die before their mother; it was a case, therefore, of direct and not fidei-commissary substitution. The children were not requested to part with their inheritance after they had once entered on it, and consequently those who survived their mother took their inheritance free from any burthen; those who died before their mother entered upon no inheritance and possessed nothing to restore.

**GALLIERS v. RYCKROFT**, [1901] A. C. 130; 69 [L. J. P. C. 124; 83 L. T. 179; 16 T. L. R. 482—P. C.

**(d) Transvaal Colony.**

**80. Appeal from Decision of High Court of the South African Republic—Proclamation (Transvaal) No. 14 of 1902.**—No appeal lies to the Supreme Court of the Transvaal from a decision of the High Court of the late South African Republic from which there was no appeal before the war.

**AFRICAN GOLD RECOVERY Co., LD. v. HAY**, [1904] [A. C. 438; 73 L. J. P. C. 108; 91 L. T. 214; 20 T. L. R. 598—P. C.

**81. Patent—Cancellation of—Parties—Transvaal Patent Act (No. 6), 1887, ss. 29, 31.**—The High Court of the Transvaal has power to cancel a patent although the Attorney-General is not a party to the action.

**AFRICAN GOLD RECOVERY Co., LD. v. HAY**, [1904] [A. C. 438; 73 L. J. P. C. 108; 91 L. T. 214; 20 T. L. R. 598; 21 R. P. C. 729—P. C.

**IV. CANADA****(a) Dominion generally.**

**82. Alien Labour—Prohibition against Importation—Immigrant Unlawfully Landed—Taking into Custody and Returning to Country of Origin—Ultra vires—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91—Alien Labour Acts of Canada, 1897 (60 & 61 Vict. c. 11), s. 6, and 1901 (1 Edw. 7, c. 13), s. 31.**—The Alien Labour Act, 1867,

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passed by the Dominion Parliament of Canada, empowers the Attorney-General for Canada, if an immigrant has been allowed to enter Canada contrary to the provisions of the Act, to cause him to be taken into custody and returned to the country whence he came.

**HELD**—that this statute was *intra vires* of the Dominion Parliament, that it necessarily gave power to impose that extra territorial constraint on the immigrant which was necessary to enable the Government to expel him from the country.

ATTORNEY-GENERAL FOR CANADA *v.* CAIN AND [GILHEULA, [1906] A. C. 542, 75 L. J. P. C. 81, 95 L. T. 314; 22 T. L. R. 757—P. C.

83. *Appeal to Privy Council—Admiralty Jurisdiction—Supreme Court of Canada—Supreme and Exchequer Court Act, 1875 (Canada) (33 Vict. c. 11), s. 47—Admiralty Act, 1891 (Canada) (54 & 55 Vict. c. 29), ss. 3, 14 (2)—Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), ss. 5, 6*—[Sect. 6 of the Colonial Courts of Admiralty Act, 1890, gives a right of appeal to his Majesty in Council from a judgment or decree of the Supreme Court of Canada, pronounced in an appeal to that Court from a judgment or decree of the Colonial Court of Admiralty for Canada constituted under that Act and the Admiralty Act, 1891 (Canada).

Decision of the Supreme Court of Canada (36 Can. S. C. R. 564) affirmed on the facts.

RICHÉLIEU AND ONTARIO NAVIGATION CO. *v.* [OWNERS OF THE STEAMSHIP CAPE BRETON, [1907] A. C. 112; 76 L. J. P. C. 11; 95 L. T. 896; 23 T. L. R. 185—P. C.

84. *Arbitration—Extent of Submission—Limit of Arbitrator's Jurisdiction—Construction.*—[Under a Canadian Act of 1850 (12 Vict. c. 200) relating to what is known as "the Common School Fund," the Government of Ontario are in the position of trustees of the proceeds of certain public lands situated in that province. By a deed of submission the provinces of Ontario and Quebec referred to arbitration certain questions as to the ascertainment of the amount of principal in the Common School Fund, and the method of calculating interest in the accounts between the two provinces. Before the arbitrators Quebec claimed that Ontario should be charged with certain uncollected purchase-moneys due in respect of some of the land, which had been sold.

**HELD**—that such a question was not within the scope of the reference; the claim was really one for wilful neglect and default as a trustee in realising moneys due to the trust, and was clearly not included in the terms of the submission.

Judgment of Supreme Court of Canada reversed.

ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR QUEBEC, [1903] A. C. 39; 72

L. J. P. C. 9; 87 L. T. 453; 19 T. L. R. 46—P. C.

85. *Company in Liquidation—Power of Liquidator to Sue in Own Name—Winding-Up Act, 1886 (R. S. Canada, c. 129), ss. 15, 31.*—[When an action is brought to recover a debt due to a company which is being wound up, or to protect property the title to which is in the company, the action should be brought by the liquidator in the name of the company. In some cases, however, a liquidator represents not the company, but creditors or contributories, *e.g.*, when he impeaches in their interest some previous deed of the company, and in such cases he may sue in his own name.

KENT AND OTHERS *v.* LA COMMUNAUTÉ DES [ŒUVRES DE CHARITÉ, ETC., [1903] A. C. 220; 72 L. J. P. C. 60; 88 L. T. 275; 19 T. L. R. 345—P. C.

86. *Constitution—House of Commons—Representation of Prince Edward Island—Terms of Union (Order in Council, June 26, 1873)—Representation of New Brunswick—"Aggregate population of Canada"—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 3, 4, 40, 51, 146, 147.*—[The representation of the province of Prince Edward Island in the House of Commons of Canada is liable to be reduced under sect. 51, sub-sect. 4 of the British North America Act, 1867, below six members, the number granted by the Terms of Union of 1873, under which Prince Edward Island was admitted into the Union, according to each decennial census.

Decision of the Supreme Court of Canada (33 Can. S. C. R. 594) affirmed.

In determining the number of representatives in the House of Commons of Canada, to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in sect. 51, sub-sect. 4, of the British North America Act, 1867, mean the whole population of Canada including that of provinces admitted to the Union subsequent to the passing of the British North America Act, 1867, and are not confined to the population of the four original provinces of Canada, which then formed the Union.

Decision of the Supreme Court of Canada (33 Can. S. C. R. 475) affirmed.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF [PRINCE EDWARD ISLAND *v.* THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA—THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK *v.* THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, (1905) 74 L. J. P. C. 9; 91 L. T. 636; 21 T. L. R. 25—P. C.

87. *Copyright—Foreign reprints—Copyright in English book—Notice to Customs Commissioners—Imperial Act in force in Canada—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 17—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 151, 152—Canadian Customs Tariff Act, 1897 (60 & 61 Vict. c. 16),*

## Canada—Continued.

ss. 4, 6; *Sch. A.*, item 125.]—It having been held by the High Court of Justice for Ontario (5 Ont. L. R. 184) that sect. 152 of the Imperial Customs Consolidation Act, 1876, requiring notice to be given to the Commissioners of Customs of Copyright in a book, was not (having regard to sect. 151 of the Act) in force in Canada, and that sect. 17 of the Imperial Copyright Act, 1842, was applicable, and an injunction having been granted, restraining the Imperial Book Company from importing into Canada any copies of the ninth edition of the "Encyclopædia Britannica," and ordering the delivery up of unsold copies thereof, and this judgment having been affirmed by the Court of Appeal for Ontario, and by the Supreme Court of Canada,

HELD—that the Privy Council ought to refuse leave to appeal further.

THE IMPERIAL BOOK CO., LD. v. ADAM AND [CHARLES BLACK AND THE CLARKE CO., LD., (1905) 21 T. L. R. 540—P. C.

88. *Copyright—Works of Art—Imperial Act not Extending to Colonies—Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68).]*—The Imperial Act (25 & 26 Vict. c. 68) conferring copyright in works of fine art does not extend beyond the United Kingdom.

*Tuck and Sons v. Priestner* ((1887) 19 Q. B. D. 629; 56 L. J. Q. B. 553; 52 J. P. 213; 36 W. R. 93—C. A.) approved.

Therefore persons who want copyright in Canada for paintings, prints, &c., must obtain such copyright by complying with the Copyright Acts of the Colony. Their English copyright is of no avail to them there.

Decision of the C. A. for Ontario (3 Ont. L. R. 697) affirmed.

HENRY GRAVES & CO., LD. v. GORRIE, [1903] [A. C. 496; 72 L. J. P. C. 95; 89 L. T. 111; 19 T. L. R. 652; 52 W. R. 113—P. C.

89. *Deadman's Island—Property in—Military Reserve—Transfer to Dominion—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 108, 117; Sch. III.]*—Deadman's Island, lying near the entrance to Burrard Inlet, in the harbour of Vancouver, was originally a military reserve, and consequently remained the property of the Imperial Government at the time of the passing of the British North America Act, 1867, and did not belong either to the Dominion under sect. 108 of the Act or to the Province under sect. 117, and was transferred to the Dominion by the Imperial Government by virtue of a dispatch of March 27th, 1884.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. [ATTORNEY-GENERAL FOR CANADA, [1906] A. C. 552; 75 L. J. P. C. 114; 95 L. T. 571; 22 T. L. R. 764—P. C.

90. "*Final Judgment*"—*What is—Yukon Territorial Act, 1899, s. 8.]*—The plaintiffs brought an action in respect of several dis-

tinct sums of money alleged to be due to them from the defendant. The Judge dismissed the action as to one particular item, referred the other items to a referee and reserved all questions of costs.

HELD—that the dismissal of the action as to the one item was a "final judgment" within the meaning of sect. 8 of the Yukon Territorial Act, 1899; and that no appeal against it could be commenced after the expiration of the twenty days limited by the section.

M'DONALD v. BELCHER, [1904] A. C. 429; 90 [L. T. 735—P. C.

91. *Fishing—Territorial Waters—Illegal Fishing—Seizure of Vessel—Evidence of Vessel's Position.]*—An American vessel was seized by a Canadian cruiser for fishing on the Canadian side of Lake Erie. The Crown brought an action to have her declared forfeited. The local Judge in Admiralty came to the conclusion upon the evidence that the vessel was not in Canadian waters and ordered her to be restored to her owners. The Supreme Court of Canada (Taschereau, C.J., dissenting) reversed this judgment and condemned the vessel.

HELD (upon consideration of the evidence)—that the judgment of the Supreme Court must be reversed and the judgment of the local Judge in Admiralty restored.

Decision of Supreme Court (34 Can. S. C. R. 673) reversed.

THE SHIP KITTY D. v. REX, (1906) 22 T. L. R. [191—P. C.

92. *Gas—Two Houses supplied with Gas—Neglect to pay for Gas supplied to One House—Gas Company not bound to supply Gas to the other House—Canada Act (12 Vict. c. 183), s. 20—Gasworks Clauses, Imperial Act, 1847 (10 & 11 Vict. c. 15), s. 29.]*—The respondent was a customer of the Montreal Gas Company. He had two sets of premises in Montreal. He took gas from the company for both.

HELD—that he was not entitled to require the company to supply gas for the one set of premises while he neglected to pay his gas bill for the other, and that there was nothing in the Canada Act (12 Vict. c. 183) to throw the rate, rent, or charge for gas upon the premises for which the supply was furnished or to make it payable out of the premises of the defaulter.

MONTREAL GAS COMPANY v. CADIEUX, [1899] [A. C. 589; 68 L. J. P. C. 126; 81 L. T. 274—P. C.

93. *Land—Crown Land—Adverse Possession—Lease by Crown—Information for Intrusion—Statute of Limitations (21 Jac. 1, c. 14).]*—The Imperial statute 21 Jac. 1, c. 14, is an Act regulating procedure merely, and its effect is to put a person against whom the Crown might file an information of intrusion on the same footing as a defendant

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in an ordinary action of ejectment, if the Crown has been out of occupation for 20 years, and to allow him to retain such possession as he had at the date of the filing of the information until the title has been adjudged in favour of the Crown.

The plaintiff and his predecessors had uninterrupted occupation for 56 years down to 1895 of a piece of land in New Brunswick, which had belonged to the Crown. No rent had been paid, and the occupation was open and unchallenged. In 1895 the defendant obtained a grant of the land from the Crown, and during the temporary absence of the plaintiff he entered peaceably and continued in occupation. The plaintiff having brought an action of ejectment:

**HELD**—that there was nothing in the statute 21 Jac. 1, c. 14, to prevent the Crown or its grantee from entering peaceably, the period of 60 years necessary to give a right as against the Crown not having expired, and that the defendant was entitled to succeed.

Decision of the Supreme Court of Canada (34 Can. S. C. R. 333) affirmed.

*EMMERSON v. MADDISON*, [1906] A. C. 569; 75 [L. J. P. C. 109; 95 L. T. 508; 22 T. L. R. 748—P. C.

**94. Land—Crown Land—Legislative Power of Dominion over Provincial Crown Property—Railway obstructing Rights of Way—Foreshore of Harbour—Crown Property—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92, 108—Canadian Pacific Railway Act (Dominion), 1881 (44 Vict. c. 1), Schd. A, s. 18 (a)—Consolidated Railway Act (Dominion), 1879 (42 Vict. c. 9), s. 15.]—The Dominion Parliament of Canada has power under sects. 91, 92, 108 of the British North America Act, 1867, to dispose of Provincial Crown lands for the purposes of a railway connecting one province with one or more other provinces.**

**HELD**—that, notwithstanding the Consolidated Railway Act, 1879, the Canadian Pacific Railway Company were authorised by the Canadian Pacific Railway Act (Dominion), 1881, to use the foreshore of the sea at the city of Vancouver, which foreshore was in fact Crown property and formed part of the harbour, for the purposes of their railway, and for such purposes to obstruct and close certain public rights of way over the foreshore.

**THE ATTORNEY-GENERAL FOR THE PROVINCE OF [BRITISH COLUMBIA v. THE CANADIAN PACIFIC RY. CO.]**, [1906] A. C. 204; 75 L. J. P. C. 38, 94 L. T. 295; 22 T. L. R. 330—P. C.

**95. Land—Jurisdiction over Provincial Court.]**—Where land is in Manitoba, neither the sale of it can be conducted nor possession given by an Ontario Court, nor has either the Supreme Court of Canada, or her Majesty in Council sitting in appeal from an Ontario Court, any wider jurisdiction.

**GREAT NORTH-WEST CENTRAL RAILWAY v. [CHARLEBOIS]**, [1899] A. C. 114; 68 L. J. P. C. 25, 79 L. T. 35—P. C.

**96. Land—Lands in Ontario surrendered by the Indians—Proprietary Right Therein—Power of Disposition—Purported Sale by Dominion Government without Assent of the Province—Validity—British North America Act, 1867, s. 91.]**—The Dominion Government, without obtaining the consent of the province of Ontario, purported to sell and convey to the appellants certain lands in Ontario, which had been surrendered (subject to certain hunting rights) by the Indians under the North-West Angle Treaty of 1873

**HELD**—that under sects. 91, 109, of the British North America Act, 1867, the proprietary rights in such lands (subject to the reservation) are vested in the Province of Ontario, and that the Dominion Government have no power to alienate such lands in violation of the proprietary rights of the province; and that their act in purporting to do so was *ultra vires*.

*St. Catherine's Milling Co. v. Reg.* (1888) 14 App. Cas. 46; 58 L. J. P. C. 54; 60 L. T. 197) followed.

**ONTARIO MINING CO. AND ATTORNEY-GENERAL [FOR CANADA v. SEYBOLD AND OTHERS]**, [1903] A. C. 73; 72 L. J. P. C. 5; 87 L. T. 449, 19 T. L. R. 48—P. C.

**97. Legislative Power—Chinamen—Legislature of the Dominion—Provincial Legislation—Aliens or Naturalised Subjects—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, sub-s. 25—British Columbia Coal Mines Regulation Act, 1890 (Revised Statutes of British Columbia, 1897, c. 138), s. 4.]**—By virtue of sect. 91, sub-sect. 25, of the British North America Act, 1867 (53 Vict. c. 38), the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the province of Canada. As the whole pith and substance of the enactments of sect. 4 of the British Columbia Coal Mines Regulation Act, 1890, consists in establishing a statutory prohibition which affects aliens or naturalised subjects, it trenches upon the exclusive authority of the Parliament of Canada, and is in that respect *ultra vires* of the provincial legislature.

**UNION COLLIERY COMPANY OF BRITISH COLUMBIA [v. BRYDEN]**, [1899] A. C. 580; 68 L. J. P. C. 118; 15 T. L. R. 508—P. C.

**98. Legislative Power—Liquor Laws—Power of Suppression—Provincial Legislation—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, sub-s. 16—Manitoba Act, 1900 (63 and 64 Vict. c. 22.)**—The British North America Act, 1867, s. 92, sub-ss. 13 and 16, assigned to the exclusive jurisdiction of provincial legislatures (1) "property

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and civil rights in the province," and (2) "generally all matters of a mere local or private nature in the province."

The question of the suppression of the liquor traffic by provincial legislation falls under No. 16 rather than No. 13. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property or civil rights.

A provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof.

Matters which are "substantially of local or of private interest" in a province—matters which are of a local or private nature "from a provincial point of view" are not excluded from the category of "matters of a merely local or private nature" within sect. 92, sub-s. 16, of the British North America Act, 1867, because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

The legislature of Manitoba did not transgress the limits of its jurisdiction when it passed the Act known as "The Liquor Act" of 1900, in order to suppress the liquor traffic in Manitoba by prohibiting provincial transaction in liquor and purporting to prohibit all use in Manitoba of spirituous fermented malt and all intoxicating liquors as beverages or otherwise than for sacramental, medicinal, mechanical, or scientific purposes, and which Act included divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of such liquors.

*Attorney-General for Ontario v. Attorney-General for the Dominion* ([1896] A. C. 348; 85 L. J. P. C. 26; 74 L. T. 533—P. C.) followed.

ATTORNEY-GENERAL OF MANITOBA v. MANITOBA [LICENCE-HOLDERS' ASSOCIATION, [1902] A. C. 73; 71 L. J. P. C. 28; 50 W. R. 431; 85 L. T. 591; 18 T. L. R. 94—P. C.

99. *Legislative Power — Naturalisation — Franchise—British Columbia—Necessary Consequences of Naturalisation to all Naturalised Aliens—Privileges accorded to Particular Classes only—British North America Act, 1867, s. 91 (25), s. 92 (1)—British Columbia Provincial Elections Act, 1897, s. 8*—The British Columbia Provincial Elections Act, 1897, after defining (sect. 3) a "Japanese" as "any native of the Japanese empire or its dependencies, not born of British parents, and including any person of the Japanese race naturalised or not,"

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goes on to provide that (sect. 8) "No . . . Japanese . . . shall have his name placed on the register of voters for any electoral district. . . ." Notwithstanding these provisions the respondent had been registered by order of the Supreme Court, who, on the authority of *Union Colliery Co. v. Bryden* held that such provisions were *ultra vires* the Provincial Legislature, on the ground that by reason of sect. 91 (25) of the British North America Act, 1867, the whole subject of naturalisation is reserved to the exclusive jurisdiction of the Dominion Parliament.

Held—that the respondent was not entitled to be registered. The Dominion Parliament has the exclusive right to determine what shall constitute naturalisation; and in all cases certain consequences must follow from naturalisation, *e.g.*, the duty of allegiance and the right to protection; on the other hand, such privileges as the franchise may be granted, or refused, at the option of the Provincial Legislature, apart from any question of alienage or naturalisation.

*Union Colliery Co. v. Bryden* ([1899] A. C. 587; 68 L. J. P. C. 118; 81 L. T. 227—P. C. No. 97, *supra*) distinguished.

CUNNINGHAM AND ATTORNEY-GENERAL FOR [BRITISH COLUMBIA v. TOMMY HONMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, [1903] A. C. 151; 72 L. J. P. C. 23; 87 L. T. 572; 19 T. L. R. 126—P. C.

100. *Legislative Power—Powers of provincial Legislature—Appointment of Queen's Counsel—Powers of Lieutenant-Governor of province—Prerogative of Crown.*—An Act of a provincial Legislature empowering the Lieutenant-Governor to appoint by letters patent Queen's Counsel within the province, is within the limit of their legislative authority, and such appointments by the Lieutenant-Governor do not constitute an encroachment upon the prerogative of the Crown.

ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ONTARIO, [1898] A. C. 247; 67 L. J. P. C. 17; 77 L. T. 539; 14 T. L. R. 106—P. C.

101. *Legislative Power — Ultra vires — British Columbia Cattle Protection Acts, 1891, 1895 (54 Vict. c. 1, and 58 Vict. c. 7).*—Action brought to recover the value of two horses which had got on the railway of the respondent company by reason of there not being any fence on each side of the railway pursuant to the British Columbia Cattle Protection Acts, 1891, 1895.

Held—that the British Columbia Cattle Protection Acts, 1891, 1895, were *ultra vires* of the provincial legislature so far as the respondent company was concerned.

MADDEN v. NELSON AND FORT SHEPPARD RAILWAY, [1899] P. C. 626; 68 L. J. P. C. 148; 15 T. L. R. 484—P. C.

102. *Legislative Power — Provincial Legislature — "Criminal Law" — British North*

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*America Act, 1867* (30 & 31 Vict. c. 3), ss. 91, 92—*Lord's Day Profanation Act (Revised Statutes of Ontario, 1897) c. 246.*—By sect. 91, sub-s. 27 of the *British North America Act, 1867*, there is reserved to the Dominion Legislature "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

HELD—that, in consequence of the above section, the *Lord's Day Profanation Act* of Ontario was *ultra vires* the Provincial Legislature.

ATTORNEY-GENERAL FOR ONTARIO *v.* HAMILTON [STREET RY. CO. AND OTHERS, [1903] A. C. 524, 72 L. J. P. C. 105; 89 L. T. 107; 19 T. L. R. 612—P. C.]

103. *Legislative Power—Provincial Legislation—Municipal Legislation affecting Railways—British North America Act, 1867* (30 & 31 Vict. c. 3), s. 92, sub-s. 10.]—A *British North America Act*, whilst it gave the Legislature control of a railway *quâ* railway to the Parliament of the Dominion, did not declare that the railway should cease to be part of the provinces in which it was situated, nor that it should, in other respects, be exempted from the jurisdiction of the provincial Legislatures. Accordingly, the Parliament of Canada has exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the construction and powers of the company, but it is, *inter alia*, reserved to the provincial Parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes.

CANADIAN PACIFIC RAILWAY *v.* CORPORATION OF [THE PARISH OF NOTRE DAME DE BONSECOURS, [1899] A. C. 367; 68 L. J. P. C. 54; 80 L. T. 434—P. C.]

104. *Legislative Power—Railways—"Civil Rights"—British North America Act, 1867* (30 & 31 Vict. c. 3), s. 92 (10), (13).]—The Act of Parliament of Canada, 4 Edw. 7, c. 31—which prohibits through railway companies which are within the jurisdiction of the Dominion Parliament from contracting out of their liability to pay damages for personal injuries to their servants—is an Act ancillary to railway legislation, and as such within the competency of the Dominion Parliament, though it may affect "civil rights in the province," which by sect. 92 (13) of the Act of 1867, are left to the exclusive jurisdiction of the Provincial Legislature.

THE GRAND TRUNK RY. CO. OF CANADA *v.* THE [ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, [1907] A. C. 65; 76 L. J. P. C. 23; 95 L. T. 631; 23 T. L. R. 40—P. C.]

105. *Legislative Power—Railways—Level Crossing in Town—Protection of Street—*

*Apportionment of Expenses—"Person Interested"—Railway Act, 1888 (Canada) (51 Vict. c. 29), ss. 187, 188—British North America Act, 1867* (30 & 31 Vict. c. 3), ss. 91 (29), 92 (8), (10) (a), 13.]—A railway connecting one province with another crossed the street of a town by a level crossing. The Railway Committee, acting under sects. 187 and 188 of the Dominion Railway Act, 1888, directed that the railway company should maintain gates and watchmen at the level crossing, and that the cost thereof should be borne in equal proportions by the railway company and the corporation of the town. The corporation having objected to pay their proportion.

HELD—that sects. 187 and 188 of the Railway Act, 1888, were not *ultra vires* the Dominion Parliament; that the corporation of the town were "persons interested" within the meaning of sect. 188 of that Act, and that therefore the order of the Railway Committee was within their jurisdiction.

THE CORPORATION OF THE CITY OF TORONTO *v.* [THE CANADIAN PACIFIC RY. CO., (1907) 24 T. L. R. 103—P. C.]

106. *Mines and Minerals—Railway—Land Subsidy—Reservation of Mines and Minerals—Dominion Lands Act (Revised Statute of Canada, 1886 c. 54), ss. 29, 32, 47, 48, 90—Railway Land Subsidies Act, 1890* (53 Vict. c. 4), s. 2.]—Lands granted by the Crown as a subsidy towards the construction of a railway under 53 Vict. c. 4, are not subject to the Dominion Lands Act, and the regulations of 1889, and where there is no express reservation of mines and minerals in the grant, the mines and minerals, except gold and silver, pass under the grant.

Decision of the Supreme Court of Canada (33 Can. S. C. R. 673) reversed.

CALGARY AND EDMONTON RAILWAY CO. AND [ANOTHER *v.* THE KING, [1904] A. C. 765, 73 L. J. P. C. 110; 91 L. T. 301; 20 T. L. R. 770—P. C.]

107. *Mining Law and Regulations—"Placer" Miner—Renewal of Grant—Right to—Effect of—Right of Government to impose a Royalty—Dominion Lands Act, 1886* (R. S., c. 54), s. 47—*Mining Regulations, 1889*, s. 17.]—A person holding a grant for placer mining is not in the same position as the holder of a quartz mining grant, and is not entitled, as of right, to a renewal of his grant.

If a placer miner obtains a renewal of his grant before the expiration of its currency, he holds under his new grant, not in continuation of, but in substitution for, his original grant; and, therefore, his new grant is subject to all regulations in force at the date when it came into operation.

The Governor in Council has power to make a regulation requiring placer miners to pay a percentage on their output. Such a royalty is not a tax, but a reservation by the owner out of his grant.

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Decision of Supreme Court (32 Can. S. C. R. 586) affirmed

CHAPPELLE v. REGEN, CARMACK v. REGEN; [TWEED v. REGEN, [1904] A. C. 127, 73 L. J. P. C. 18, 89 L. T. 513; 20 T. L. R. 71—P. C.]

108. *Patent—Canadian Patent and British Patent for same Invention—Expiry of British Patent—Expiry of Canadian Patent—“If a Foreign Patent exists”—Canadian Patent Act—Revised Statutes of Canada, c. 61—Canadian Patent Act (55 & 56 Vict. c. 24), s. 1.*—On the 1st of March, 1892, an American obtained a patent in the United States for “improvements in boiler and other furnaces.” On the same day he applied in Canada for a Canadian patent and in England for a British patent for the same invention.

On the 12th of July, 1892, the British patent was granted for fourteen years from the 1st of March, 1892.

On the 15th of October, 1892, the Canadian patent was granted for eighteen years from the 15th of October, 1892.

On the 1st of March, 1897, the British patent expired, the fees necessary for keeping it subsisting not having been paid.

HELD—that a British patent was a foreign patent within the meaning of sect. 8 of the Canadian Patent Act, that as soon as the British patent expired, the Canadian patent, if then existing, expired also, as the meaning of the section was that there was no limit as to time, except that the foreign patent must exist and expire after the Canadian patent had been granted and before it had ceased from any other cause.

DOMINION COTTON MILLS CO., LD. v. GENERAL [ENGINEERING CO. OF ONTARIO, LD. [1902] A. C. 570, 71 L. J. P. C. 119; 87 L. T. 186, 18 T. L. R. 766, 19 R. P. C. 521—P. C.]

109. *Patent—Combination—Material Part—Infringement—Hose Couplers—Canadian Patent Act (R. S. Can. c. 61), s. 13.*—There are three ways in which a patent for an apparatus may be infringed: (1) by taking the whole instrument from beginning to end, (2) by taking a certain number of its parts, in which case it is a question of fact whether the substance has been taken with only a colourable alteration; (3) by taking a part, or parts, which have been claimed by the patentee as a separate head of invention.

In considering whether the substance of an invention has been taken the state of previous knowledge is important, for, if the merit of the invention consisted in the idea or principle, a machine based on the same idea or principle might well be an infringement, although the detailed means of carrying it into effect be different: *secus*, if the idea be old, and the merit of the invention be the particular means employed.

Decision of Court of King's Bench (31 Quebec L. R. 103) affirmed.

CONSOLIDATED CAR HEATING CO. v. CAME, [1903] A. C. 509, 72 L. J. P. C. 110; 89 L. T. 224, 19 T. L. R. 692—P. C.]

110. *Practice—New Trial—Negligence—Injury caused by Explosion—Suitability of Machinery—Evidence for Jury—New Trial—Functions of Court of Appeal*—A workman in a cartridge factory was injured by an explosion. A jury awarded him damages, finding “neglect” on the part of the employers “to supply suitable machinery,” and “to take proper precautions to prevent an explosion,” they also found that the plaintiff’s injury was “not in any way caused by his own fault, neglect, or negligence.” The Court of Review and Court of King’s Bench refused to interfere with the verdict, but the Supreme Court of Canada set it aside.

HELD—that on such an appeal to the Supreme Court the duty of that Court is not to re-try the question, but is similar to that of the English Court of Appeal; that a verdict must be allowed to stand, if it be such as a jury of reasonable men might find on the evidence before them; and that, in the present case, there was ample, if not conclusive, evidence to support the verdict.

MCARTHUR v. DOMINION CARTRIDGE CO., [1905] A. C. 72; 74 L. J. P. C. 30; 53 W. R. 305; 91 L. T. 698, 21 T. L. R. 47—P. C.]

111. *Practice—Rule of Judicial Committee of Privy Council—Concurred Judgments in Courts Below—New Point—Avoidance of Gift made by Testator in his Lifetime—Civil Code (art. 762).*—It is not the practice of the Privy Council to disturb a judgment on a question of fact where the Courts below have unanimously agreed in their conclusion on the evidence, except where it is plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered. It is a rule of practice at the Board that a new point will not be entertained by their Lordships which might have been met by evidence in the Courts below.

By art. 762 of the Civil Code, gifts purporting to be *inter vivos* are void as presumed to be made in contemplation of death when they are made during the supposed mortal illness of the donor, whether it be followed or not by his death, unless circumstances tend to render them valid. There was no allegation in the pleadings nor evidence that the gifts made during the supposed mortal illness of the donor—which of course means during an illness of the donor which was supposed by those about him, and believed by himself, to be mortal in its character—that was likely to result in his death. It was contended that art. 762 applied to the gifts which were made by the testator to the respondent during his lifetime.

HELD—that the point could not be entertained by their Lordships, as there were

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neither the pleadings nor facts before them which would entitle them to do so.

ARCHAMBAULT v. ARCHAMBAULT, [1902] A. C. 575; [71 L. J. P. C. 131, 87 L. T. 404—P. C.]

112. *Railway—Canada Railway Act* (51 Vict. c. 29), s. 262, sub-ss. 3, 4—*Construction—Railway Committee of Privy Council of Canada.*—The Dominion Railway Act (51 Vict. c. 29), s. 262, sub-ss. 3, 4, imposed upon the Grand Trunk Railway Company the duty of filling or packing frogs and other spaces. The Railway Committee of the Privy Council of Canada had ordered, under statutory authority, that the company should be at liberty to leave out the packing or filling of frogs and other spaces from December to April in each year.

Held—that the committee had no power to make the order, as the power of the committee to dispense with filling had reference only to the filling specifically mentioned in the Act, and did not apply to the case in question, and that such an extension was not authorised by the ordinary grammatical construction of the sub-sections, nor made imperative by any context or provision to enlarge the scope of the proviso.

GRAND TRUNK RAILWAY COMPANY OF CANADA v. [WASHINGTON, [1899] A. C. 275; 68 L. J. P. C. 37; 80 L. T. 301—P. C.]

113. *Railway—Mortgage—Charge on Land and Railway—Power of Sale*—46 Vict. c. 24, ss. 14, 15, 16; 47 Vict. c. 60; 51 Vict. c. 29.]—A railway which is subject to the legislation of the Dominion of Canada can be sold in a suit by trustees for bondholders to enforce a mortgage on the railway company's railway, lands, and franchises.

*Semble*, a railway which is subject exclusively to the law of the Province of Ontario cannot be sold in a suit to enforce such a mortgage.

Decision of the Court of Appeal for Ontario (8 Ont. L. R. 342) affirmed.

THE CENTRAL ONTARIO RY. v. THE TRUSTS AND [GUARANTEE CO., LTD., [1905] A. C. 576; 74 L. J. P. C. 116; 93 L. T. 317; 21 T. L. R. 732—P. C.]

114. *Revenue—Customs Act, 1886* (49 Vict. c. 32), ss. 25, 31, 34, 150—*Customs Tariff Act, 1894* (57 & 58 Vict. c. 23), s. 4—*Goods imported.*—Goods are "imported into Canada" within the meaning of sect. 4 of the Customs Tariff Act, 1894, when they are landed and delivered to the importer or to his order, or when they are taken out of the warehouse, if they are placed in bond, not when the vessel enters a port of call on her way to her ultimate destination.

Judgment of the Court below affirmed.

CANADA SUGAR REFINING CO., LTD. v. THE [QUEEN, [1898] A. C. 735; 67 L. J. P. C. 126; 79 L. T. 146; 14 T. L. R. 545—P. C.]

115. *Revenue—Customs Duty—Foreign*

*Ship Imported into Canada—Duty on when Registered—Ultra vires—Customs Tariff Act, 1897* (60 & 61 Vict. c. 16), ss. 3, 4, *Sched. A., item 409.*—A foreign built ship is subject to customs duty if imported into Canada upon "application for Canadian Register," i.e., upon "application for British Register in Canada."

The terms of the Customs Tariff Act, 1897, which impose such duty, are not *ultra vires* as conflicting with the provisions of the Merchant Shipping Act, 1894.

Decision of the Supreme Court of Canada (32 Can. S. C. R. 277) affirmed.

ALGOMA CENTRAL RY. CO. v. THE KING, [1903] [A. C. 478; 72 L. J. P. C. 108; 89 L. T. 109; 19 T. L. R. 623; 9 Asp. M. C. 431—P. C.]

116. *Rights of Dominion and Provinces—British North America Act, 1867* (30 Vict. c. 3), ss. 91, 92, 108, *Sched. 3—Rivers and Lakes—Public Harbours—Fisheries.*—There is no presumption that because legislative jurisdiction in respect of particular subject-matters was vested in the Dominion Parliament by the British North America Act, 1867, proprietary rights were thereby transferred to it.

Rivers remain vested in the Provinces, and only improvements in rivers and lakes are transferred to the Dominion of Canada.

Public harbours are vested in the Dominion, but it does not follow that, because a foreshore on the margin of a harbour is Crown Property it necessarily forms part of the harbour.

Sect. 91 of the British North America Act, 1867, does not convey to the Dominion of Canada any proprietary rights in relation to fisheries, but the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, though proprietary rights may be thereby affected; but it does not follow that the legislation of a provincial legislature is incompetent merely because it may have relation to fisheries.

The Dominion Parliament has jurisdiction to pass an Act dealing with "works constructed in or over navigable waters."

In matters as to which the Dominion Parliament has exclusive power to legislate, provincial legislation cannot be held valid till overridden by Dominion legislation.

The Judicial Committee will not deal with questions affecting the rights of persons not parties to the litigation.

ATTORNEY-GENERAL FOR CANADA v. ATTORNEYS-GENERAL FOR ONTARIO, QUEBEC, AND NOVA SCOTIA, [1898] A. C. 700; 67 L. J. P. C. 90; 78 L. T. 697—P. C.]

117. *Revenue—Succession Duties—Death of Person in Ontario—Certain Movable Property in Quebec—Quebec Succession Duty Act, 1892.*—A person, who was domiciled in Ontario, and who died there, had at the time of his death (*inter alia*) the following property:—(a) a mortgage debt secured on



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land in Montreal, (b) shares in a bank, whose head office is in Montreal; (c) shares in the Montreal register of a bank, whose head office is at Toronto, but which has separate registers at Toronto and Montreal for different portions of its capital. Quebec claimed succession duty on this property under the following words in the Quebec Succession Duty Acts: 1191 B., "All transmissions owing to death of the property in . . . movable and immovable property in the province. . ."

**HELD**—that the property was not liable to duty. The taxes imposed by the Acts on movable property are imposed only on property which the successor claims under or by virtue of Quebec law; whereas the property now in question had devolved under the law of Ontario.

*Wallace v. A.-G.* ((1865) L. R. 1 Ch. 1; 35 L. J. Ch. 124; 13 L. T. 480) approved.

Decision of Court of King's Bench for Lower Canada affirmed.

*LAMBE v. MANUEL*, [1903] A. C. 68; 72 L. J. [P. C. 17; 67 L. T. 460, 19 T. L. R. 68—P. C.

118. *Telephone Company—Rights of—Incorporated by Dominion Act—Undertaking extending to more than one Province—Act of Provincial Legislature—Effect of—British North America Act, 1867* (30 & 31 Vict. c. 3), ss. 91, 92—*Dominion Act, 1880* (43 Vict. c. 67)—*Ontario Act, 1882* (45 Vict. c. 71).—The defendant company was incorporated by the Dominion Act of 1880, which gave it power to carry its wires "along, across or under any public highways, streets," &c.

**HELD**—(1) that the undertaking of the company was one of those expressly excepted by sect. 92 (10) of the British North America Act, 1867, from the "local works and undertakings" assigned to provincial legislatures, such exception including "lines of . . . telegraphs and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province"; (2) that, therefore, no provincial legislature could interfere with its operations, and it could open the streets of Toronto without leave from the corporation.

*R. v. Mohr* ((1881) 7 Quebec L. R. 183) overruled.

In consequence of the last mentioned decision the company had assented to the passing of the Provincial Act of 1882, empowering them to open such streets on obtaining leave from the corporation.

**HELD**—(3) that such Act was *ultra vires* the Provincial Legislators, and could not be validated or made operative by the company's assent; (4) that an amending Dominion Act of 1882 (45 Vict. c. 95) did not render the consent of the corporation necessary to opening up streets; and (5) that, therefore, the company might still open the streets without leave.

**HELD ALSO**—(6) that the company's undertaking could not be regarded as divided into a local business within the control of the provincial legislature, and a national business under the control of the Dominion Parliament

*TORONTO CORPORATION v. BELL TELEPHONE CO.*, [OF CANADA, [1905] A. C. 52; 74 L. J. P. C. 22; 91 L. T. 700; 21 T. L. R. 45—P. C.

119. *Temperance Act—Search Warrant before Prosecution—Certiorari—Special leave to Appeal—Canada Temperance Act, 1888* (51 Vict. c. 34), s. 10].—A search warrant was issued and executed under the Canada Temperance Act, 1888; and a quantity of intoxicating liquor was found upon the hotel premises searched. The appellant was convicted in respect thereof and an order made for the destruction of the liquor. The Supreme Court refused a *certiorari* to bring up and quash the record of the search and the destruction order.

**HELD**—that the decision was plainly correct, and that special leave to appeal should be refused.

*TOWNSEND v. COX*, [1907] A. C. 514; 76 [L. J. P. C. 98—P. C.

120. *Temperance Act—Variance in the Complaint—Numerous Convictions—Offences included in One Complaint—Maximum of Penalty—Canada Temperance Act, 1864* (27 & 28 Vict. c. 18), ss. 15, 17].—Sect. 17 of the Canada Temperance Act, 1864, provides that two or more offences by the same party may be included in one complaint provided the time and place of each offence are stated; but whatever may be the number of the offences included in one complaint the maximum of penalty imposable for them all shall in no case exceed \$100. The Superior Court was of opinion that the legislature thought a penalty of \$100 was sufficient punishment for all offences committed by the respondent within the three months previous to the prosecution prescribed by sect. 15.

**HELD**—that the purpose of sect. 17 appeared to be to prevent a prosecution under the Act, where only one offence is charged, failing by reason of the evidence not being sufficient to prove it, or in consequence of a variance in the complaint from the evidence of the time when, or the person to whom, the intoxicating liquor was sold, if more than one offence had been committed, and the limit of the penalty to \$100 indirectly restrained the use of that power. There was no reason for thinking that "may" was to be imperative, and the same as "shall."

*WENTWORTH v. MATHIEU*, [1900] A. C. 212; 69 [L. J. P. C. 11; 82 L. T. 161; 16 T. L. R. 223—P. C.

(b) *British Columbia.*

121. *Local Government—Corporation—Bridges—Adoption by taking over and managing—By-law—Liability of Corporation for Accident to Bridge—British Columbia*

## Canada—Continued.

*Municipal Act*, 1892 (55 Vict. c. 33).—The corporation of the city of Victoria under the British Columbia Municipal Act, 55 Vict. c. 33, which prescribed no particular form of adoption, took into its hands and managed a bridge since 1892.

HELD—that the statute was satisfied, and that it was to be assumed from that condition of things that all those things were legally done. If illegality be raised, the burden of proof is upon those persons who seek to show that these acts were illegal and not justified by the course of law and administration in which they were engaged. It would be for the corporation itself to show that that, which was *prima facie* their act, was not their act, by every species of evidence by which their authority could be negatived.

In an action to recover damages from the corporation by reason of an accident, the nature of which was that, while a tramcar was passing over a bridge under the care and control of the corporation, the bridge broke down and the husband of the plaintiff was drowned, the proximate cause of the accident was found by the jury to be the decay and an injury to a particular beam by an act of an officer of the corporation. The question whether, if the original construction of the bridge was such, and the pressure placed upon it by the tramway company was so great, that, under any circumstances, independently of decay or misuse of the beam, the weight placed upon it would have caused the destruction of the bridge, not having been presented to the jury, could not be raised after the trial.

VICTORIA CORPORATION *v.* PATTERSON, [1899]  
[A. C. 615, 68 L. J. P. C. 128; 81 L. T. 270—P. C.]

122. *Mineral Rights—Power of Provincial Legislature—Vancouver Island Settlers' Rights Act*, 1904, s. 3].—The Vancouver Island Settlers' Rights Act, 1904, was not *ultra vires* the Legislature of British Columbia. The effect of sect. 3 of that Act in granting the fee simple of land to any settler within the railway belt on certain conditions is to pass the mines and minerals as well as surface rights.

M'GREGOR *v.* ESQUIMALT AND NANAIMO RY. CO., [1907] A. C. 462; 76 L. J. P. C. 85; 97 L. T. 223—P. C.]

123 *Revenue—Income Tax—Meaning of word "Income"—Assessment Act*, 1901 (1 Edw. 7, c. 56), s. 3].—The word income in sect. 3 of the British Columbia Assessment Act, 1901, includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious.

Therefore, engineers paid not by wages or by salary, but according to a mileage rate calculated on the miles run by their engines, are liable to pay income tax on the excess of their earnings above the statutory limit of \$1,000.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* [OSTRUM, [1904] A. C. 144; 73 L. J. P. C. 11; 89 L. T. 509; 20 T. L. R. 64—P. C.]

124. *Waterworks—"Unrecorded Water"—Esquimalt Waterworks Acts*, 1885 (48 Vict., c. 30), s. 10, and 1892 (55 Vict. c. 51), ss. 3, 10—*Water Clauses Consolidation Act*, 1897 (60 Vict., c. 45), ss. 2, 40].—Certain water from Goldstein River and Niagara Creek held not to be "unrecorded water" within the meaning of sect. 40 of the Water Clauses Consolidation Act, 1897, so as to authorise the respondent municipality to appropriate it as a source of water supply for the city, the same having been already "ascertained, set out, or appropriated" by the appellants under sect. 10 of the Esquimalt Waterworks Act, 1885, and sect. 3 of the Esquimalt Waterworks Act, 1892, for the purpose of fulfilling the obligation imposed upon them by sect. 10 of the latter Act of supplying water, if required to do so, to the respondents.

THE ESQUIMALT WATERWORKS CO. *v.* THE CORPORATION OF THE CITY OF VICTORIA, [1907] A. C. 499; 76 L. J. P. C. 75, 97 L. T. 492; 23 T. L. R. 762—P. C.]

## (c) Lower Canada.

125. *Appeal from Judgment on Petition of Right—Contract—Interpretation*.—An appeal lies to Her Majesty from the decision of the Court of Queen's Bench on a petition of right.

A contract purported to be made between Her Majesty the Queen, represented by the provincial secretary, and the respondent Demers. It did not purport to contain any covenant or obligation of any sort on the part of the Crown. By the contract the respondent undertook to print certain public documents at certain specified rates.

HELD—that for all work given to the respondent on the footing of the contract, the Government was undoubtedly bound to pay according to the agreed tariff. But that the contract imposed no obligation on the Crown to pay the respondent for work not given to him for execution.

REG. *v.* DEMERS, [1900] A. C. 103, 81 L. T. 795; 69 L. J. P. C. 5—P. C.]

126. *Builder's Privilege—Hypothecary Privilege—Civil Code of Lower Canada, arts. 2013 G. and 2103 L—Act to amend the Civil Code, &c.* (59 Vict. c. 42).—In the distribution of the estate of one L., an insolvent proprietor, the appellants, the Bank of Hochelaga, in right of a firm of builders and suppliers of materials, claimed priority over the insolvent's general creditors. The bank did not comply with the formalities required by the articles of the Civil Code as amended by the Act of 59 Vict.

HELD—that whatever the reason for non-compliance may have been, art. 2103 L., introduced by the Act 59 Vict., made it perfectly clear that the hypothecary privilege

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conferred on suppliers of materials, only arises on notice being given to the proprietor in virtue of Art. 2013 G. and registered according to Art 2103. It lapses unless the prescribed legal proceedings are taken within three months from the date of the notice. The claim of the Bank therefore failed.

**LA BANQUE D'HOCHELAGA v STEVENSON**, [1900] A. C. 600; 69 L. J. P. C. 139, 83 L. T. 235—P. C.

**127. Company—Resolution of Directors—No Quorum—Validity—Powers of Company—Construction of Statute**—1 Edw. 7, c. 67.]—A company acting under their statute (1 Edw. 7, c. 67) purchased land. A resolution of the Board had authorised the completion of the purchase subject to an option of reconveying within a specified time.

**HELD**—(1) upon the construction of the statute that the purchase was *intra vires*, the company having power to acquire for the purpose of its business real or immovable estate up to a certain value, except in the judicial district of Quebec, and being the sole judge (so long as it acted *bona fide*) of what land it required,

(2) that the company, having supplied to the vendor a copy of the resolution as being a valid one, could not now say that it was not passed by a proper quorum; and

(3) that, the specified time having elapsed, the purchase became absolute.

**MONTREAL AND ST. LAWRENCE LIGHT RY. CO. v. [ROBERT]**, [1906] A. C. 196; 75 L. J. P. C. 33, 94 L. T. 229; 13 Manson, 184—P. C.

**128. Contract—Gifts—Land purchased by Husband in Names of his Wife and Daughter—Payment by Husband consistent with Husband's Ownership or Otherwise.**]—The law of Quebec leaves parties contemplating marriage free to make what contracts they think fit, and as they may make contracts in Quebec they may equally bring into Quebec ready-made contracts and leave them untouched. As regards gifts between husband and wife, the parties are not left to freedom of contract. They are positively prohibited from making such gifts. The appellant sued his daughter for estate moneys, alleging that lands were purchased and paid for by his wife and daughter, that on the death of his wife his daughter succeeded to the purchases by the wife, and that, having regard to the circumstances of the family, the enjoyment of the properties had been consistent with the ownership of the ostensible purchasers. He showed that in point of fact all payments for those properties were made by means of his cheques, given either as an individual or described as manager of the business which he and his wife created.

**HELD**—that the appellant had not proved that he was the sole owner of the money so spent, for though consistent with his being the owner, it was also consistent with the money belonging to his wife, or that the

money was earned by the two, that the payments made were a mode of securing to her a share in the joint earnings, as their business or branches of business were jointly worked, and that the appellant had failed to establish his claim.

**EDDY v EDDY**, [1900] A. C. 299—P. C.

**129. Credit—Terminated by Insolvency of Debtor—Rule Applies to Purchase of Land—Civil Code of Lower Canada, Art. 1092.**]—The respondents sold lands to the appellants, on terms that the balance of the purchase-money together with interest thereon should be paid in ten years. It was found as a fact that the appellant company had become insolvent, and had diminished the value of the security.

**HELD**—that Art. 1092 of the Civil Code applied, and that the respondents were entitled to a declaration that their claim was a charge upon the land, and to have the land sold by auction in default of their claim being satisfied.

Judgment of the Court of King's Bench for the Province of Quebec (appeal side) affirmed.

**KENSINGTON LAND CO. AND OTHERS v. CANADA [INDUSTRIAL CO.]**, [1903] A. C. 213; 72 L. J. P. C. 66; 83 L. T. 711—P. C.

**130. Debt—Sale of a Debt—Civil Code of Lower Canada, Arts. 1570, 1571—Signification thereof to Debtor—What a Sufficient Signification**]—Art. 1571 of the Civil Code of Lower Canada, which together with Art. 1570 deals with the sale of debts, declares that "the buyer has no possession available against third persons until signification of the act of sale has been made, and a copy of it delivered to the debtor. . . ."

The notification referred to need not be by a notarial act, and the institution of an action against the debtor to enforce the claim is of itself a sufficient signification of the act of sale, further, there is nothing in the Code requiring the signification and the delivery of a copy to be made at the same time.

Moreover, *quære*, whether the debtor is a "third person" within the meaning of the Article in question.

**MURPHY v. BURY** (1895) 24 Can. S. C. 668) disapproved.

Decision of the majority of the Court of King's Bench for the Province of Quebec reversed.

**BANK OF TORONTO v. ST. LAWRENCE FIRE [INSURANCE CO.]**, [1903] A. C. 59; 72 L. J. P. C. 14; 87 L. T. 462; 19 T. L. R. 69—P. C.

**131. Fishery Rights—Gulf of St. Lawrence—Whether included in a Deed of Grant.**]

**HELD**—that upon its true construction an old grant by the King of France of a seigniorie and fief on the Gulf of St. Lawrence was not sufficiently definite to give to

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the grantee exclusive right to fish for salmon on the shore of the land included in the grant.

CABOT v. ATTORNEY-GENERAL FOR QUEBEC, [1907]  
[A. C. 511; 23 T. L. R. 762—P. C.]

132. *Husband and Wife — Wife Raising Money for Husband by Mortgage of her Separate Property—Mortgage Invalidated by Art. 1301 of the Lower Canada Civil Code—Burden of Proof as to the Purpose for which Money Required.*—By Art. 1301 of the Civil Code of Lower Canada "a wife cannot bind herself either with or for her husband otherwise than as *en qualité de commune*, any such obligation contracted by her in any other quality is void and of no effect."

Upon the true construction of this article, if a wife mortgages her separate property to secure a loan, the creditor must at his peril see that the money is in fact used for her purposes only; the burden of proof is on him; and, if he fails to discharge such burden, he cannot recover the money lent from the wife, and the mortgage itself is also invalidated.

TRUST AND LOAN CO. OF CANADA v. GAUTHIER  
[AND OTHERS, [1904] A. C. 94; 73 L. J. P. C. 5; 89 L. T. 453, 20 T. L. R. 15—P. C.]

133. *Insolvent Trader—Abandonment in favour of Creditors—Preferential Right of Landlord—Retrospective Effect of Legislation—Civil Code, Art. 2005—61 Vict. (Quebec), c. 46.*—A lease of certain property was granted to a trader who afterwards became insolvent, and who made a judicial abandonment of his property for the benefit of his creditors under Art. 853 of the Code of Civil Procedure of Quebec. After the date of the lease and before the abandonment for the benefit of the creditors, Art. 2005 of the Civil Code was amended by 61 Vict. (Quebec), c. 46, giving the landlord a preference over the other creditors for two years' rent only.

HELD—that the amended Article applied to judicial abandonments occurring after it came into force, though the lease to the insolvent trader was before that date.

Decision of the Court of King's Bench for Quebec (12 Quebec L. R. K. B. 334) reversed.

ROSS v. BEAUDRY AND OTHERS, [1905] A. C. 570;  
[74 L. J. P. C. 106; 93 L. T. 315; 21 T. L. R. 735—P. C.]

134. *Insurance — Life Policy — Insurable Interest — Protector of Deceased — Incontestability on the Lapse of a certain Period—Public Policy or Expediency—Civil Code of Lower Canada, Art. 2590.*—By Art. 2590 of the Civil Code of Lower Canada it is enacted in regard to life assurance: "The insured must have an insurable interest in the life upon which the assurance is effected."

HELD—that the only insurable interest which the appellant had in the life of A. P. as stated in the proposal for insurance, was

that the appellant was the protector of A. P. whenever he stood in need of protection, which, if true, was an interest the very reverse of what is required by Art. 2590 of the Code.

HELD ALSO—that the clause of the policy which provided that the instrument should become "incontestable" on the lapse of a period of a year or upwards, during which premiums are regularly paid, furnished no good answer to the objection founded on the terms of the Code, as the rule of the Code was one which rested upon general principles of public policy or expediency, and could not be defeated by the private convention of the parties.

ANOTIL v. MANUFACTURERS' LIFE INSURANCE CO  
[1899] A. C. 604; 68 L. J. P. C. 123; 81 L. T. 279—P. C.]

135. *Local Government—Electric Lighting—Licence by Resolution of City Council—Exclusive Privilege by Bye-law of City Council—Provincial Legislature—Quebec Act (58 Vict. c. 69).*—The respondent company in 1887, under a resolution of the City Council of Hull, had established their system of electric lighting under such restrictions and regulations as were observed in Ottawa, and subject to the instructions of the Committee on streets and improvements as to the places where the poles should be erected.

In 1895 the appellant company was incorporated by an Act of the Legislature of Quebec (58 Vict. c. 69) for the purpose of working under a bye-law of the Hull City Council, an exclusive privilege during thirty-five years to establish in the city of Hull V.'s system of lighting and heating by electricity, or by natural gas, or otherwise.

The appellant company, finding that the operations of the respondent company interfered with their profits, required them to remove their appliances, and to desist from supplying electric light by means of their system, and commenced an action against them to obtain a revocation of the licence granted to them.

HELD—that the scheme in favour of which the bye-law was passed was a purely local undertaking, and as such it came within the exclusive jurisdiction of the provincial legislature, and not less so because in such cases it was usual, and probably essential for the success of the undertaking, to exclude for a limited time the competition of rival traders; that nothing more was given by the resolution of 1887 than a permission in its nature revocable; and that it was not intended that the licence granted by the resolution of 1887 should be revoked by the bye-law itself; and that the appellant company could not prevent the respondent company from supplying light under the permission accorded them in 1887.

HULL ELECTRIC CO. v. OTTAWA ELECTRIC CO.,  
[1902] A. C. 237; 71 L. J. P. C. 58; 86 L. T. 208; 18 T. L. R. 344—P. C.]

## Canada—Continued.

136. *Local Government—Municipal Code of Quebec, Art. 712, sub-s. 3—Construction—Property of a Seminary—Taxation—Exemption.*—Where the working of a farm belonging to a seminary was not for any other purpose than that of acquiring a revenue therefrom, and it was shown that in fact a clear profit was derived from its cultivation, it was none the less so because the ecclesiastics and pupils of the seminary were in the habit, after the crops had been harvested, of walking for purposes of exercise over the fields composing the farm.

HELD—not to fall within sub-s. 3 of Art. 712 of the Municipal Code of Quebec, by which property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," was exempt from taxation, and that the farm was taxable.

LE SÉMINAIRE DE QUEBEC v. LA CORPORATION DE [LIMOULOU, [1889] A. C. 288; 68 L. J. P. C. 34, 80 L. T. 321—P. C.

137. *Local Government—Municipal Corporation—By-law—Guarantee of Debenture of Company—Approval by Ratepayers and Lieutenant-Governor—Town Corporations Act (Revised Statutes of Quebec, 1888, Tit. XI, c. 1 (Arts. 4, 404; 4, 406; 4, 531))—Stradacona Water, Light, Powers Companies Act, 1897 (60 Vict. c. 78, Quebec), ss. 7 (c), 27.]—A by-law of a municipal corporation under the Town Corporations Act and the Stradacona, etc., Companies Act, 1897, agreeing to guarantee the debentures of the company, is not valid until it has been approved by the ratepayers and by the Lieutenant-Governor in Council.*

Decision of the Supreme Court of Canada (33 Can. S. C. R. 50) affirmed.

HANSON AND ANOTHER v. THE CORPORATION OF [THE VILLAGE OF GRANDMÈRE, [1904] A. C. 789; 73 L. J. P. C. 105, 91 L. T. 302; 20 T. L. R. 772—P. C.

138. *Local Government—Municipal Corporation—Street Widening—Expenses—One-half to be Assessed upon the Frontagers—Roll of Assessment—Time from which Prescription Runs—Petition for Annulment of Assessment—Interruption of Prescription—Quebec Act (52 Vict. c. 79), ss. 120, 144, 231, 241, Civil Code, Articles 2227, 2232, 2236.]—The City of Montreal were desirous of widening a street, and thereupon Commissioners, appointed in accordance with the City Charter Act (52 Vict. c. 79), in February, 1895, deposited in the office of the city treasurer a special roll of assessment, whereby one-half of the cost of the improvement was assessed on the owners of the land and buildings situated on each side of the street. In August, 1895, a number of the owners filed, in accordance with the Act, a petition praying that the roll of assessment should be annulled as being void and of no effect. In June, 1901, judgment was given*

for the city upon the petition. In September, 1902, some of the lands charged with the payment of the assessment were seized by the sheriff for the purpose of levying the amount due.

HELD—(1) that by sect. 231 of the Act, the assessment became due and recoverable when the roll of assessment was filed, and that therefore the period of prescription under sect. 120 of the Act, namely, three years, ran from that date; (2) that the right to recover the amount of the assessment was not interrupted or suspended by the pendency of the proceedings for annulment, and therefore the claim to recover the amount of the assessment was bared, (3) that there had been no acknowledgment of liability; and (4) that the only effect of sect. 144 of the Act is to fix a time within which an assessment may be attacked, and to make it unassailable after the expiration of that time, and does not affect the date on which the assessment comes into force, or render the debt conditional.

Decision of the Supreme Court of Canada (35 Can. S. C. R. 223) affirmed.

THE CITY OF MONTREAL v. CANTIN AND OTHERS, [1906] A. C. 241; 75 L. J. P. C. 41; 94 L. T. 357; 22 T. L. R. 364—P. C.

139. *Practice—Leave to Amend—Interfering with Discretion of Judge.*—A liquidator had brought an action in his own name, instead of in that of the company (as he ought to have done), and judgment had on that ground been given for the defendants. Leave to amend had been asked and refused.

HELD—that leave to amend should have been given, and that the Court did not consider that they were interfering with the judge's discretion, for he had been guided by an erroneous interpretation of the code.

Decision of Court of King's Bench for Quebec (appeal side) reversed.

KENT AND OTHERS v. LA COMMUNAUTÉ DES [SEURS DE CHARITÉ ETC., [1903] A. C. 220; 72 L. J. P. C. 60; 88 L. T. 275; 19 T. L. R. 345—P. C.

140. *Railway—Negligence—Death of Employé of Railway Company—Member of Railway Provident Society—"Indemnity or Satisfaction"—Right of Widow to Sue—Civil Code of Lower Canada, Art. 1056—Dominion Railway Act (51 Vict. c. 29), s. 243.]—The right of action of the widow and relatives of a deceased under Art. 1056 of the Civil Code of Lower Canada is an independent and personal right of action, and not, as in the Fatal Accidents Act, 1846, one conferred on the representatives of the deceased. A deceased workman, who was killed by the negligence of a railway company in whose employment he was, was a member of the company's insurance and provident society—which was formed to provide sick benefits to members and insurance on death, and one of whose bye-laws provided that, in consideration of the subscription of the com-*

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pany to the society no member or his representatives should have any claim against the company for compensation on account of injury or death from accident.

HELD—that there had been received no "indemnity or satisfaction" within Art. 1056 of the Civil Code, first, because the company did not contribute to the insurance fund, but only to the sick fund; and secondly, because the payment received from the insurance fund was independent of the negligence of the company, and would equally have been made if the deceased had died a natural death.

*Robinson v. Canadian Pacific Railway Company*, ([1892] A. C. 481, 61 L. J. P. C. 79, 67 L. T. 505—P. C.) followed. *R. v. Gronier* ([1899] 30 Can. Supreme Court, 42) overruled. Decision of the Supreme Court of Canada [84 Can. S. C. R. 45] reversed.

*MILLER v. THE GRAND TRUNK RAILWAY COMPANY* [OF CANADA, [1906] A. C. 187, 75 L. J. P. C. 45, 94 L. T. 231, 22 T. L. R. 297—P. C.]

141. *Railway—Statutory Powers—Injury caused by Ordinary and Normal Use of Railway—Sparks from Engine—Negligence—Responsibility in Damages—Civil Code of Lower Canada, Art. 356—Dominion Railway Act, 1888 (51 Vict. c. 29), ss. 92, 288.*—The ground upon which the immunity of a railway company for injury caused by the normal use of their line is based is that the legislature, which is supreme, has authorised the particular thing so done in the place, and by the means contemplated by the legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code. This permission of course, does not authorise the thing to be done negligently or even unnecessarily to cause damage to others.

A railway company was held to be liable to damages to the extent of \$300 for injuries to the plaintiff's property alleged to be caused, and admitted to have been caused, by sparks from one of their locomotive engines while employed in the ordinary use of its railway. On appeal:

HELD—that as the railway company was authorised by statute to carry on their railway undertaking in the place, and by the means that they did carry it on, it was not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of the railway.

*Geddis v. Proprietors of Bann Reservoir* ((1878), 3 App. Cas. 430, 438); and *Hammer-smith Railway Co. v. Brand* ((1869) L. R. 4 H. L. 171, 215; 38 L. J. Q. B. 265; 18 W. R. 12; 21 L. T. (N.S.) 238) H. L. (E.) followed.

*CANADIAN PACIFIC RAILWAY Co. v. ROY*, [1902] [A. C. 220; 71 L. J. P. C. 51; 50 W. R. 415; 86 L. T. 127; 18 T. L. R. 200—P. C.]

142. *Stockbrokers—Authority—Stock Transactions—Onus of Proof—Admission by*

*Defendant—"Commercial Matters"—Art. 1233 (6), (7), of the Civil Code of Quebec.*—The plaintiffs, stockbrokers, entered into various stock transactions for the defendant, of which some disclosed profits in the defendant's favour, and others, namely, those in Achison's Railway Shares and Canada Cotton Shares, showed a loss; and the plaintiffs sued to recover the balance of their account.

HELD—(1) that the onus was upon the plaintiffs to prove, first, a mandate from the defendant to act for him in the several transactions which they claimed to have carried out on his behalf, and secondly, the due execution of that mandate. (2) That if it was necessary to show commencement of proof in writing so as to satisfy par. (7) of Art. 1233 of the Civil Code of the Province of Quebec, which is as follows:—"Proof may be made by testimony of all facts concerning commercial matters. . . . (7) In cases in which there is a commencement of proof in writing. In all other matters proof must be made by writing or by the oath of the adverse party." That was to be found in the deposition of the respondent, in which, when called on behalf of the appellants, he admitted that the appellants were stockbrokers, and that he employed them as his agents to transact his business, that they bought and sold "something" for him, and that he gave them instructions to do "something" for him on the markets in New York, Montreal and other places. (3) That the transactions in question were "commercial matters" within the provision contained in par. (1) of Art. 1233. (4) That because of the commercial character of the transactions one of the plaintiffs was a competent witness for them under sect. 2 of the Provincial Act (54 Vict. c. 45 (5)), that when a person employs a broker to do business on a Stock Exchange he should, in the absence of anything to show the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

*FORGET v. BAXTER*, [1900] A. C. 467; 69 L. J. [P. C. 101, 82 L. T. 510—P. C.]

143. *Tramways—Clearing Snow from Streets—Duty of Company to Cart away Snow cleared off the Track.*—A tramway company were by their agreement bound to "keep their track free from ice and snow under instructions from the city." This they had recently done by electric sweepers—a modern invention which enabled them by working continuously during snowstorms to keep open the whole track. The result was that a dangerous trench was left down the middle of the street.

HELD—(1) that, in view of the fact that anyone might throw snow from his roof or from the pavement into the street, it could not be suggested that the company must clear away the snow from the street alongside their track; and (2) that the city could not forbid the use of the sweepers, and so

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compel the company to adopt some other method, for the agreement authorised the company to work "in the manner successfully in use elsewhere."

Decision of the Court of King's Bench (11 Quebec L. R. (K. B.) 458) affirmed.

**CITY OF MONTREAL v. MONTREAL STREET RY CO.**, [1903] A. C. 482, 72 L. J. P. C. 119; 89 L. T. 30, 19 T. L. R. 568—P. C.

**144. Tramways—Construction of Contract—Montreal Street Tramways.]**—Upon the true construction of the contract between the Montreal Street Railway Co. and the Montreal Corporation, the company are bound to pay to the corporation a percentage upon earnings from traffic within the city, and not upon earnings from traffic outside the limits of the city.

Decision of Supreme Court of Canada (34 Can. S. C. R. 459) reversed.

**MONTREAL STREET RY. CO. v. MONTREAL CORPORATION**, [1906] A. C. 100; 75 L. J. P. C. 9, 93 L. T. 678, 22 T. L. R. 60—P. C.

**(d) Manitoba.**

**145. Swamp Lands in Manitoba—Transfer thereof to the Province of Manitoba—Date of Actual Transfer—Profits of Lands between Dates of Act and of Transfer—48 & 49 Vict. c. 50 (Canada)—Canadian Revised Statutes, 1886, c. 47, s. 4.]**—By sect. 1 of the Canadian Act (48 & 49 Vict. c. 50), "All Crown lands in Manitoba which may be shown to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the Province."

After an elaborate survey and report, an Order in Council of 1888 declared the lands in a scheduled list to be "vested in Her Majesty for the purposes of the Province of Manitoba."

**HELD**—that the lands vested only as from the date of the Order and not of the Act, and that the profits derived from them in the interval were rightly applied to Canadian purposes.

**ATTORNEY-GENERAL FOR MANITOBA v. ATTORNEY-GENERAL FOR CANADA**, [1904] A. C. 799; 73 L. J. P. C. 100; 91 L. T. 300; 20 T. L. R. 769—P. C.

**(e) Ontario.**

**146. Appeal to Privy Council—Appellable Value—Action for Infringement of Trade-Mark—Passing off Goods—Revised Statutes of Ontario, 1897, c. 48, s. 1.]**—In an action for infringement of a trade-mark and for passing off goods as those of the plaintiffs, the defendant appealed to the Privy Council from the judgment of the Court of Appeal for Ontario. That Court had not allowed the bringing of the appeal to the Privy Council as involving a matter exceeding the value of \$4,000 within sect. 1 of the Revised Statutes of Ontario, 1897, c. 48, but had left the question of the competency of the appeal open.

**HELD**—that the question was one for the Court of Appeal, and that, as that Court had expressed no opinion, the appeal was not competent, and must be dismissed.

**G. W. GILLET & Co., Ld. v. LUMSDEN**, [1905] [A. C. 601, 74 L. J. P. C. 155, 93 L. T. 314; 21 T. L. R. 698—P. C.]

**147. Charity—Land for Ecclesiastical Purposes—"Greek Catholic Church"—Evidence]**

**HELD**—upon the evidence, that the purpose for which land was vested in trustees for building a church was that the church should be a Greek Orthodox Church and not a Greek Church in communion with the Church of Rome.

Decision of the Supreme Court of Canada (37 Can. S. C. R. 177) affirmed

**ZACKLYNSKI AND OTHERS v. POLUSHIE AND [OTHERS]**, (1907) 24 T. L. R. 152—P. C.

**148. False Representation—Evidence of]**—The judicial committee held that on the evidence allegations of fraudulent misrepresentation as to the sale of certain mining claims had not been established.

Decision of Canadian Supreme Court (36 Can. S. C. R. 279) reversed.

**BARRETTE v. LE SYNDICAT LYONNAIS DU KLON-DIRE**, (1907) 23 T. L. R. 532—P. C.

**149. Interest—Sum Due—"Usual for a Jury to Allow It"—Judicature Act, Revised Statutes of Ontario, 1897, c. 51, s. 113.]**—By Ontario law, in cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems fair and equitable that the party in default should make compensation by payment of interest, it is incumbent on the Court, under sect. 113 of the Judicature Act, Revised Statutes of Ontario, 1897, c. 51, to allow interest for such time and at such rate as the Court thinks right.

**THE TORONTO RY. CO. v. TORONTO CORPORATION**, [1906] A. C. 117; 75 L. J. P. C. 36; 93 L. T. 646, 22 T. L. R. 32—P. C.

**150. Limitation of Actions—Unregistered Conveyance—Subsequent Registered Mortgage—Right of Entry—Registry Act (Revised Statutes of Ontario, c. 136), s. 87]**—A lady upon her marriage in 1891 conveyed land to a solicitor to the intent that it might be reconveyed to herself and her husband. The solicitor registered the conveyance to himself, and executed the reconveyance, but did not register it, producing to his client a forged certificate of registration. Subsequently in 1895 the solicitor mortgaged the land, and the mortgage was registered. In 1903 the mortgagee brought an action to enforce his mortgage.

**HELD**—that, as under sect. 87 of the Registry Act (Ontario) the unregistered conveyance to husband and wife was only void as against the subsequent mortgagee who had

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registered his mortgage, and not as against the solicitor, the right of entry did not accrue until the mortgage was registered, and the Statute of Limitations did not begin to run until 1895, and the action was not barred.

Decision of the Supreme Court of Canada (36 Can. S. C. R. 455) reversed.

McVITY AND ANOTHER *v* TRANOUTH AND ANOTHER, (1907) 24 T. L. R. 165—P. C.

151. *Schools—Qualified Teachers—Separate Schools Act* (Revised Statutes of Ontario, 1897, c. 294), s. 36.]—The members of the religious communities known as the "Brothers of the Christian Schools" and "the Grey Nuns," who became members after the passing of the British North America Act, 1867, and who have not received certificates of qualification to teach in the public elementary schools of Ontario, are not to be considered as qualified teachers for the purposes of the Separate Schools Act of Ontario.

BROTHERS OF THE CHRISTIAN SCHOOLS AND OTHERS *v* THE MINISTER OF EDUCATION OF ONTARIO AND OTHERS, [1907] A. C. 69; 76 L. J. P. C. 22; 95 L. T. 630, 23 T. L. R. 29—P. C.

152. *Street Railway—Agreement with Purchaser—Street Railway Powers within Additions to City—Requirements to lay down Lines in Streets—Failure to Comply—Remedy of Corporation—Routes and Stoppage of Cars*—Neither the City of Toronto Corporation nor the Toronto Railway Company have any street railway powers, under 55 Vict. c. 99 (Ontario) and the agreement scheduled thereto, over streets within new territorial districts added to the city during the term covered by the agreement.

Under conditions 14 and 17 of the agreement, upon failure of the company to establish and lay down new lines and to open the same for traffic, or to extend the tracks and services upon any street or streets as provided in the agreement, the right to grant the privilege to another person or company is the only remedy open to the city: an action for damages will not lie.

Having regard to the company's "exclusive right to operate" the tramways, it is for the company and not for the city engineer, with the approval of the city corporation, to determine what routes shall be adopted by the company; and, subject to condition 39, it is for the company, and not for the city engineer, to determine where cars should be stopped for the purpose of taking up or setting down passengers.

Decision of the Supreme Court of Canada (37 Can. S. C. R. 430) varied.

THE CORPORATION OF THE CITY OF TORONTO *v* THE TORONTO RY. CO.; THE TORONTO RY. CO. *v* THE CORPORATION OF THE CITY OF TORONTO, [1907] A. C. 315; 76 L. J. P. C. 57; 96 L. T. 794; 23 T. L. R. 480—P. C.

153. *Taxes—Assessment—Electric Street Railway—Rolling Stock—Real Estate—Res judicata—Assessment Act* (Revised Statutes of Ontario, c. 224), ss. 2 (9), 39 (2), 62, 63, 75, 84.]—The cars used by the appellants on their electric street railway are personal and not real estate, and therefore are exempt from assessment under the Assessment Act.

The jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of Appeal from that Court is confined to the question whether the assessment is too high or too low; and therefore a decision of the Court that electric cars are assessable as real estate, the assessment being a nullity *ab initio*, cannot be pleaded as an estoppel.

Bank of Montreal *v* Kirkpatrick (2 Ont. L. R. 113) commented on.

THE TORONTO RY. CO. *v* THE CORPORATION OF [THE CITY OF TORONTO, [1904] A. C. 809; 73 L. J. P. C. 120; 20 T. L. R. 774; 91 L. T. 541—P. C.

154. *Taxes—Landlord and Tenant—Lessee from Municipality—Taxes—Liability of Lessee to pay—No Provision in Lease as to Payment of Taxes—Insertion of Covenant in Lease—Assessment Act* (Ontario), 1892 (55 Vict. c. 48), s. 7, exemption 7, ss. 20 and 24.]—A lease of land by the Corporation of the City of Toronto to a railway company, made in pursuance of an agreement which contained no provision as to the payment of taxes, ought to contain a covenant by the lessee to pay the taxes, that obligation being imposed upon them, as lessees of a municipality, by sects 7 (7), 20 and 24 of the Assessment Act (Ontario), 1892.

Decision of the Court of Appeal for Ontario (5 Ont. L. R. 717) affirmed.

THE CANADIAN PACIFIC RY. CO. *v* THE CORPORATION OF THE CITY OF TORONTO, (1905) 74 L. J. P. C. 15, 91 L. T. 703; 21 T. L. R. 44—P. C.

155. *Waterworks—Appropriation of Water—Act of Incorporation of Water Commission*—36 Vict. c. 102, s. 15.]—Sect. 15 of 36 Vict. c. 102 (Ontario), which incorporated Water Commissioners, authorised them to enter upon any land of any person within a certain area, and to survey, set out, and ascertain such parts thereof as they might require for the purposes of the waterworks, and also to divert and appropriate any river, pond, spring, or stream or water therein as they should judge suitable and proper, and to contract with the owner or occupier of the lands for the purchase thereof, or of any part thereof, or of any privilege that might be required for the purposes of the Water Commissioners; and in case of disagreement respecting the amount of purchase or value thereof, or as to any damage therefrom, the same should be decided by arbitration. The Water Commissioners erected a dam with flash boards across a river some miles below the appellant's mill, with the result that at certain seasons his lands were flooded, and



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the water-power of his mill was affected. The Commissioners had not taken any steps to purchase his rights before erecting the dam and boards.

HELD—that where the Commissioners desired to appropriate a person's water rights, or to acquire an easement over his property, as well as where they desired to appropriate his land, they must first take the proper steps, e.g., by serving notice to treat, to have the compensation assessed; and that in default of so doing, they were liable to an action and an injunction.

Decision of Supreme Court of Canada (34 Can. S. C. R. 650) reversed.

SAUNBY v. LONDON WATERWORKS COMMISSIONERS [AND OTHERS, [1906] A. C. 110; 75 L. J. P. C. 25; 93 L. T. 648; 22 T. L. R. 37—P. C.

## V. CEYLON.

156. *Arbitration—Reference by Court of all Matters in Dispute in a Pending Action—Party Purporting to Revoke Submission—Arbitrator Proceeding ex parte—Validity of Award—Ceylon Civil Procedure Code, 1889, ss. 676-697.*—In an action, in which there were claims and counterclaims arising out of commercial transactions between them, the parties instead of proceeding to trial in the ordinary course, applied to the Court for an order "that all matters in dispute between us in this action" should be referred to W. The Court accordingly made the order, providing that the arbitrator "shall have all such powers and authorities as are vested in arbitrators and umpires under the Code of Civil Procedure."

On the first day of the hearing the respondent purported to revoke the submission, and withdrew from the proceedings, whereupon the arbitrator proceeded *ex parte*, the respondent now sought to set aside his award.

HELD—that, the subject of the arbitration being an action in Court, it was a judicial proceeding under the control of the Court, and was governed by sects. 676, 677, and 691, therefore the award could only be set aside for misconduct or corruption, and none was shown.

Decision of Supreme Court of Ceylon (4 N. L. R. 35) reversed.

AITKEN, SPENCE & Co v. FERNANDO, [1903] [A. C. 200, 72 L. J. P. C. 63; 88 L. T. 179, 19 T. L. R. 295—P. C.

157. *Setting Aside Decree for Default—Defendant Prevented by "Accident or Misfortune" from Appearing—Defendant of Unsound Mind not so Found—Admissibility in Evidence of Lunacy Order—Ceylon Civil Procedure Code, 1889, Chap. XII., Art. 87.*—The Ceylon Civil Procedure Code, 1889, Chap. XII., Art. 87, in order to prevent any injustice being done to defendants who through no fault of their own have decrees made against them in their absence, pro-

vides that: "No appeal shall lie against any decree *nisi* or absolute for default; but, if any defendant, against whom a decree absolute for default shall have been passed, shall within a reasonable time after such decree appear and satisfy the Court, upon notice to the plaintiff, by good and sufficient evidence that he was prevented from appearing to show cause against the notice for making the decree absolute by reason of accident or misfortune, or by not having due information of the proceedings," the Court may set aside the order.

A Master in Lunacy in England made an order under sect. 116 of the Lunacy Act, 1900, appointing a receiver of a defendant, a person of unsound mind, not so found by inquisition.

HELD—that such order in lunacy was not conclusive evidence of anything except its own existence, but being made by a competent tribunal in a matter within its jurisdiction it could not be rejected as inadmissible; that the order was admissible as *prima facie* evidence, and if uncontradicted ought to be regarded as good and sufficient evidence of the facts recited in it which were essential to its validity not only in this country, but in all his Majesty's dominions; and that the defendant was prevented by accident or misfortune from appearing within the meaning of Art. 87.

HARVEY v. THE KING, [1901] A. C. 601; 70 [L. J. P. C. 107; 84 L. T. 849; 17 T. L. R. 601—P. C.

158. *Suit for Partition of Intestate's Estate—Administrator not a Party—Lapse of Time—Dealings with Estate—Civil Procedure Code, s. 547.*—A man died intestate in 1884: his widow and son, without obtaining letters of administration, divided his real estate amongst the various heirs and executed deeds of gift accordingly: the allottees had since dealt with their shares.

One of the daughters, an infant in 1884, now brought a suit for partition or alternatively for sale of part of the intestate's estate.

HELD—that the action was in substance one within sect. 547 of the Civil Procedure Code, which was in force at the date of action brought, and was therefore not maintainable in the absence of an administrator on the record.

Further, no partition could be effected by the Court without a complete administration of the estate, which was not at present in a condition to be divided.

PONNAMMA v. ARUMOGAM AND OTHERS, [1905] [A. C. 383; 74 L. J. P. C. 102; 92 L. T. 740, 21 T. L. R. 524—P. C.

159. *Will — Execution — Attestation — Notary Public Present without Attesting—Capacity of Testator—Ordinance No. 7 of 1840.*—By sect. 3 of Ordinance No. 7 of 1840 no will shall be valid unless the signature of the testator "shall be made or acknow-

*Ceylon—Continued*

ledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present then such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

A testator signed his will in the presence of five witnesses who duly subscribed the will in his presence. There were also other persons present in the room at the time, among them being a licensed notary public who did not attest the will.

**HELD**—that the mere presence of the notary public, who did not attest the will, did not invalidate it, as the words "if no notary shall be present" meant if no notary shall be present acting in his notarial capacity.

*Semble*—that a will is valid if the testator was of sound mind when he gave instructions to his solicitor to prepare his will, and the will is prepared according to these instructions, even though the testator, when the will is subsequently read over to him, is unable to follow all the provisions of the will, but accepts it as prepared according to those instructions.

*Parker v. Felgate* ((1883) 8 P. D. 171; 52 L. J. P. 95, 47 J. P. 808, 32 W. R. 186—Div. Ct.) approved.

*PERERA v PERERA*, [1901] A. C. 354, 70 L. J. [P. C. 46; 84 L. T. 371, 17 T. L. R. 389—P. C.]

**VI. CHANNEL ISLANDS.**

160. *Guernsey—Easement—Public Right of Way—Dedication—Grant—Prescription—Delay in bringing Action for Declaration of Title.*—The appellant commenced an action against the respondents for a declaration that a tunnel was his private property and that the public had no right of way through it. It was not contested that the appellant was the proprietor of the soil of the tunnel, on the other hand, it was not contested by the appellant that the tunnel had *de facto* been used by the public as a road to the harbour since its construction in or after the year 1866. In the Channel Islands the doctrine of dedication to the public is unknown, and the public, like a private individual, must make out their title to a right of way by grant or prescription. The respondents relied upon this public user, and also upon a certain resolution of July 11th, 1866, a minute of which was found in the public register of the Island of Sark.

**HELD**—that there was no conveyance or grant of the right of way claimed, or contract for the grant of it, to which effect could be given in the Court of the island; that the public had no right of way through

the tunnel; and that the appellant, who was a minor in 1866 and attained the age of 20 years (which is the age of majority in the Channel Islands) in 1876, was not precluded by his delay in bringing the present action.

*GODFRAY v. CONSTABLES OF THE ISLAND OF SARK*, [1902] A. C. 534, 71 L. J. P. C. 116, 87 L. T. 3, 18 T. L. R. 671—P. C.

161. *Jersey—Gift by Husband to Wife—Settlement in favour of Husband and Wife by Father-in-Law—Right of Husband's Heir.*—By the law of Jersey a husband cannot give or convey his real estate to his wife, during the continuance of the marriage, to the prejudice of his lawful heir. This rule, however, was held not to apply to a case where a wife's father had, in consideration of an annuity paid to himself, conveyed certain real estate to the husband and wife jointly, during their joint lives, the survivor to take the whole. The deed in such a case being taken to be, not a contract of sale and purchase, but a family arrangement.

*BROOMER v. ARTHUR*, [1898] A. C. 777; 67 [L. J. (P. C.) 148—P. C.]

162. *Jersey—Resolution of Parish to apply Parish Funds—Suit to Annul Resolution—Contract entered into Pursuant to Resolution—Laches of Plaintiff.*—The Royal Court of Jersey has power to interfere if the civil assembly of a parish resolve to employ parish funds improperly, but an objector must apply to the Court promptly.

In February, 1903, the ecclesiastical assembly of a parish considered the desirability of repairing the church. From February to September, 1903, the matter was under consideration by the civil assembly, and on September 3rd they voted a specific sum for the purpose; on September 17th a contract was duly entered into for carrying out the work.

On September 20th the appellant applied to the Court to declare the resolution of September 3rd null and void.

**HELD**—that as he was a member of both assemblies, and knew of all the proceedings and the urgent need for repairs, his application was too late.

*ROBERTS v. EREAUT*, [1905] A. C. 61; 74 [L. J. P. C. 28; 91 L. T. 809—P. C.]

163. *Jersey—Will—Validity—Undue Influence—Inadmissible Evidence—Practice.*—In a suit against executors, trustees and beneficiaries impugning a will on the ground of undue influence, Jersey law

(1) renders inadmissible the evidence of the executors, but

(2) does not render inadmissible the evidence of persons, not legatees or trustees, but merely parochial officials whose co-operation may be necessary in administering the charitable trusts of the will, and who have been wrongly added as parties to the suit.

In such a suit the plaintiff must be held

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strictly to the case made on his pleadings, and cannot at the trial raise an entirely new case of fraud.

BAUDAINS AND OTHERS *v.* RICHARDSON AND [OTHERS, [1906] A. C. 169; 75 L. J. P. C. 57; 94 L. T. 290, 22 T. L. R. 333—P. C.]

## VII. GIBRALTAR.

164. *Criminal Jurisdiction and Procedure—Original Jurisdiction with Morocco—Mode of Trial.*—By the 11th subsection of Ord. 3 the Court of Gibraltar has in all criminal matters in which the defendant is a British subject an original jurisdiction with the jurisdiction of the Court of Morocco. The appellant was charged with having committed an offence within the territorial waters of the Empire of Morocco, and was arrested in London. The Queen's Bench Division ordered him to a trial before the Supreme Court at Gibraltar.

HELD—that the mode of trial prescribed by the Gibraltar Order in Council must be pursued.

SPILSBURY *v.* REG., [1899] A. C. 392; 63 J. P. [691; 80 L. T. 602; 19 Cox C. C. 303—P. C.]

## VIII. HONG KONG.

165. *Companies—Articles of Association—Irregular Registration—Acceptance and Adoption—Validity—Companies Ordinance (Hong Kong) No. 1 of 1865, ss. 6, 11 and 14-18—Companies Act, 1862.*—The memorandum of association of the respondent company was duly signed by nine persons, and their signature was duly attested. The memorandum was accompanied by a small printed book purporting to contain "Articles of Association of the Man On Insurance Company, Limited," but these articles were not signed. The registrar, however, registered them with the memorandum, and thereupon gave a certificate of the incorporation of the company. The articles so registered had been published and put forward as the company's only articles of association, and had been acted on, amended, and added to by the shareholders of the company, and the company's business had been conducted under the regulations contained therein for nineteen years without any objection, and the company on the record said that these articles were its articles of association.

Sections 6, 11, and 14-18 of the Companies' ordinance (Hong Kong), 1865, were substantially and for all material purposes identical with the sections bearing the same numbers in the Companies Act, 1862, and Table A in the schedule to the Ordinance corresponded with Table A in the Companies Act.

HELD—that in the circumstances the inference was to be drawn that all the shareholders had accepted and adopted the articles as the valid and operative articles of association of the company;

that there was no reason why the shareholders should not adopt the articles, although irregularly registered; that though the statutory mode of doing so was by special resolution, yet that was only machinery for securing the assent of the shareholders, or a sufficient majority of them; and that the registered articles had become and were the articles of the company as surely as if they had been formally adopted by special resolution.

HO TUNG *v.* MAN ON INSURANCE CO., [1902] [A. C. 232, 71 L. J. P. C. 46; 85 L. T. 617; 18 T. L. R. 118, 9 Manson, 171—P. C.]

166. *Limitation of Actions—Intestate's Estate—Vesting in Registrar of Supreme Court, pending Grant of Letters of Administration—Forged Will—Probate—Revocation—Date from which Statute of Limitations runs—Hong Kong Ordinance No. 13 of 1864, s. 8, No. 8 of 1860, s. 39; No. 9 of 1870, s. 1.*—An intestate died in 1880. In 1886 probate of an alleged will was granted to the person named therein as executor. In 1896 the alleged will was declared a forgery, and the probate was revoked. In 1897 letters of administration were granted to the respondent. In 1899 the respondent, as administrator, commenced an action against the appellants for an account of certain alleged partnership transactions between the deceased and the appellants. The appellants pleaded the Statute of Limitations.

HELD—that by the revocation the grant of probate was void *ab initio*, and must be treated as a nullity, and as never having had any real existence; that there was nothing in sect. 39 of the Ordinance No. 8 of 1860 or sect. 1 of the Ordinance No. 9 of 1870 to overrule the established rule of law that no action can be maintained in respect of the estate of a deceased person, except by a duly constituted administrator or executor, and the sections referred to placed the registrar of the Supreme Court, pending the grant of letters of administration, in the position of a receiver, and gave him powers incident to such an office, but nothing more; and that the Statute of Limitations contained in sect. 8 of Ordinance No. 13, 1864, ran against the intestate's estate from the date of the grant of letters of administration in 1897 only, and the action was not barred.

CHAN KIT SAN *v.* HO FUNG HANG, [1902] A. C. [257; 71 L. J. P. C. 49; 51 W. R. 18; 86 L. T. 245, 18 T. L. R. 420—P. C.]

## IX. JAMAICA.

167. *Easement—Nuisance—Variation of Servitude—Question not submitted to Jury—Court's Power to draw Inferences of Fact—New Trial—Jamaica Code of Civil Procedure, s. 438.*—The plaintiffs (now respondents) sued the defendants (now appellants) for damages in respect of a nuisance committed by the latter and for an injunction to restrain its continuance. The question

## Jamaica—Continued.

arose whether the case had in effect been submitted to the jury. The plaintiffs supported their injunction on the ground that, owing to the extensions of the works, there had been a variation in the kind of servitude which the defendants claimed to impose upon them, substantial enough to constitute a new wrong of appreciable amount.

HELD—that the question was clearly one for the jury, that owing to the way in which the works of each party were treated as a whole, that question was never put to the jury, probably it was never suggested at all during the trial in any such way as to bring out the separate considerations relating to the new works, that the defendants were entitled to have the opinion of a jury upon their liability and for that purpose a new trial was necessary.

HELD ALSO—that, on the construction of sect. 438 of the Civil Procedure Code of Jamaica, the Court is allowed to draw all inferences of fact not inconsistent with the findings of the jury, and if satisfied that it has before it the materials necessary for determination may give judgment; but the Code does not enable the Court to decide questions of fact never submitted to the jury at all

ROYAL MAIL STEAM PACKET CO. v. GEORGE AND [BRANDAY, [1900] A. C. 480; 69 L. J. P. C. 107; 82 L. T. 539—P. C.

## X. NEWFOUNDLAND.

168. *Crown Licence—Effect of—Stranger Cutting Timber on Licensee's Ground before Licence—Trespass—Jus tertii—Damages.*—Possession forms a good title against a wrongdoer, who cannot set up a *jus tertii* unless he claims under it.

*The Winkfield* ([1902] P. 42; 71 L. J. P. 21; 52 W. R. 246; 85 L. T. 668—C. A.) applied.

The effect of a grant by the Newfoundland Government under sect. 51 of c. 13 of the Consolidated Statutes is to demise the land included in it, although subject to restrictions as to user.

The appellant and respondent applied for a grant of a certain area of land; the latter was successful. Before the respondent received his licence, the appellant cut trees on the land; at a later date he cut other trees, and still later removed trees cut both before and after the licence to the respondent.

HELD—that the respondent being in possession of the logs, even though cut before he entered under his licence, could maintain detinue; and was entitled to the value of the logs wrongfully removed without deducting the cost incurred by the appellant in felling and removing them.

*Semble*, in such a case the cost of felling, &c., might be considered in assessing damages as distinct from the value.

GLENWOOD LUMBER CO., LD. v. PHILLIPS (or [BISHOP], [1904] A. C. 405; 73 L. J. P. C. 62; 90 L. T. 741; 20 T. L. R. 531—P. C.

169. *Insolvency—Consolidated Statutes of Newfoundland, c. 90, s. 34—Debts due to Government—Education Act, 1892 (55 Vict. c. 5)—Higher Education Act, 1893 (56 Vict. c. 7).—Payments made by the Colonial Treasury to a bank to the credit of the several boards of education established under the "Education Act, 1892," or the "Higher Education Act, 1893" do not constitute debts due to the Government within the meaning of the Colonial Insolvency Act.*

FOX v. GOVERNMENT OF NEWFOUNDLAND, [1898] [A. C. 667; 67 L. J. P. C. 77; 78 L. T. 602; 5 Manson, 238—P. C.

170. *Whaling Licence—Application for—Grant—Newfoundland Whaling Industry Act, 1902.*—The appellants applied for a whaling licence for a certain area, and paid and obtained receipts for their licence fees in two consecutive years. The licence when actually granted in the course of the second year proved to be for a smaller area than that specified in the application. The appellants contended that the receipt amounted to a licence, or a contract to grant one, for the larger area; and that under the statute the area could not be reduced in subsequent years except for special reasons, none of which were applicable to their case.

HELD—that licences could only be granted by the Governor in Council; and that a mere receipt for fees by an official was of no effect, either as a licence, or as evidence of a contract to grant one.

NEWFOUNDLAND STEAM WHALING CO., LD. v. [GOVERNMENT OF NEWFOUNDLAND, [1904] A. C. 399; 73 L. J. P. C. 69; 91 L. T. 153; 20 T. L. R. 566—P. C.

## XI. NEW ZEALAND.

171. *Charitable Devise or Bequest—Institution for Education—Church of England—Beneficiaries to be Brought up in a Particular Religion—Beneficiaries from Another Country—Deceased Persons' Estates Duties—Charitable Gifts Duties Exemption Act, 1883 (46 & 47 Vict. No. 54), ss. 2, 3—Land and Income Assessment Act Amendment Act, 1892 (55 & 56 Vict. No. 46), s. 3, sub-s. 4.*—A testator, who died in 1894, bequeathed the residue of his estate, both real and personal, to trustees for the purpose of founding and endowing an institution for the maintenance and education of boys who were orphans, or the sons of persons in straitened circumstances, resident in the provincial district of Auckland, or in the province of Ulster, Ireland; and the institution was to be managed by persons of a particular religion, and the inmates were to be brought up and instructed in that religion.

HELD—to be a charitable devise or bequest, and a "public" institution within the New Zealand Estates Duties Exemption Act, 1883, s. 2.

**New Zealand—Continued.**

HELD ALSO—as to the land devised, that the institution was “carried on for charitable purposes” within the New Zealand Land and Income Tax Exemption Act, 1892, s. 3, sub-s. 4.

DILWORTH v. COMMISSIONERS OF STAMPS, [1898]  
[A. C. 99; 68 L. J. P. C. 1, 47 W. R. 337; 79  
L. T. 473, 15 T. L. R. 61—P. C.]

172. *Company — Winding-up — Effect in Colony—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104).*—The Joint Stock Companies Arrangement Act, 1870, does not extend to or bind the Courts of the Colonies, and therefore, proceedings under that Act cannot be pleaded as a defence to an action by a creditor of a company in a Colony

Ellis v. McHenry (L. R. 6 C. P. 228) distinguished.

Gibbs v. Société des Métaux (25 Q. B. D. 399) approved and followed.

NEW ZEALAND LOAN AND MERCANTILE AGENCY CO.  
[v. MORRISON, [1898] A. C. 349, 67 L. J. P. C.  
10; 77 L. T. 603; 5 Manson, 171; 14 T. L. R.  
141; 46 W. R. 239—P. C.]

173. *Land—Crown Lands—Ejectment from Crown Lands—Lands Surrendered to Crown Subject to Subsisting Contracts—Contract to Sell—Subsequent Squatter—Possession for Less than 60 Years.*—In 1845 land was granted to a company by the Crown. The company had previously contracted to sell it to P.

In 1850, under an Act of that year, the company surrendered all its lands to the Crown, in whom such lands became vested “subject to any contracts subsisting in regard to any such lands.”

P. obtained no conveyance from the company, and never applied to the Crown for his contract to be completed.

The land now in question (part of that granted as above mentioned and contracted to be sold to P.) became derelict, and B. “squatted” upon it. B. subsequently conveyed such land to the appellant.

HELD—that the surrendered lands became vested in the Crown in 1850 unfettered by any trust enforceable by any Court of Law and Equity; and that, even if P.’s rights had passed to the appellant, they were not such as a Court could enforce, and that the appellant was a trespasser.

P.’s only remedy would be by representation to the Crown.

RIDDIFORD v. R., [1905] A. C. 147; 74 L. J. P. C. [37; 92 L. T. 247; 21 T. L. R. 265—P. C.]

174. *Land—Title—Registered Owner—Certificate—Errors in Procedure—Conclusiveness of Certificate—Fraud—Trustee—Land Transfer Act, 1885 (49 Vict. No. 57), ss. 10, 12, 13, 14, 35, 55, 56, 65, 67, 189, 190—Native Land Act, 1873 (37 Vict. No. 56), ss. 33, 51, 75, 87—Native Land Court Act, 1894 (58 Vict., B.D.—VOL. I.*

No. 43), ss. 56, 57, 73.]—A registered certificate of title to land under the Land Transfer Act, 1885, is conclusive in the absence of fraud. Mere errors or defects in procedure will not affect the conclusiveness of the certificate. Fraud means actual fraud, and does not include what is known as constructive or equitable fraud. A registered *bona fide* purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor.

Having regard to the Land Transfer Acts and the Native Land Acts, it is not the duty of a District Land Registrar to examine into the validity of a Crown grant, nor to inquire how a Governor’s warrant has been obtained, nor to inquire into the proceedings in the Native Land Court culminating in an order of freehold title.

The true effect of sects 57 and 73 of the Native Land Court Act, 1894, considered.

Though a registered owner may hold as trustee, if the alleged *cestui que trust* is a rival claimant, who can prove no trust apart from his own alleged ownership, the registered owner cannot be treated as a trustee. *Solicitor-General v. Mere Tini* (17 N. Z. L. R. 773) not followed upon this point.

Decisions of the Court of Appeal for New Zealand (21 N. Z. L. R. 691; 22 N. Z. L. R. 1, 37) reversed.

THE ASSETS CO., LD. v. MERE ROIHI AND [OTHERS], [1905] A. C. 176; 74 L. J. P. C. 49; 92 L. T. 397, 21 T. L. R. 311—P. C.]

175. *Land—Native Land Court—Jurisdiction—Rehearing—Validation Act.*—Where the Legislature has given attention to a special subject, and has provided for it, it cannot be presumed that a subsequent general enactment is intended to interfere with the special provision, unless that intention is very clearly manifested.

Therefore, the “Validation Act” of 1893 does not affect proceedings in the Native Land Court under the Acts of 1886 and 1888. Judgment of the Court below affirmed.

The rehearing given by the Native Land Court Acts is not confined to cases where the title to particular land is the only question decided by the Court. A right of rehearing expressly given is not taken away, because the same degree includes matter which is not appealable.

Judgment of the Court below reversed.

BARKER v. EDGER, [1898] A. C. 748; 67 L. J. [P. C. 115; 79 L. T. 151—P. C.]

176. *Land—Native Lands—Confiscation—Regrant by Crown—“Held in Trust”—Native Land Acts—Native Custom.*—The use of the word “trust” is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings, such an expression as “to be held in trust” for a definite class of persons does not always create an equitable interest in their favour in the property so to be held.

Kinloch v. Secretary of State for India in 32

**New Zealand—Continued.**

*Council* ((1882) 7 App. Cas. 619, 51 L. J. Ch. 885; 30 W. R. 845; 47 L. T. 133—H. L. (E.)) referred to.

The Governor of New Zealand in Council issued a proclamation dated January 12th, 1867, the meaning and effect of which was that none of the lands in a certain district continued to be native lands within the meaning of the Native Land Acts. All native titles by native custom were extinguished. But the Government was willing to grant out lands in the district in question to loyal natives and to others who should come in and submit within a certain time. At a meeting of certain loyal natives a formal agreement was come to with them on June 13th, 1870, by which certain land was made inalienable both as to the sale and mortgage, and held in trust in "the manner provided or to be provided by the General Assembly for native land held under trust."

**HELD**—that the terms of the agreement itself showed that the persons to whom lands were to be granted were to derive their title from the Crown, as the grants were to be to them in fee simple—an expression quite inapplicable to lands held by native custom; that the trusts (if any) must be found in some Act of the General Assembly, and could not be got at by reference to native customs, or to enactments relating to native lands generally; that the idea that the grantees were to hold in trust for an unascertained and practically unascertainable class of natives who were loyal in the old rebellion, or who came in and submitted within a reasonable time after January 12th, 1867, was too extravagant to require serious comment, and that the grantees were beneficially entitled as the General Assembly were not shown to have created any trusts in favour of the appellants or other loyal natives.

*TE TEIRA TE PAEA v. TE ROERA TAREHA*, [1902] A. C. 56; 71 L. J. P. C. 11; 85 L. T. 558; 18 T. L. R. 44—P. C.

**177. Land—Valuation of Land—Control of Court over Valuer-General—Government Valuation of Land Amendment Act, 1900**—The Supreme Court of New Zealand has no power, at the instance of a leaseholder, to control the Valuer-General in fixing the value of land under the Government Valuation of Land Amendment Act, 1900, when the freeholders have assented to his valuation.

*WARD BROTHERS v. ATTORNEY-GENERAL FOR NEW ZEALAND*, (1907) 76 L. J. P. C. 52; 96 L. T. 280, 23 T. L. R. 297—P. C.

**178. Licensing—Licensing Poll Declared Void—Effect of, on Existing Licences—Power to Renew—New Zealand Licensing Act, 1895, s. 3—New Zealand Interpretation Act, 1888, s. 5, (7).**—A poll was taken in a certain district of New Zealand to determine whether the existing licences should be reduced in

number. The poll was declared void owing to irregularities; but the machinery of the Act had been set in motion by fixing a day for the poll, and the result was that (construing the Act literally) no licence could be renewed, although the electors had not in fact determined upon the policy to be adopted.

**HELD**—that, construing the Act liberally as required by sect. 5 (7) of the New Zealand Interpretation Act, 1888, and with regard to other sections of the particular Act itself, it was plainly intended that existing licences should continue until the electors came to some decision; and that therefore the licensing committee ought, under the circumstances, to hear applications for renewals, as if no poll had ever been fixed.

*SMITH v. M'ARTHUR & SONS*, [1904] A. C. 389; [73 L. J. P. C. 88; 90 L. T. 744, 20 T. L. R. 529—P. C.]

**179. Licensing Law—Election—Licensing Poll—Dispute as to Result—Inquiry—Magistrate usually Exercising Jurisdiction—Regulation of Local Elections Act, 1876 (40 Vict., No. 26), s. 48—Magistrates' Courts Act, 1893 (57 Vict. No. 55)—Alcoholic Liquors Sale Control Act Amendment Act, 1895 (59 Vict., No. 45), ss. 3, 7 (1) (o).**—The jurisdiction of magistrates in New Zealand under the Act of 1893 is not local. They possess a general jurisdiction throughout the colony subject to departmental arrangements and control. Therefore any stipendiary magistrate who, as part of his official duty in accordance with departmental arrangements, exercises jurisdiction, though only occasionally, at a particular place, has jurisdiction to hear a petition presented under the Alcoholic Liquors Sale Control Act Amendment Act, 1895, for an inquiry as to the result of a licensing poll under the Regulation of Local Elections Act, 1876, and the jurisdiction is not confined to the stipendiary magistrate who usually exercises jurisdiction in the Court in which the petition is filed.

Decision of the Court of Appeal for New Zealand (22 N. Z. L. R. 934) reversed.

*BASTINGS AND OTHERS v. CALLAGHAN*, [1905] A. C. [351; 74 L. J. P. C. 79; 92 L. T. 734; 21 T. L. R. 501—P. C.]

**180. Local Government—Compulsory Purchase—Claims for Compensation—Omission to give Notice of Non-admission of Claims—New Zealand Public Works Act, 1894 (58 Vict. No. 42), s. 44.**—Certain lands belonging to the respondents were required by the corporation of the city of Wellington for public improvements. They were taken under the New Zealand Public Works Act, 1894, and the respondents were dispossessed. In due course they sent in a claim in accordance with Sched. II. of the Act stating amongst other things the total amounts of their respective claims. The period of sixty days mentioned in sect. 44 of the Act expired without notice being given by or on behalf of the corporation that they did not

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admit the claim. In due course the respondents filed copies of their claims, together with receipts thereof, in the Supreme Court. Thirty-one days in the one case and fifteen days in the other after the expiration of the statutory period the town clerk discovered that he had allowed the time prescribed by the Act to elapse. The respondents declined to withdraw the claim and allow the matter to go to the Compensation Court. Thereupon the Council gave notices of motion in the Supreme Court, asking in each case for an order to set aside the claim "so that the same might become void and of no effect as an award within the meaning of the Act of 1894, notwithstanding the provisions of sect. 44 of the Act."

**HELD**—that the rights of the claimants were fixed by statute before the Supreme Court had anything to do with the matter; that the only function of the Supreme Court was to enforce the claim as an award, and see that the money reached the proper hands; that the claim could not be set aside, and that the respondents were entitled to demand a proper receipt in conformity with the Act.

**WELLINGTON CORPORATION v. JOHNSTON; WELLINGTON CORPORATION v. LLOYD**, [1902] A. C. 396; 71 L. J. P. C. 73; 86 L. T. 538; 18 T. L. R. 519—P. C.

181. *Local Government—Municipal Corporation—Cost of Constructing Bridge—Contribution towards Cost—"Adjacent Borough or County"—Municipal Corporations Act, 1900 (64 Vict. No. 50), s. 219.*—By sect. 212 of the Municipal Corporations Act, 1900 (New Zealand), where the council of any borough desires to construct a bridge in any position that will be of advantage or benefit to the inhabitants of an adjacent borough or county or other district, the Governor may declare that a proportion of the cost thereof shall be borne by any such local authority. The borough of Lower Hutt proposed to construct a bridge over the Hutt river at a point within its own boundaries, and applied that a proportion of the cost should be borne by the city of Wellington. The city of Wellington did not immediately adjoin Lower Hutt, there being a distance of six miles between their boundaries, and three other local districts intervened.

**HELD**—(affirming the decision of the Court of Appeal for New Zealand)—that the city of Wellington was "adjacent" to the borough of Lower Hutt within the meaning of sect. 219, and that, therefore, there was jurisdiction to order the former to bear a proportion of the cost of the bridge.

**THE MAYOR, &C., OF WELLINGTON v. THE MAYOR, &C., OF LOWER HUTT**, [1904] A. C. 773; 73 L. J. P. C. 80, 20 T. L. R. 712; 91 L. T. 539—P. C.

182. *Merchandise Marks—False Trade Description—Cases of Wax Vestas—Importer*

*"acted innocently"—Liability of Goods to Forfeiture—Remedy—New Zealand Patents, Designs, and Trade Marks Act (53 Vict. No. 12 of 1889), ss. 89, 104—New Zealand Customs Laws Consolidated Act, 1882 (46 Vict. No. 55), s. 267.*—The respondents in 1900 consigned several packages of matchboxes to their agents in New Zealand. The boxes were stamped "New Zealand," but filled with London matches. It was not disputed that, having regard to their contents—wax vestas—the boxes bore a false trade description. On the other hand, it was conceded that neither the respondents nor their agents or servants had any fraudulent intention, or any intention of transgressing the law of the colony. The cases of wax vestas were seized and detained by the appellant as goods prohibited to be imported into New Zealand, and liable to forfeiture there by virtue of the provision of the New Zealand Patents, Designs, and Trade Marks Act, ss. 89 and 104, and the New Zealand Customs Laws Consolidation Act, 1882. The respondents challenged the legality of the seizure by bringing an action against the appellant.

**HELD**—that though the respondents had "acted innocently," the seizure and forfeiture were authorised; that the respondents had mistaken their remedy, and that the case was met by sect. 267 of the Customs Laws Consolidation Act, 1882, under which an application to the Governor supported by proper evidence might have been made.

**COMMISSIONERS OF TRADE AND CUSTOMS v. BELL & Co.**, [1902] A. C. 563, 71 L. J. P. C. 109; 87 L. T. 156; 18 T. L. R. 765—P. C.

183. *Mining—Compensation—Land Injurious Affected—Claim—Public Works Act, 1894 (58 Vict. No. 42), s. 44—Mining Act, 1898 (62 Vict. No. 38), ss. 108—116, 232—235.*—A claim for compensation for lands injuriously affected in respect of any matter authorised by the Mining Act, 1898, unless it is settled by agreement, under sect. 233, must be heard and determined by the tribunal therein specified. The provisions of sect. 44 of the Public Works Act, 1894, which is incorporated in the Mining Act, 1898, subject to the provisions of the latter Act—which section enacts that if within sixty days after the receipt of the claim for compensation notice is not given disputing the claim, the claimant may file a copy of his claim in the Supreme Court, which shall have the effect of an award—is inconsistent with sect. 233 of the Mining Act, and is therefore not applicable to a claim for compensation under that Act.

**HESLOP v. THE MINISTER OF MINES FOR NEW ZEALAND**, [1904] A. C. 781; 73 L. J. P. C. 117; 20 T. L. R. 771; 91 L. T. 544—P. C.

184. *Railway Company—Failure to Complete Line Within Time Limited—Determination by Governor of Company's Interest—Rights of Debenture Holders—New Zealand Railways Construction and Land Act, 1881 (45 Vict. No. 37), ss. 123, 125, 126.*—A com-

*New Zealand—Continued.*

pany was formed in England under the Companies Act, 1862, for the purpose of constructing and working a railway in New Zealand. The company raised £750,000 by the issue of debentures, and began the work of construction. The contract for the construction of the railway was subject to the provisions of two statutes of the Legislature of New Zealand—"The Railways Construction and Land Act, 1881," and "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884." The company failed to carry out its contract for the completion of the line.

**HELD**—that there was nothing to prevent the Governor availing himself of the powers conferred upon him by sects. 123, 125, and 126 of the Act of 1881, and thereby acquiring an absolute title to the railway to the exclusion of the company and its shareholders. That the company had only a determinable interest in the railway, and owing to their default the Governor could determine their interest, and when their interest was determined, all rights depending upon the title of the company fell with it.

COATES v. REG., [1900] A. C. 216; 29 L. J. P. C. [26, 82 L. T. 162—P. C.

185. *Revenue—Estate Duty—Exemption—Widow—Life Interest—Power of Appointment—Appointment to Herself Absolutely—Deceased Persons' Estates Duties Acts, 1881 (45 Vict. No. 41), ss. 5, 7, 36, and 1885 (49 Vict. No. 21), s. 15.*—By the law of New Zealand no duty is payable "in respect of any real or personal property to which any wife . . . shall become absolutely entitled . . . under her husband's will."

A testator by his will gave his widow a life interest in his residuary estate, and, subject thereto, the residuary estate was to be held in trust for such person or persons as she should by deed or will appoint, and in default of appointment over. Shortly after the testator's death the widow appointed the whole of the residuary estate, subject to her own life interest to herself absolutely.

**HELD**—that the liability to pay duty was imposed by the Deceased Persons' Estates Duties Acts, 1881 and 1885, on the property as from the testator's death, and that therefore the widow could not claim exemption of the residue from duty under sect. 18 of the Act of 1885 on the ground that she had become absolutely entitled to it under the will; and, *semble*, also she did not become "entitled under the will."

Decision of Supreme Court of New Zealand (19 N. Z. L. R. 566) affirmed.

JACKSON v. COMMISSIONER OF STAMPS, [1903] [A. C. 350; 72 L. J. P. C. 68; 88 L. T. 480; 19 T. L. R. 434—P. C.

186. *Revenue—Income Tax—Company—"Income Derived from Business"—Profits*

*Derived from New Zealand—Transmission of Telegraphic Messages to Places Outside Australasia—Land and Income Assessment Act, 1900 (64 Vict. No. 49), ss. 51, 59, 65.]*—The respondent company owned submarine cables from Wakapuaka, in New Zealand, to La Perouse, in New South Wales, and from Port Darwin, in South Australia, to Madras. Their head office was in London. The telegraph lines in New Zealand belonged to the Government. The course of business in the case of telegraphic messages transmitted from New Zealand to places beyond Australia was as follows:—The New Zealand Government received the message from the sender, together with the entire charge (at the rate of 5s. 2d. a word), and transmitted it over their line to Wakapuaka, the charge for which was 1d. a word. It was there handed to the respondents, who transmitted it to La Perouse (the charge for which was 3d. a word), and it was there handed to the Government of New South Wales. The Government of New Zealand deducted 1d., and, by arrangement with the respondents, 3d., and credited the New South Wales Government with the balance, 4s. 10d. The New South Wales Government in its turn transmitted the message to Adelaide, the charge for which was 1d. a word, and credited the South Australian Government with the balance, 4s. 9d. The latter sent the message to Port Darwin, the charge for which was 7d. a word, and credited the respondents with the balance, 4s. 2d., and the respondents sent the message over their own cable to Madras.

**HELD**—that the profits made by the respondents upon the transmission of telegraphic messages from Port Darwin to Madras were not "profits derived from New Zealand" from the business carried on there within the meaning of sects. 51 and 59 of the Land and Income Assessment Act, 1900 (New Zealand), and were not therefore assessable to income tax in New Zealand.

Decision of the C. A. of New Zealand (24 N. Z. L. R. 308) affirmed.

COMMISSIONER OF TAXES FOR NEW ZEALAND v. [EASTERN EXTENSION, AUSTRALASIA, AND CHINA TELEGRAPH COMPANY, [1906] A. C. 526; 75 L. J. P. C. 84; 95 L. T. 308, 22 T. L. R. 730—P. C.

187. *Revenue—Income-tax—Profits in New Zealand—Commission Agent for Sale of Goods in England—Land and Income Assessment Act, 1900 (64 Vict. No. 49), s. 51.]*—The appellants were provision commission agents in London, and through their agents in New Zealand they made advances there to the owners of butter and cheese factories against their produce, which was then consigned to the appellants in London and sold there, and the proceeds of the sales, after deducting expenses and commission, were remitted to New Zealand. For the purpose of making the advances the appellants had a credit at various banks in New Zealand. The appellants having been assessed to income-



**New Zealand—Continued.**

tax in New Zealand under the Land and Income Assessment Act, 1900.

**HELD**—that, as the contracts for the sale of the produce from which the appellants' profits were made, and which formed the essence of their business, were made in England, and not in New Zealand, the appellants were not assessable to income-tax in New Zealand thereon.

Decision of the Supreme Court of New Zealand (26 N. Z. L. R. 625) reversed.

LOVELL AND CHRISTMAS, LD. v. THE COMMISSIONERS OF TAXES, (1907) 24 T. L. R. 32—P. C.

**XII. SHANGHAI.**

188. *Land taken for Public Purposes—“Extension of Roads”—“Roads already Defined”—Shanghai Land Regulation, VI. of 1869.*—The appellants commenced the present suit for the purpose of enforcing their right to take a portion of the respondent's land for a public road. The respondent maintained that the Shanghai Land Regulation VI. of 1869 did not empower the appellants to take his land against his will. The regulation had the force of law. The appellants were empowered by the regulation to take the respondent's land “for the extension of the lines of roads at present laid down as a means of communication in the settlement.” A proviso then limited the lines of road to “those already defined.”

**HELD**—that the word “extension” did not only mean enlargement of an existing road by adding to its length or its breadth, but meant also its branches; that the roads “already defined” included extension and new roads.

SHANGHAI MUNICIPAL COUNCIL v. McMURRAY, [1900] A. C. 206, 69 L. J. P. C. 19; 82 L. T. 101—P. C.

**XIII. SIERRA LEONE.**

189. *Crown Suits Act, 1855 (18 & 19 Vict. c. 90)—Ordinance of 1881, s. 19.*—The Crown Suits Act, 1855, is not a statute “of general application” within the meaning of sect. 19 of the Sierra Leone Ordinance of November 10th, 1881.

JOHNSON v. R., [1904] A. C. 817; 73 L. J. P. C. 113; 98 L. T. 234; 53 W. R. 207—P. C.

**XIV. TRINIDAD.**

190. *Accounts—Order for Account—Extraneous Matters—Entries Disallowed—Discretion of Court.*—The appellant's claim, as stated in his writ of summons, was “to have an account taken of what is due to the plaintiff under a certain agreement dated in January, 1892, for pitch dug and won from plaintiff's land and land of one Eugenia Bennicourt (since deceased) at La Brea.” Appearance was entered, but no pleadings delivered. An order was made that the ac-

counts “in this matter” should be taken by Routledge, J. It appeared that there had been brought into the account transactions relating to pitch dug, not from the lands of either of the Bennicourts, but from the lands of one Numa Joasse.

**HELD**—that those last-mentioned matters were extraneous to the scope and ambit of the account ordered, which related solely to the lands of the Bennicourts, and that the certificate of Routledge, J., must be varied, and the proceedings restored to their proper limits, in conformity with the original order for an account.

BENNICOURT v. LE GEUDRE, [1900] A. C. 173; 69 [L. J. P. C. 21—P. C.

**XV. ZANZIBAR.**

191. *Compulsory Purchase—Lands Taken by Government under Statutory Powers—Compensation—Local Law—Mahomedan Law—“Exterritoriality”—Judicial Notice—Potential Value—Buildings—Indian Land Acquisition Act, 1894, s. 6—Zanzibar Order in Council, 1884.*—Land of the plaintiffs in the island of Mombasa was taken by the Government under statutory powers. Mombasa is a small island adjacent to the coast of Africa, and it forms part of the mainland dominions of the Sultan of Zanzibar. The authorities who dealt with the case were established and regulated by Her Majesty's Order in Council in 1884, and founded on a previous treaty. It was not till 1896 that the Indian Land Acquisition Act of 1894 was brought into force in Zanzibar, and not till 1896 that the Consul-General issued a notice under sect. 6 of that Act declaring that the land would be required for the railway, and inviting claims for compensation. The plaintiffs claimed compensation for the value of the land and houses erected thereon by the engineers of the Government without lawful authority.

**HELD**—(1) that the day of that declaration was the day on which the land was to be valued at its market value for purposes of compensation; (2) that Her Majesty's jurisdiction was to be exercised under and in accordance with the law of England, which recognises the principle that the incidents of land are governed by the law of its site, and, therefore, Mohammedan law applied to this case; (3) that the order was made subject to treaties for the time being in force, and Art. XVI. of the treaty of 1886 conferred on British subjects the right of “exterritoriality” as regards their persons and their property, which, however, did not exclude the local law; (4) that the Zanzibar judge was bound to take judicial notice of the Zanzibar law, whatever it might be, applicable to the case before him, therefore the buildings on the land had not become the plaintiffs' property, but the compensation for the houses was the value which the houses bore upon the plaintiffs being directed to remove them; and (5) that speculations on the value

## Zanzibar—Continued.

likely to be conferred in future on the land taken for the railway by the construction of the railway itself could not be considered.

SECRETARY OF STATE FOR FOREIGN AFFAIRS *v.* [CHARLESWORTH, PILLING & Co., [1901] A. C. 373; 70 L. J. P. C. 25; 84 L. T. 212; 17 T. L. R. 265—P. C.

## XVI. INDIA.

192. *Adoption of Son—Gift to such Son—Wajib-ul-arz — Invalid Adoption — Hindu Law.*—

HELD—that a clause in a *Wajib-ul-arz*, by which the deceased gave property to his sister's son, whom he stated that he had adopted, could not be treated as a will under which the adopted son was entitled to take as a *persona designata* independently of adoption, that the intention was to give the property to him as the adopted son capable of inheriting by virtue of the adoption; and that, as the adoption was invalid according to the general Hindu law—the adoption of a sister's son being wholly void—and was not warranted by family custom, it gave no right to inherit, and the gift had therefore no effect upon the property.

MUSAMMAT LALI *v.* MURLI DHAR, (1906) 22 [T. L. R. 460—P. C.

193. *Adoption of Son—Authority of Husband to Widow—Adoption of Second Son—Validity—Hindu Law.*—A husband authorised his wife to adopt to him a son. After his death she adopted a boy, who died. She then adopted another boy.

HELD—that the power to adopt was not exhausted by the first adoption, and that the second was valid.

Decision of the High Court of Madras (I. L. R. 26 Madras, 681) affirmed.

KANNAPALLI SUBYANAYANA AND OTHERS *v.* PUCHA [VENKATARAMANA, (1906) 22 T. L. R. 670—P. C.

194. *Advocate—Suspension from Practice—Misconduct—English Barrister admitted as Advocate—Jurisdiction of Court—Conduct of Advocate Conducting Case—Publication of Libel on Judge—"Reasonable cause" for Suspension.*—The High Court of Allahabad has power to suspend from practice before that Court a member of the English Bar who has been admitted to the roll of advocates of the Court.

Rule 197 of the Rules of Court, which provides that "the Chief Justice and the Judges present for the time being in Allahabad may, for good cause appearing to them, by an order in writing under the seal of the Court suspend or remove from the rolls of the Court any advocate," applies where the Chief Justice and the Judges may for good cause and without charge or trial suspend or remove from the roll any advocate—*e.g.*, where an advocate is convicted of a criminal offence; and therefore in other cases the

Court is properly constituted of three Judges under rule 2.

The appellant, who, while conducting a case in Court, had an altercation with the presiding Judge, published in a newspaper of which he was the editor and publisher an article reflecting upon certain of the Judges of the Court in their judicial capacity. The article amounted to a libel, and the publication thereof was a contempt of Court. The Supreme Court suspended the appellant from practice for four years.

HELD—that there was "reasonable cause" within the meaning of sect. 8 of the letters patent by which the High Court was established for the order of suspension.

IN RE S. B. SARBADHICARY, (1906) 23 T. L. R. [180; 95 L. T. 894—P. C.

195. *Agency Court—Appeal to Governor in Council—Appeal to be decided in accordance with Judicial Principles—Ganjam and Vizagapatam Agency Courts Act (No. xxiv. of 1839)*—In appeals from an Agency Court in a scheduled district under the Scheduled Districts Act, 1874, to the Governor in Council, the latter must act upon legal and judicial principles without regard to considerations of policy and expedience.

So HELD—where the Governor rejected an appeal on the ground that it would be inexpedient to reopen a question which had been decided by a District Court, although the High Court had since held that the District Court had no jurisdiction to entertain the matter.

MAHARAJAH OF JEYPORE *v.* GUNUPARAM PATNAICK [AND OTHERS, (1905) 21 T. L. R. 170—P. C.

196. *Arbitration—Award—Setting Aside—Revision — Jurisdiction of Court — Indian Limitation Act, 1877 (Act 15 of 1877), s. 12; Sched II., s. 158—Code of Civil Procedure (Act 14 of 1882), ss. 520, 521, 622.*—A reference to arbitration with the view of determining the rights and interests of the parties in two Government leases took place before two arbitrators, one named by each party. The order of reference had been duly made by the Court. The arbitrators took upon themselves the burden of the reference, and they concurred in an award which on the face of it seemed to be a fair and reasonable settlement of the matters in dispute. The award was duly submitted to the Court. Both parties objected to it. The subordinate Judge overruled all objections, and pronounced a decree in accordance with the award. From the decree of the subordinate Judge the appellants appealed to the Chief Court of the Punjab, who held that no appeal lay, but that an application might be made in revision under sect. 622 of the Code of Civil Procedure.

HELD—that the Chief Court was right in holding that no appeal lay, but wrong in saying that an application might be made in revision, as such an application in the present case was avowedly an application to

*India—Continued.*

set aside the award, and as such it was prohibited by the Limitation Act, of which the Court was bound to take notice, though no objection was made by the parties.

GHULAM JILANI AND OTHERS *v.* MUHAMMAD [HASSAN, (1902) 18 T. L. R. 141—J. C.

197. *Bengal—Bengal Tenancy Act (No. viii of 1885), ss. 93, 98—Dispute between Co-owners of Estate—Manager—Power to Sell or Mortgage—“Management”*—By sects. 93-95 of the Bengal Tenancy Act, 1885, in case of a dispute between co-owners of an estate as to its management, a manager might be appointed, and by sect. 98, sub-sect. 3, “he shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might, but for his own appointment, have exercised, and the co-owners shall not exercise any such power.”

HELD—that “management” included the power to sell or mortgage the estate :

HELD ALSO—that a co-owner had power to deal with his own share in the estate, subject to any charge on the whole estate properly created by the manager.

AMAR CHUNDER KUNDU *v.* SOSHI BUSHAN ROY [AND OTHERS, (1904) 20 T. L. R. 128—P. C.

198. *Bengal—Zemindar and Talook—Enhancement of Rent—“Fair and Equitable Rent”—Evidence—Road Cess Returns—Limitation of Action—Bengal Tenancy Act (No. viii. of 1885), s. 7—Bengal Cess Act No. ix. of 1880), s. 95—Indian Evidence Act (No. i. of 1872), ss. 21, 32.*—If a zemindar is entitled to enhance a tenure-holder's rent, sect. 7 of the Bengal Tenancy Act provides that “where no customary rate exists it may be enhanced . . . up to such limit as the Court thinks fair and equitable.” A plaintiff failed to prove any customary rent, and the Judge considered the evidence as to “fairness” unreliable and unsatisfactory. Some road cess returns were, however, put in, which he considered trustworthy, and upon the basis of these returns he fixed the rent. By sect. 95 of the Bengal Cess Act, 1880, these returns are made admissible evidence against the person by whom, or on whose behalf, they are filed.

HELD—that the Judge was fully justified in acting on such evidence.

In an earlier action the plaintiff had claimed arrears at the enhanced rate from the date fixed for it to come into operation, but his claim was dismissed as being premature.

HELD—that the earlier proceedings stayed the operation of the Law of Limitation.

Decision of the High Court of Bengal (Ind.) L. R. 26 Calc. 832 reversed.

HEM CHUNDER CHOWDERY *v.* KALI PROSUNNO [BHADURI AND OTHERS, (1903) 19 T. L. R. 573—P. C.

199. *Charitable Purposes—Deed of Wakf—Family Endowment.*—A deed executed by a deceased munshi in his lifetime declared that “the income and profit of the endowment (four lakhs of rupees) should, after defraying its necessary expenses according to the provisions hereafter made in this document, be applied to charitable purposes.”

HELD—that on the terms of the deed itself the property was not in substance dedicated to charitable purposes, but, on the contrary, was dedicated substantially to the maintenance and aggrandisement of the family estates for family purposes, and that the deed, therefore, could not be supported as a wakf.

MUSSAVMAT MEJIB-UN-NISA AND OTHERS *v.* ABDUL [RAHIM AND ABDUL AZIZ, (1901) 17 T. L. R. 129—P. C.

200. *Compulsory Purchase—Inquiry by Officers whether Land needed—Notice of Inquiry—Subsequent determination by Collector of value of Land—“Award”—Judicial Inquiry—Land Acquisition Act (No. i. of 1894), ss. 4, 6—12.*—Under sect. 40 of the Land Acquisition Act, 1894, the officer appointed by the Government to inquire whether land is needed by a company for the construction of some work, and whether that work is likely to prove useful to the public, acts in the public interests, and there is no provision requiring notice of the inquiry to be given to the owner of the land.

The subsequent inquiry held by the collector to ascertain the value of the land is not a judicial, but an administrative proceeding, and, therefore, the collector may act upon information already in his possession as well as upon that which is given at the inquiry.

Decision of the High Court of Bengal (I. L. R. 30 Calc 36) affirmed.

EZRA *v.* THE SECRETARY OF STATE FOR INDIA IN [COUNCIL, THE BANK OF BENGAL AND ANOTHER, (1905) 21 T. L. R. 321—P. C.

201. *Criminal Law—Irregularity—Illegality—Joinder of More than Three Offences in One Indictment—Code of Criminal Procedure (Act of 1898), ss. 234, 537.*—The disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period of time than by law could have been joined together in one indictment.

N. A. SUBRAMANIA IYER *v.* THE KING- [EMPEROR, (1901) 17 T. L. R. 736—P. C.

202. *Leave to Appeal in Criminal Cases—Meaning of “Disaffection in Sect. 124 A. of Indian Penal Code.”*—This was a petition to the Judicial Committee of the Privy Council for special leave to appeal against a conviction and sentence passed upon the

*India—Continued.*

petitioner by the High Court of Bombay, raising the question of the meaning of the word "Disaffection" in sect. 124 A. of the Indian Penal Code. Their lordships refused leave to appeal, being of opinion that there was nothing in the summing-up, which was of very great length, from which they could dissent, and that no case had been made out to justify them in departing from the rules which had been laid down as to granting leave to appeal in criminal cases.

GANGADHAR TILAK v. QUEEN-EMPRESS, [1898] 25 [Indian Appeals 1; 14 T. L. R. 50—P. C.

203. *Ejectment — Evidence — Permanent Cultivator — Tenant under a Temple—Purakudi—Ulavadai mirasidars.*—In an ejectment action brought by a trustee of a temple, the question was whether the defendants were merely *purakudis*, or were *ulavadai mirasidars*, or permanent cultivators.

The defendants put in evidence a permanent lease by the then temple manager in 1813 of half the disputed lands to their predecessor in title, and one of 1820 dealing in a similar way with the whole of the disputed lands.

In 1817, however, was passed the Madras Regulation (No. vii.) as to dealings with charitable lands, and under this both these leases might have been impugned.

In 1831 the lessee petitioned the collector for a lease for one year, and apparently made no mention of the earlier grants: he was described in the agreement and the collector's order as a *purakudi*, but in the petition he described himself as *ulavadai mirasidar*.

HELD—(without deciding what might be the true position of *ulavadai mirasidars*) that the true inference was that the defendants had no more permanent rights of cultivation than *purakudis*.

SEENA PENA REENA v. CHOKKALINGHAM PILLAY [AND OTHERS, (1904) 20 T. L. R. 285—P. C.

204. *Estoppel—False Statement—Knowledge of other Person that Statement is False—Contract of Infant—Voidability—Mortgage by Infant—Repudiated—Liability to Refund Advance—Indian Evidence Act (Act i. of 1872), s. 115—Indian Contract Act (Act ix. of 1872), ss. 19, 64.*—Sect. 115 of the Indian Evidence Act, 1872, provides that "When one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief," he shall be estopped from denying the truth of that thing. Whether this section applies to infants, *quære*; it does not apply to a case where the other person knew the real facts and was not misled.

A money-lender lent money upon a mortgage to a person, whom he knew well to be an infant, but got the infant to sign a

declaration stating that he was of age, and that the money was advanced to him upon the faith of his assurance to that effect.

HELD—that the infant was nevertheless entitled to repudiate the mortgage upon coming of age, and to have it cancelled.

Sect. 64 of the Indian Contract Act, 1872, provides that "... The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

HELD—that the Act has no application to the case of infants, who are declared by it incompetent to contract; and that therefore the infant mortgagor need not, on repudiating the mortgage, refund the money advanced to him.

Decision of the Bengal High Court affirmed on varied grounds.

MOHORI BIBEY AND ANOTHER v. DHARMODAS [GHOSE, (1903) 19 T. L. R. 295—P. C.

205. *False Imprisonment—Statute of Limitations—Release on Bail—Time Runs from Date of Release, if Warrant subsequently set Aside.*—The plaintiff was arrested on a warrant issued by an Indian district magistrate, and then released upon bail. The warrant was subsequently set aside by an Order in Council, and he commenced his action for false imprisonment. Such an action must in India be commenced within one year from the termination of the imprisonment (Indian Limitation Act, 1877 (Act No. xv.), s. 4, sch. 2, art. 19).

HELD—that the imprisonment ended when he was released on bail; and, therefore, under the circumstances of the case, the action was barred.

Decision of the Judicial Commissioners at Hyderabad, affirmed.

*Bird v. Jones* (1845) 7 Q. B. 742 followed. SYED MAHAMAD YUSUF-UD-DIN v. SECRETARY OF [STATE FOR INDIA, [1903] 19 T. L. R. 496—P. C.

206. *Hindu Law—Alienation by Widow of Husband's Estate—Consent of Reversioners—What Sufficient.*—A Hindu widow may validly alienate her deceased husband's estate for purposes other than those sanctioned by Hindu law if she obtains the consent of the reversioners interested in the estate.

The consent of the next reversioners at the date of the alienation concludes another person who on the widow's death has become the actual reversioner.

Ordinarily, all persons constituting the "next reversioner" should consent, but in some cases it may be impossible to require strict compliance with this rule.

BAJRANGI SINGH v. MANSARNIKA BAKSH SINGH, [1907] 24 T. L. R. 46—P. C.

207. *Hindu Law—Benares—Mitacshara—*

*India—Continued.*

*Stridhan—Property inherited by a Female from a Female—Descent—Power of Disposition.*—Under the Hindu law of the Benares School property which a woman takes by inheritance from a male is held by her, not absolutely, but only for a qualified estate, with reverter after her death to the heirs of her predecessor in title; and (apart from any grounds of necessity) it can only be alienated subject to such a condition.

No distinction can be drawn in this respect between property inherited from a male, and from a female: and the text of the Mitacshara, which upon a literal construction seems to make all property inherited by a female *stridhan* in the strict sense of the word, cannot be relied upon as laying down the contrary.

J., a widow, inherited property from her mother, which the latter had acquired by gift. J. was now dead, and her two sons claimed to recover possession of the property from a stranger. The High Court dismissed their suit, but only on the ground that their sister was really the heir to the property, because their mother inherited it from a female, and therefore it was her *stridhan*, and passed to her *stridhan* heirs in the female line to the exclusion of the male line.

HELD—that the property was not J.'s *stridhan* and that the plaintiffs could recover it.

Decision of the High Court of Allahabad (Ind. L. R. 22 All. 353) reversed.

SHEO SHANKAR LAL AND ANOTHER v. DEBI SAHAI,  
[19 T. L. R. 570—P. C.]

207A. K, an Hindu lady, inherited property from her mother, and purported to mortgage it.

HELD—that she could not grant more than her life interest.

SHEO PERTAB BAHADUR SINGH v. THE ALLAHABAD BANK, LD., (1903) 19 T. L. R. 571—P. C.]

208. *Hindu Law—Inheritance—Rights of Sons by different Wives—Priority.*—The eldest son by a junior wife is entitled to succeed to the father's estate in preference to a younger son by a first wife.

JAGDISH BAHADUR v. SHEO PARTAB SINGH, (1901)  
[17 T. L. R. 390—P. C.]

209. *Hindu Law—Joint Hindu Family—Mitacshara—Member of Family a Minor—Mortgage of Family Property for Family Purposes in Case of Necessity—Mother Appointed Guardian—Property Mortgaged without Leave of Court—Validity of Mortgage.*—The karta of an undivided Mitacshara family can, with the consent of the adult members, mortgage family property for family purposes in case of necessity, so as to charge the property as against all the members of the family.

A guardian of an infant's property cannot properly be appointed in respect of his in-

terest in the property of an undivided Mitacshara family.

Therefore, where the mother and guardian of an infant member of such a family joined in mortgaging property for family purposes, it was held that she did not do so *qua* guardian, and that no leave of the Court was necessary; but that it was a mortgage by the adult members of the family, and consequently binding on the infant.

GHEARIB-UL-LAH v. KHALAK SINGH AND OTHERS,  
[(1903) 19 T. L. R. 447—P. C.]

210. *Jurisdiction of Indian Courts—Action on Foreign Judgment—Cause of Action Arising Abroad—Defendant Trading by an Agent in India—Agent-Manager of Joint Family Property—Foreign Insolvency—Bar to Action on the Judgment—Civil Procedure Code (Act xiv. of 1882), s. 17.*—It must not be too hastily assumed that a defendant, who is a foreigner and not residing within the jurisdiction of the Indian Courts, can be sued in them upon a judgment, obtained in a foreign Court, upon a cause of action arising abroad, merely because he carries on business within the jurisdiction through an agent.

Girdhar Damodar v. Kassigar Hiragar (Ind. L. R. 17 Bombay 662) distinguished on the facts.

However that may be, a relative who manages a joint family property in India, and pays the defendant his share of the proceeds, is not such an agent as to make his principal liable to be sued in the Indian Courts.

The plaintiff and defendant were French subjects residing at Pondicherry, and the plaintiff obtained a judgment there upon a promissory note. The defendant was declared insolvent as from a date prior to the proceedings, and apparently paid no dividend to his creditors. The plaintiff thereupon sued upon the judgment in the Arcot Court, alleging that the defendant carried on business there through an agent.

HELD—that, on the facts, he was not so carrying on business; and, *semble*, the foreign insolvency would be a bar to the action.

ANNAMALAI CHETTY v. MURUGASA CHETTY AND ANOTHER, (1903) 72 L. J. P. C. 89; 88 L. T. 712; 19 T. L. R. 515—P. C.]

211. *Kathiawar—Appeal to Privy Council—British Territory—Court of Political Agent.*—Kathiawar is not as a whole within the King's dominions. If a Court administering justice on the King's behalf outside the King's dominions makes an order, judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from appealing to the King in Council merely by the fact that he is not a subject of the King.

The jurisdiction exercised by the Court of the assistant political agent in Kathiawar, and upon appeal by the Court of the political agent and the Governor of Bombay

*India—Continued.*

in Council, is political and not judicial in character, and therefore no appeal lies to the King in Council.

*Status of Kathiawar and its administration discussed.*

HEMCHAND DEVCHAND v. AZAM SAKARLA. [CHHOTAMLAL, THE TALUKA OF KOTDA SANGANI v. THE STATE OF GONDAL, [1906] A. C. 212; 22 T. L. R. 208—P. C

212. *Limitation of Actions—Land Submerged by River—Land Reformed—Possession—Presumption as to Possession during Period of Submersion*—In order to sustain a claim to land by limitation under the Indian Act, there must be an actual possession of a person claiming as of right by himself or herself, or by persons deriving title from him. If possession of the Government is in fact determined by the submergence by a river of the land which then becomes derelict, so long as it remains in that state no title can be acquired against the true owner. To bring the case within the statute, dispossession by *vis major* has the same effect as voluntary abandonment.

Kally Churn Sahoo v Secretary of Stat. (I. L. R. 6 Cal. 725) overruled.

SECRETARY OF STATE FOR INDIA IN COUNCIL v [KRISHNAMONI GUPTA AND OTHERS, (1902) 18 T. L. R. 540—P. C.

213. *Limitation—Religious Dedication—Sebait of an Idol—Proprietary Right—Infant—Indian Limitation Act (No. xv. of 1877), s. 7.*—Religious dedications of land to idols may be of a more or less complete nature, but, *semble*, even in the case of a dedication of the most complete kind, the possession and management of the property are in the *sebait*, who has therefore the right to bring any actions necessary for the protection of the property.

If, therefore, a *sebait* succeeds while still a minor, the Statute of Limitations does not begin to run until he comes of age, from which event he has under sect. 7 of the Act of 1877 three years in which to institute his suit.

MAHARAJA JAGANINDRA NATH ROY BAHADUR v [HEMANTA KUMARI DEBI AND OTHERS, (1904) 20 T. L. R. 718—P. C

214. *Limitation—Mortgage—Suit “to Enforce Payment of Money”—Money Charged upon Immovable Property—Suit “by Mortgagee for Foreclosure or Sale”—Indian Limitation Act (xv. of 1877), Arts. 132, 147.*—By article 132 of the Indian Limitation Act, 1877, in a suit “to enforce payment of money charged upon immovable property” the period of limitation is twelve years; and by article 147, in a suit “by a mortgagee for foreclosure or sale,” the period is sixty years.

Held—that article 147 did not apply to every suit by a mortgagee in which he asked for foreclosure or sale, but applied only to

the class of mortgages, such as English mortgages, in which alone the suit could be and always was brought for foreclosure or sale; and article 132 applied to all other suits to enforce payment of money charged upon immovable property.

VASUDEVA MUDALIAR AND OTHERS v. K. S. [SRINIVASI PILLAI AND SADAGOPA MUDALIAR, (1907) 23 T. L. R. 724—P. C.

215. *Limitation—Rent in Arrear—Ascertained Rent—Rent Recovery Act (Madras Act, No. viii. of 1865)—Indian Limitation Act, 1877 (Act No. xv.), Schedule 2, Art. 110.*—Rent becomes due within the meaning of the Indian Limitation Act, 1877, Schedule 2, art. 110, when it is an ascertained rent, which the tenant is under an obligation to pay, and which the landlord can sue for.

Under the Rent Recovery Act (Madras Act, No. viii. of 1865), where the landlord has tendered a puttah which the tenant has refused to accept, the rent becomes due when the Court has settled the terms of the puttah, including the amount of the rent.

RAJA RANGAYA APPA RAO BAHADUR v. BOBBA [SREERAMULU AND OTHERS, (1904) 20 T. L. R. 76—P. C.

216. *Mahomedan Law—Mushua—Undivided Property—Validity of Gift.*—The rule of Mahomedan law as to the invalidity of a gift of undivided specified shares in property capable of division does not apply to shares in companies and freehold property in a commercial town.

IBRAHIM GOOLAM ARIFF v. SAIBOO AND OTHERS, [(1907) 23 T. L. R. 680—P. C.

217. *Mitakshara Law—Family Property—Zemindari—Evidence of Partition—Cesser of Commensality—Right of Mother on Partition—Omission to Reserve her share—Action to Recover Movable and Immovable Property—Code of Civil Procedure (Act x. of 1877) s. 44, rule a.*—In considering whether there has in fact been a partition of joint family property a cesser of commensality on the part of one of the family is important, but not conclusive evidence.

Upon such a partition, the mother is entitled under Bengal law to the share of a son, but she may waive her claim by acquiescence in a partition from which she is omitted. The omission to reserve for her a share, when she has not in fact waived her claim, does not *ipso facto* invalidate the partition, but the Court can re-adjust the division of property so as to do justice to all parties.

Krishnabai v. Khangowda (1 L. R. 18 Bombay 197) distinguished.

There is nothing irregular in seeking to recover in one suit movable and immovable property, where the cause of action is the same in respect of both, *e.g.*, where a widow claims her husband's share in family property under a partition not completed at the date of his death.

India—Continued.

CHOWDHRY GANESH DUTT THAKOOR AND OTHERS  
[v. JEWACH THAKOORAIN, (1904), 20 T. L. R.  
45—P. C.

218. *Mitakshara Law—Self-acquired Im-movable Property—Power of Alienation.*—By the law of the Mitakshara a Hindu has power to dispose of his self-acquired property, whether movable or immovable, according to his own pleasure.

RAO BALWANT SINGH v. RANI KISHORI, (1898) 14  
[T. L. R. 237—P. C.

219. *Mitakshara Law—Survivorship—Joint Family Property.*—A Hindu gentleman named Venkat Rao, living in the province of Madras, where the Mitakshara law prevailed, died in 1869, leaving a widow, who died in July, 1875, and a daughter, who died in 1884. He left no other widow and no descendant except his daughter and her issue. His daughter married and had two sons—viz., Niladri and Appa Rao. Niladri was born in his grandfather's lifetime, and died in 1892. Appa Rao was born after his grandfather's death, and died in 1901. Venkat Rao's property was his own separate property. The litigation which had culminated in these appeals was between persons claiming under those two brothers, grandsons of Venkat Rao, and the main questions raised on the appeals were as follows—viz.: (1) Did Venkat Rao leave a will, or did he die intestate? (2) If he died intestate, did his property descend on the death of his daughter to her two sons jointly, with benefit of survivorship, or jointly or in common without benefit of survivorship? In the latter case Niladri's share would, on his death, have devolved on his widow and children.

HELD—that, on the facts, Venkat Rao revoked the will he made, and that he died intestate; that Niladri and Appa Rao, on their mother's death, succeeded as heirs to their grandfather's estate; that they were joint owners with benefit of survivorship.

RAJAH CHELIKANI VENKAYAMMA GARU v. RAJAH  
[CHELIKANI VENKATARAMANAYYAMMA BAHADUR  
GARU (1902) (and cross appeal), 18 T. L. R.  
685—P. C.

220. *Mitakshara Law—Zemindari—Impartible Estate—Execution under a Money Decree—Sale of "Right Title and Interest" before 1889—What interest passed—Code of Civil Procedure (Act viii. of 1859), s. 249.*—In determining what interest in property passed under a sale of such property in execution of a money decree, the questions are: "What did the Court intend to sell? and what did the purchaser understand that he was buying?"

In 1876 the "right, title and interest" of the head of a family in the family zemindari was sold in execution of a money decree, at that date it was considered that such a property was inalienable by the head of the

family except for certain special purposes; in 1889, however, the previously accepted interpretation of the law was reversed

HELD—that the estate which passed to the purchaser under the execution sale was only the debtor's life interest, for the purchaser must be taken to have relied on the law as understood at the date of the sale, which allowed only the life interest to be aliened.

Lloyd v. Gubert ((1866) 6 B. & S. 100—Ex.) followed.

Decision of High Court (1 L. R. 22 Mad. 110) affirmed.

ABDUL AZIZ KHAN SAHIB v. COMMERCIAL BANK OF  
[INDIA AND OTHERS, (1904) 20 T. L. R. 46—  
P. C.

221. *Mokhasa Tenure—Grant of Land subject to Burden of Service—Claim by Zemindar to Dispense with Services and Retake Possession of Land.*—Where lands are granted subject to a burden of service (and not merely in lieu of wages), then, so long as the holders of those grants are willing and able to perform the services, the Zemindar has no right to put an end to the tenure, whether the services are required or not.

Rajah Leelanund Singh v. Thakoor Munoorunjun Singh (L. R. I. A. Sup. Vol. 181, at p. 185) followed.

In a certain village land had been held by Mokhasadars and their ancestors on a quit rent of Rs. 144 per annum for more than 100 years, rendering a service of 15 men to guard the Zemindar's fort and treasury, and to perform other duties. Such services were rendered down to 1860, but had seldom been called for since, as they were of little value. The Rs. 144 had been regularly paid down to the present date, and the land had always descended from father to son.

HELD—that the evidence pointed to a grant subject to a burden of service, and that the Zemindar could not release the burden and resume possession.

RAJAH VENKATA NARASIMHA v. RAJAH SOBHANAN-  
[DRI AND OTHERS, (1905) 22 T. L. R. 79—P. C.

222. *Mortgage—Decree for Payment, and, in Default, for Sale—Date fixed in Decree for Payment—Right to Interest Subsequently—Transfer of Property Act, ss. 88, 97.*—The plaintiff, now appellant, was a mortgagee, and the respondent represented the mortgagor, who was defendant, and was dead. The mortgage was made on 11th December, 1882, to secure three lakhs of rupees. The mortgagor failed to pay, and the mortgagee filed a plaint praying payment of principal and interest on a day to be fixed by the Court, and for sale in default of payment. The question arose whether, according to the decree, any interest was payable subsequent to the day fixed for payment of the specified sums—viz., future interest to 20th January, 1886, at 6 per cent; future interest to 20th July, 1886, at 6 per cent.

HELD—that, considering the universality of the long-established practice, its continuance

*India—Continued.*

for years after the Transfer Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting it, the conformity of sect. 97, which was *in pari materia* with sect. 88, the presumption that sect. 88 was framed with reference not to the running of interest, but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by the Procedure Code, according to the proper construction of the decree the plaintiff was entitled to interest at 8 annas per cent. up to the date of payment.

*Amolik Ram v. Lachmi Narain* ((1896) 1 L. R. 19—All. 174) dissented from.

*MAHARAJAH OF THE BHARATPUR STATE v. RANI*  
[Kanno Dei, (1901) 17 T. L. R. 34—P. C.]

223. *Mortgage—Redemption—Payment by one of several Co-mortgagors—Charge—Transfer of Property Act*, (iv. of 1882), s. 95.]—Sect. 95 of the Transfer of Property Act, 1882—by which “where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession”—is not limited to mortgages under which possession passes and therefore repasses on redemption, but it makes the condition of obtaining possession apply only to cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption.

*MALIK AHMAD WALI KHAN v. MUSAMMAT SHAMSI*  
[IAHAN BEGAM AND ANOTHER, (1906) 22 T. L. R. 389—P. C.]

224. *Mortgage—Sale of Land for Arrears of Revenue—Incumbrances—Purchase by “Proprietor”—Revenue Sales Act*, 1859 (Bengal Act xi.), ss. 37, 53.]—The respondent, who was a mortgagee, obtained a decree against his mortgagors, and executed the decree by attachment and sale of the estate under the provisions of the Civil Procedure Code. The sale took place on February 17th, 1896, when the respondent himself became the purchaser, and on March 21st, 1896, he obtained his sale certificate, and on April 29th he was put into possession. Meanwhile, on January 12th, 1896, default occurred in payment of the Government revenue payable in respect of the estate, and on March 25th, 1896, the estate was sold under the Revenue Sales Act, 1859, and the respondent became the purchaser in the name of a nominee, and in the following September the sale certificate in the name of the nominee was granted.

**HELD**—that the respondent when he purchased the estate at the revenue sale purchased an estate of which he was the “proprietor” within the meaning of sect. 53 of the Revenue Sales Act, 1859, and that he therefore purchased it subject to its incumbrances.

*MUSSANAT SHAM KUMARI v. RAJA RAMESWAR*  
[SINGH BAHADUR AND OTHERS, (1904) 20 T. L. R. 666—P. C.]

225. *Mortgage—Suit for Decree of Sale—“Contentious Suit”—Sale—Lis pendens—Transfer of Property Act* (No. iv. of 1882), s. 52.]—As soon as a first mortgagee brings a suit to obtain a decree for sale there is a “contentious suit,” within sect. 52 of the Transfer of Property Act, 1882, before the summons in the suit is served on the defendant, and the defendant cannot create a second mortgage on the property so as to affect the rights of the plaintiff.

*FAIZAZ HUSAIN KHAN v. MUNSHI PRAG NARAIN*  
[AND OTHERS, (1907) 23 T. L. R. 405—P. C.]

226. *Mortgages—Transfer—Additional Advance—Original Mortgage not kept alive—Intention to have the Benefit of Original Mortgage—Execution Creditor—Code of Civil Procedure*, 1882, s. 276.]—A purchase of property by the appellant at a sheriff’s sale was held subject to a prior lien claimed by the respondents on the ground that the appellant had full knowledge of the real facts of the case when he bought the property. The appellant’s contention that two old mortgages were extinguished by the mode in which they were dealt with failed on the ground that so to hold would be to defeat the obvious intention of the parties. Section 276 of the Civil Procedure Code does not give an execution creditor an unencumbered fee simple instead of an equity of redemption against the intention of the parties.

*DINOBUNDHU SHAW CHOWDERY v. JOGMAYA DASI*  
[AND OTHERS, (1902) 18 T. L. R. 138—P. C.]

227. *Mortgages—Usufructuary Mortgage—Redemption—Interest—Delivery to or Possession of Mortgaged Property by Mortgagee—Lease of Mortgaged Property by Mortgagee to Mortgagor—Transfer of Property Act*, 1882 (Act No. iv.), s. 58 (d)]—The father of the respondent, on June 15th, 1851, mortgaged twelve villages in which he had proprietary rights to an ancestor of the appellant to secure an advance of 5,600 rupees at 2 rupees per cent. interest. Until the mortgagor paid the principal with interest to the very last pie, the mortgagee was to continue in possession and occupation of the villages. Possession of the twelve villages was given at the time of the execution of the mortgage. In 1853 their number was reduced to six by a grant, and to five by settlements in 1858 and 1864. The mortgagee appeared to have acquiesced in such reductions. The rents of the remaining villages constituted an ample security for the whole amount of the mortgagee’s claim.

**HELD**—that the mortgage was one of the class known as usufructuary mortgages, in which possession of the mortgaged property is delivered to the mortgagee, who takes the rents and profits in lieu of interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of



*India—Continued.*

the mortgage money; that the arrangement between the parties was completed by the execution of a lease under which the mortgagor became the tenant of the mortgagee and paid rent in lieu of interest, and therefore took his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond, and that the mortgagor was entitled to redeem on payment of the mortgage money of 5,600 rupees only.

RAJA PERTAB BAHADUR SINGH *v.* GAJADHER  
[BAKSH SINGH, (1902) 18 T. L. R. 762—P. C.]

228. *Oudh—Life Tenant's Power to Alienate—Injunction—Oudh Estates Act (Act 1. of 1869), ss. 10, 11.*—A widow, who has only a life interest, is not empowered by sects. 10, 11, of the Oudh Estates Act to alienate the property. Although sect. 10 makes the lists framed under the Act conclusive evidence that the persons named therein are taluqdars or grantees, the Court can go behind them to the extent at least of recognising trusts, and will probably grant an injunction restraining a taluqdar registered as such from alienating the property to the detriment of persons beneficially interested in it

SHEO PERTAB BAHADUR SINGH *v.* THE ALLAHABAD  
[BANK, LD., (1903) 19 T. L. R. 571—P. C.]

229. *Oudh—Taluqdar—Entry of Name in List—Conclusive Evidence—Inclusion of Name of Person Dying before Act—Effect on Rights Accruing at Death—Oudh Estates Act (Act 1. of 1869), s. 10.*—By sect. 10 of the Oudh Estates Act, 1869, the inclusion of a person's name in the first and third of the lists therein referred to is conclusive evidence that such person is a Taluqdar within the meaning of the Act, and has received a Sanad declaring that the estates included in it shall descend according to the law of primogeniture; but this does not apply to the case of a person who died before 1869, but whose name was by some means included in the list

A. was a Taluqdar, but was never officially recognised as such and never received a Sanad; he died in 1865, but in 1869 his name was for some unexplained reason included in the first and third lists under the Act.

HELD—that his estates descended upon his death according to Mahomedan law, and that the inclusion of his name in the lists after his death could not alter the rule of descent to that of primogeniture, and so deprive some of his heirs of rights already acquired by them at the date of his death.

MOHAMMAD ABDUSSAMAN AND OTHERS *v.* KURBAN  
[HUSIAN AND OTHERS, (1904) 20 T. L. R. 65—P. C.]

230. *Oudh—Taluqdar and Under Proprietor—Arrears of Rent—Interest Upon—Oudh Rent Act (No. 22), 1886, ss. 12, 141—*

*Interest Act (No. 32), 1839, s. 1—Indian Contract Act (No. 9), 1872, s. 73.*—An under-proprietor, as distinct from a tenant, is not liable to pay interest upon arrears of rent-charge under sect. 141 of the Oudh Rent Act, 1886

Muhammad Siddiq Khan *v.* Muhammad Nasir-ul-lah Khan (L. R. 26 Ia. 45) followed. An under-proprietor held land of a Taluqdar under a compromise in an action.

HELD—that the original agreement was merged in the decree of the Court, and that the under-proprietor was not holding under any "contract" which would render him liable for interest upon arrears of rent under sect. 73 of the Contract Act, 1872.

Neither the compromise nor the decree prescribed or indicated any time for payment of the rent.

HELD—that the interest upon arrears was not payable under sect. 1 of the Interest Act, 1839.

Duncombe *v.* Brighton Club and Norfolk Hotel Co. ((1875) L. R. 10 Q. B. 371; 44 L. J. Q. B. 216; 23 W. R. 795; 32 L. T. 863) and L. C. D. Ry. Co. *v.* S. E. R. Co. ([1892] 1 Ch. 120; 61 L. J. Ch. 294; 40 W. R. 194; 65 L. T. 722—C. A.) discussed.

THAKUR GANESH BAKSH *v.* THAKUR HARIKAR  
[BAKSH, (1904) 20 T. L. R. 401—P. C.]

231. *Oudh—Taluqdar—Bequest of Property to Younger Son—"Legatee"—"Brother"—Marginal Notes to Indian Statutes—Oudh Estates Act (i.), 1869, ss. 8, 15, 22.*—Marginal notes in an Indian Statute cannot be referred to for the purpose of construing it.

A half-brother is within the meaning of the word "brother" in sect. 22 of the Oudh Estates Act, 1869.

In sects. 13, 14 of that Act the expression "a person who would have succeeded according to the provisions of this Act" means "a person to whom the estate would have descended according to the provisions of the special clause of sect. 22 applicable to the particular case," but does not include all possible heirs of the owner.

Therefore, where a Taluqdar, whose property by custom devolved on a single heir, made it over to his younger son before 1869, the property was held to pass on the son's intestacy to his widows and not to his eldest brother, for the customary and prescribed line of succession was broken once for all by the transfer to him from his father, his elder brother (and not himself) being the person "who would have succeeded" but for such transfer.

THAKURAIN BALRAJ KUNWAR AND ANOTHER *v.*  
[RAE JAGATPAL SINGH, (1904) 20 T. L. R. 534—P. C.]

232. *Oudh—Village Community—Proprietary Tenure—Sale of Property—Right of Pre-emption—"Co-sharers of the whole Mahal"—Liability for Revenue Assessed on the Mahal—Land Revenue (Oudh) Act (No. 17), 1876, ss. 108, 112—Oudh Laws Act*

*India—Continued.*

(No. 18), 1876, s. 9.]—The owner of a separate *chak*, who, under the settlement by which he holds, pays an annual revenue through the *lambardars* of the village, being liable in the case of the default of others for the revenue assessed on the whole *mahal*, is entitled to the right of pre-emption under sect. 9 of the Oudh Laws Act, 1876.

MUNNU LAL AND ANOTHER *v.* MAULVI SAJJID  
[MUHAMMAD ISMAIL AND OTHERS, (1904) 20  
T. L. R. 668—P. C.

233. *Practice—Appeal to High Court from Lower Appellate Court*—“*Substantial Error or Defect in the Procedure*”—*Finding of Fact—No Evidence to Support—Civil Procedure Act* (Act x.), 1877, s. 584.]—Where the High Court of India reversed a decision of the Lower Appellate Court on the ground that that Court had disposed of the suit upon a case not raised by the parties, and as to which the evidence had not been directed,

HELD—that the High Court had rightly interfered to correct “a substantial error or defect of procedure” within the meaning of sect. 584 of the Civil Procedure Act, 1877.

A finding of the Lower Appellate Court is final upon a question of fact if, and only if, it “has before it evidence proper for its consideration in support of the finding.”

SHIVABASAVA *v.* SANGAPPA, (1904) 20 T. L. R.  
[719—P. C.

234. *Practice—Appeal—Final Order—Interlocutory Order—Code of Civil Procedure*, 1882, ss. 594, 595.]—The High Court set aside the refusal of the subordinate Judge to set aside his decree as having been passed *ex parte*, and remanded the case under sect. 562 of the Code of Civil Procedure, 1882, in force in India, “for disposal on its merits.” On appeal,

HELD—that what was remanded was merely the application immediately before the Court, namely, the application to set aside the decree, and that it was that application which the subordinate Judge would, under the remand, proceed to dispose of, by allowing the respondent to endeavour to satisfy him of the conditions specified in sect. 108, and then, if that be done, by setting aside the decree.

HELD ALSO—that the order was in no sense final, but a purely interlocutory order directing procedure, and the appeal must be dismissed with costs.

RAI RADHA KISHEN *v.* COLLECTOR OF JAUNPORE,  
[(1901) 17 T. L. R. 129—P. C.

235. *Practice—Death of one Defendant—Application to Substitute Legal Representation—Delay in Applying—Abatement of Suit—Civil Procedure Code* (Act xiv. of 1882), s. 368—*Civil Procedure Code Amendment Act* (Act vii. of 1888), s. 66.]—By sect. 368 of the

Civil Procedure Code and sect. 66 of the Amendment Act if any defendant die before decree, and the right to sue does not survive against the other defendant or defendants alone, the plaintiff may apply within six months to substitute the legal representative of the deceased; if he fail to do so within six months the suit is abated, unless he excuses his delay to the satisfaction of the Court.

A defendant died in July, 1898; in November probate was granted to his executor; in April, 1899, the plaintiff applied to substitute the executor.

HELD—that, in the absence of an excuse for the delay, the suit had abated.

RAJ CHUNDER SEN *v.* GANGADAS SEAL AND  
[OTHERS, RAMGATI DUT *v.* RAJ CHUNDER SEN,  
(1904) 20 T. L. R. 303—P. C.

236. *Practice—Evidence—Fresh Evidence—Civil Procedure Code*, ss. 563, 623.]—Sect. 563 of the Code of Civil Procedure applies where the Appellate Court, upon examining the evidence as it stands, finds that some inherent lacuna or defect exists, and does not apply where a discovery is made outside the Court of fresh evidence. The latter case is provided for by sect. 623.

KESSOWJI ISSAR *v.* THE GREAT INDIAN PENINSULA  
[Ry. Co., (1907) 96 L. T. 859; 23 T. L. R.  
530—P. C.

237. *Privy Council—Appeal to—Appealable Limit—Question of Law—Right of Appeal—Code of Civil Procedure*, 1882, ss. 595, 596, 600.]—The presence of some substantial question of law does not give a right of appeal when the value is below the amount of 10,000 rupees, except by leave. Leave will only be given in special cases, such, for example, as those in which the point in dispute is not measurable by money, though it might be of great public or private importance.

BANARSEI PARSHAD *v.* MUSSAMMAT MEWA KUN-  
[WAR, (1901) 17 T. L. R. 128—P. C.

238. *Punjab—Village—Sale—Right of Pre-emption—Tenants with Rights of Occupancy—“Village Communities”—Act xii. of 1878*, ss. 9, 10, 11, 12—*Punjab Laws Act*, 1872.]—The expression “village communities” in sect. 10 of Act xii. of 1878 is not to be construed in a narrow sense as denoting only a village community of the typical kind: it includes occupancy tenants, and even persons of inferior rank unconnected with the land; and therefore the change from the word “village” in sects. 9, 12, to the expression “village community” in sect. 10 does not narrow the operation of the former sections.

The sole proprietor of a village died, and the occupancy tenants claimed the right of pre-emption to which sects. 9, 12, *primâ facie* entitled them. It was argued that this right was excluded by sect. 10 because, there being one proprietor only, there was no “village community” in the strict sense.

HELD—that the occupancy tenants had the right of pre-emption.

*India—Continued.*

Decision of the Chief Court of the Punjab affirmed.

RAHIM-UD-DIN AND OTHERS *v.* REWAL AND [OTHERS, (1903) 19 T. L. R. 349—P. C.

239. *Registration of Documents—Lease of Immovable Property—Agreement to pay a Monthly sum in consideration of obtaining a Lease of a Reversionary Interest—Necessity for Registering Agreement—Indian Evidence Act, 1872 (Act No. I.), s. 92—Indian Registration Act, 1877 (Act No. III.), s. 17—Transfer of Property Act, 1882 (Act No. IV.), ss. 105, 107.]—In July, 1895, the Rajah of Ramnad executed a reversionary lease of portions of his zemindary in favour of Ramasany C. The lease recited that there were subsisting leases affecting the properties demised, some of which would not expire till 1911. The new lease was accordingly made to commence in 1912, was expressed to be perpetual, the annual rent was fixed, its recovery, as well as that of road-cess and other charges was provided for, and the rights and obligations of both parties defined. During the negotiations it was agreed that, in consideration of his obtaining the lease, Ramasany C. should pay the Rajah 500 rupees a month for ten years, from July, 1895, and that arrangement was put in writing and sent to the Huzur Treasury. On July 12th, 1895, the Rajah executed a trust deed, in which he recited that he was possessed of his zemindary, subject to subsisting debts, charges, encumbrances and leases, and that he was desirous of making a settlement for the benefit of his heir-apparent and elder minor son. The trusts were declared in detail, including payment of a monthly allowance to the Rajah himself. No payments having been made by Ramasany C. in respect of his agreement to pay 500 rupees a month, the Rajah, on December 9th, 1895, assigned that agreement for value to Ramanadhan C.*

HELD—that the agreement was not affected by sect. 92 of the Indian Evidence Act, 1872, and that there was nothing in the Indian Registration Act, 1877, or the Transfer of Property Act, 1882, which required that it should be registered as part of the lease; and that the rights accruing after July 12th, 1895, were not intended to pass.

SUBRAMANIAN CHETTIAR *v.* ARUNACHALAM CHETTIAR [AND OTHERS, (1902) 18 T. L. R. 724—P. C.

240. *Religious Processions—Public Streets.]—All members of the public have equal rights in streets which are vested in the local authority, and therefore one religious sect has no right to prohibit another religious sect from conducting religious processions in the streets.*

Decision of the Supreme Court of Madras (I. L. R. 26 Mad. 376) affirmed.

SADAGOPA CHARARIAR *v.* KRISHNAMOORTHY RAO, [1907] 23 T. L. R. 403—P. C.

241. *River Altering Course—Accretion—*

*Assessment of Reclaimed Lands—Permanent Settlement, 1793—Evidence—Thak Maps—Survey Maps—Act ix. of 1847, ss. 3, 5, 6.]—The burden of showing that any particular lands were included in, and assessed under, the Permanent Settlement of 1793, lies upon those who affirm that such is the case.*

The bed of a river is presumably Government property; and, if it shifts its course and leaves part of the bed dry, it cannot be assumed that such part of the bed was assessed permanently in 1793.

Maps and survey maps made in India for revenue purposes are official documents, prepared by competent persons, and with such publicity and notice to persons interested, as to be valuable and admissible evidence of the state of things at the date of their preparation; but it is not correct for a judge of first instance to direct himself that he ought in every case to accept the latest thak or survey map as decisive, when the question is whether or not lands were included in the settlement of 1793.

MAHARAJA JAGADINDRA NATH ROY BAHADOOR *v.* [SECRETARY OF STATE FOR INDIA, (1903) 19 T. L. R. 124—P. C.

242. *River Altering Course—Accretion—Sudden Change in Course—Ownership of Soil—Bengal Regulation (No. xi. of 1825).]—Where a non-tidal river separating two estates belonging to different owners suddenly changes its course, the property in the soil is not changed.*

THAKURAIN RITRAJ KOER *v.* THAKURAIN SAR- [FARAZ KOER, (1905) 21 T. L. R. 637—P. C.

243. *Sale to Satisfy Road Cess—Fraudulent Sale—Certificate of Collector—Setting Aside—Limitation—Public Demands Recovery Act (Bengal Act, VII. of 1880), ss. 12, 17, 24.]—The Public Demands Recovery Act, 1880, applies to cases of road cess.*

A sale took place in execution of a certificate granted by a deputy collector under the above Act in respect of a fine imposed upon the plaintiff for failure to comply with a notice issued under the Cess Act, 1880. Subsequently the plaintiff applied to set aside the sale as irregular and fraudulent. The Commissioner admitted the appeal, and made an order annulling the sale, and the Board of Revenue decided that the fine was unjust, and set aside the certificate for its recovery. The plaintiff then brought a suit to set aside the sale.

HELD—that the Commissioner had jurisdiction to make the order, and the Court would set aside the sale.

BABU LALITESWAR SINGH *v.* MAHANT RAM KISHEN [Das, (1906) 22 T. L. R. 675—P. C.

244. *Shiah Law—"Wakf"—Creation by Will.]—Under the Shiah law, as well as under the Sunni law, it is possible by will to create a "wakf"—i.e., to devote property to religious purposes; and it is not necessary to carry out the object by the indirect process*

*India—Continued.*

of making a gift of the property, coupled with a direction to the donee to create the "wakf" desired.

*Agha Ali Khan v. Altaf Hasan Khan* (Ind. L. R. 14 Allahabad 429) overruled.

, Decision of Judicial Commissioners reversed.

*BAKER ALI KHAN AND ANOTHER v. ANJUMAN [ARI BEGAM AND ANOTHER, (1903) 19 T. L. R. 296—P. C.*

**245. Succession—Childless Widow—Succession to her Property—Co-widow—Husband's Brother or Nephew—Mitakshara—Mayukha.**—Upon the death of a childless widow holding property for an absolute estate of inheritance;

**HELD**—that her co-widow was entitled to succeed in preference to her husband's brother, or brother's son.

*BAI KESSERBAI v. HUNSRAJ MORARJI AND [ANOTHER, (1906) 22 T. L. R. 538—P. C.*

**246. Succession—Devolution of Property—Zemindari—Grant in lieu of Palayam—Impartible Estate—Primogeniture—Maintenance.**—The question whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture must depend upon the facts of each case

In 1814 a Sannud was granted to a Poligar conferring upon him the rights of a Zemindar in sixty-five specified villages. The Sannud was expressed to be granted in lieu of all formed privileges, and conferred the Zemindari of V. to the grantee to hold in perpetuity to his heirs, successors and assigns at the permanent assessment named therein. Since that date the Zemindari had been uniformly enjoyed as an impartible estate.

**HELD**—that the estate was impartible, and descended according to the rules of primogeniture.

When impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line.

It is not the practice of the Privy Council to interfere with the decision of an Indian Court upon a question as to amount of maintenance.

*KACHI KALIYANA AND ANOTHER v. KACHI YUVA [AND OTHERS, (1905) 21 T. L. R. 721—P. C.*

**247. Tenancy—Agricultural Purpose—Indigo Manufacture—Practice—Second Appeal—Code of Civil Procedure, ss. 584, 585—Bengal Tenancy Act, 1885 (No. viii.), s. 23.**—The judge of first instance having found that the manufacture of indigo was an agricultural purpose, and that the use of land for an indigo factory came within sect. 23 of the Bengal Tenancy Act, 1885;

**HELD**—that the High Court were not justified in overruling his decision upon second appeal.

*HARI MOHUN MISSER v. SURENDRA NARAYAN [SINGH, (1907) 23 T. L. R. 550—P. C.*

**248. Trustee—New Trustee—Appointment Right of Settlor's Lineal Descendant—Discretion of Court—Power to Appoint a Woman—Mutawalli.**—There is no legal prohibition against a woman holding a Mutawalliship when the trust involves no spiritual duties such as she cannot properly discharge in person or by deputy.

*Semble*, a person who is not a Mahomedan, or not an orthodox one, may be a Mutawalli.

By a consent order a trustee was to retire, and a new trustee was to be appointed, "preference being given to the lineal descendants of the settlor."

**HELD**—that the Court had a discretion to appoint a person who was not such a lineal descendant, and that under all circumstances the discretion had been properly exercised.

*SHAHAR BANOO v. AGA MAHOMED JAFFER BINDA [MEEM AND OTHERS, (1907) 23 T. L. R. 186—P. C.*

**249. Will—Administration—Setting aside Deeds on Ground of Fraud—Jurisdiction of Court—Construction—"Poojas"—"Heirs."**—A suit was brought in the Indian High Court by a widow for administration of the estate of her deceased husband, who was resident and whose estate was situate within the jurisdiction, the principal executor being also resident there.

**HELD**—that in such suit the Court had jurisdiction to set aside deeds obtained by fraud from the widow by the executor, including leases of land outside the Court's territorial jurisdiction.

The will having provided for the repayment to the executors of their "pooja" expenses,

**HELD**—that an inquiry should be directed as to whether the sums appearing to have been so expended by the executors were reasonable and proper having regard to the terms of the will and all the circumstances of the case, and, if not, what sums ought to be allowed.

*Semble*—the word "heirs" as used in the particular will meant the testator's "right heir."

*BENODE BEHARI BOSE v. SRIMATI NISTARINI AND [OTHERS, (1905) 21 T. L. R. 656—P. C.*

**250. Will—Interpretation—Bequest to the "Eldest Son to be born"—Vesting of Share.**—A testator by his will directed that all his movable and immovable property should "descend in equal shares to the eldest son to be born to each of the daughters of his late brother . . . The sons of those daughters (of my brother) shall after their birth remain under the control and guardianship of the executor Saheb until they

**India—Continued.**

attain majority at the expiry of twenty-one years, and whenever the eldest son of any of the ladies shall attain majority the executor will make over his share to him to his satisfaction." After the testator's death a son was born to one of the daughters, and died in infancy. There was no other issue of that daughter.

**Held**—that on the birth of the son the half share became vested in him, and on his death it passed to his father as his heir.

**HARRISS AND ANOTHER v. BROWN AND OTHERS,**  
[1901] 17 T. L. R. 652—P. C.

251. *Will—Probate—"Hindu"—"Sikh"*—*Indian Succession Act* (No. x. of 1865), s. 331—*Probate and Administration Act* (No. v. of 1881), s. 2]—The term Hindu in sect. 2 of the Probate and Administration Act, 1881, and sect. 331 of the Indian Succession Act, 1865, includes a Sikh; and therefore under the former Act probate can be granted of the will of a Sikh.

A person born a Hindu is not excluded from the category of Hindus merely by occasional unorthodoxy in matters of diet and ceremonial.

**RANI BHAGWAN KAUR v. BOSE AND OTHERS,**  
[1903] 19 T. L. R. 690—P. C.

252. *Will—Probate—Mahomedan Will—Estoppel—Confirmation by Will of Void Transactions—Subsequent Action to set aside Transactions—Probate and Administration Act* (No. v. of 1881), ss. 4, 59, 88.]—The will of a Mahomedan lady, which confirmed a deed of release of the testatrix's property to the defendant, was admitted to probate under the Probate and Administration Act, 1881, though the plaintiffs, who were her heirs, had entered a caveat against it. The plaintiffs then brought an action to compel the defendant to account for two-thirds of the testatrix's property, a Mahomedan having only power to dispose of one-third of his property by will. It was admitted that, apart from the effect of the probate, the deed of the release and the confirmation thereof in the will were of no effect, as having been obtained by undue influence, but it was contended that the plaintiffs were estopped by the probate from denying the validity of the confirmation of the deed contained in the will.

**Held**—that probate granted under the Act of 1881 did not create an estoppel as contended.

**MIZRA KURBATULAIN BAHADUR (SINCE DECEASED),**  
[AND NOW REPRESENTED BY NAWAB AKBARI  
BEGUM AND OTHERS v. PEARA SAHIB, (1905) 21  
T. L. R. 650—P. C.

**DEPENDENTS.**

See MASTER AND SERVANT.

**DEPOSIT.**

See PARLIAMENT.

**DEPOSITIONS.**

See CRIMINAL LAW AND PROCEDURE  
EVIDENCE.

**DEPRECIATION.**

See INCOME TAX, TRUSTS AND  
TRUSTEES.

**DERELICT.**

See SHIPPING AND NAVIGATION.

**DESCENT AND DISTRIBUTION.**

- I. DEVOLUTION OF ESTATE. . . 1026
- II. DISTRIBUTION OF ASSETS . . 1027

And see HUSBAND AND WIFE, 21.

**I. DEVOLUTION OF ESTATE.**

1. *Estate pur Autre Vie—Devised to Intestate without Words of Limitation—No Special Occupant—Wills Act, 1837* (1 Vict. c. 26), s. 6.]—J. W. M. was entitled for his life, under a settlement, to a seventh share in certain hereditaments, which were vested in the trustees of the settlement; this share he assigned to J. I., who devised it to trustees for the use of his grandson, M. I., without adding any words of limitation. M. I. died intestate, and the question now arose as to whether his heir-at-law or his legal personal representative was entitled to the one-seventh share until the death of J. W. M., the *cestui que vie*.

**Held**—that, though J. I.'s will passed to his grandson his whole interest, there was nothing on the face of the will to indicate

*Devolution of Estate—Continued.*

that the grandson's heir was to take as special occupant; and that the mere fact that the whole interest passed did not entitle the heir to enter, and that, therefore, the share passed to M. I.'s personal representative.

*Doe v. Lewis* ((1842) 9 M. & W. 662; 11 L. J. Ex. 305) followed in preference to *In re King* ([1898] 1 I. R. 91; [1899] 1 I. R. 30).

HELD ALSO—that no general occupancy arose, the property being vested in the trustees of the original settlement, who would hold the proceeds in trust for M. I.'s personal representative, when constituted, as part of the intestate's personal estate.

IN RE INMAN, *INMAN v. INMAN*, [1903] 1 Ch. 241; [72 L. J. Ch. 120; 51 W. R. 188, 88 L. T. 173—Eady, J.

2. *Estate pur Autre Vie—Special Occupancy—Intestacy*—A lessee of lands which had been demised to the lessee, his heirs, executors, administrators and assigns, for three lives or for thirty-one years, by his will devised the lands to the trustees in trust for A. B., without any words of limitation in relation to either the legal or equitable interest. A. B. died intestate. One of the lives mentioned in the lease was still in existence. The term of years had long since expired.

HELD (affirming the decision of Porter, M.R. (1898) 1 Ir. R. 91)—that the heir-at-law, and not the personal representative of A. B., was entitled to the estate *pur autre vie*.

IN RE KING, *DECEASED, KING v. KING*, [1899] 1 [Ir. R. 30—C. A. Ir

3. *Mortgaged Property—Possession taken by Mortgagee—Death of Mortgagee—Widow Tenant for Life—Equity of Redemption becoming Barred during her Life Estate—Death of Widow—Devolution as Realty—From what Date.*—A mortgagee in possession devised the mortgaged property to his widow for her life, but did not dispose of the reversionary interest therein. During the continuance of the widow's life estate the equity of redemption became barred.

HELD—that the mortgagee's heir-at-law and next of kin (his brother) took the reversionary interest as realty, as from the date when the equity of redemption became barred, although it originally vested in him as personality; and that, therefore, on his death intestate it passed to his heir, subject as to one moiety to a trust in favour of the widow's representatives.

RE LOVERIDGE; *PEACE v. MARSH*, [1904] 1 Ch. [518; 73 L. J. Ch. 15; 52 W. R. 138; 89 L. T. 503—Buckley, J

## II. DISTRIBUTION OF ASSETS.

4. *Advances to Intestate's Sister—Advance by Order of Court in Lunacy—Children of Sister—Hotchpot—Statute of Distributions* (22 & 23 Car. II., c. 10), s. 5.]—Under an

order in lunacy certain sums were advanced to the sister of a lunatic, the sister and her husband consenting that the sums which should be advanced to her pursuant to the order should be taken and considered as part of any share to which she might become entitled of the estate of the lunatic at the time of his decease, in the event of her surviving him. She predeceased the lunatic, who died intestate, and she left children surviving. Her brother and sister, who survived her, had received similar advances.

HELD—that in distributing the lunatic's estate her children took *per stirpes* the share to which she would have been entitled under the Statute of Distributions, without bringing the sums advanced to her into hotchpot, although their uncle and aunt must bring into account the advances made to them.

Decision of Eady, J. ([1906] 1 Ch. 58; 75 L. J. Ch. 19; 54 W. R. 104; 94 L. T. 89; 22 T. L. R. 35) affirmed.

IN RE GIST; *GIST v. TIMBRELL*, (1906) 2 Ch. [280; 75 L. J. Ch. 657; 95 L. T. 41; 22 T. L. R. 637—C. A.

5. *Advancement—Heir-at-Law—Hotchpot.*—D. was possessed of a farm held under lease *pur autre vie*. By deed executed on the marriage of his son J., in consideration of the marriage and of £600 paid to him by the father of the intended wife, D. assigned the farm and certain stock and chattels to J. D. died intestate, leaving J., his eldest son and heir-at-law, surviving.

HELD—that the farm was exempt from being brought into hotchpot in the distribution of assets, on the ground that the assignment of it was an advancement of "land" to the heir-at-law, but that the stock and chattels transferred to him by the deed must be brought into hotchpot as being simply an advancement of personal estate

IN RE LYONS; *LYONS v. LYONS*, [1903] 1 Ir. R. [156—M. R.

6. *Intestacy—Death of Sole Executor and Universal Devisee in Testator's Life—Advances to Children—Hotchpot—Statute of Distribution*, 1671 (22 & 23 Chas. 2, c. 10), s. 5.]—Where a will has become inoperative by reason of the sole executor and universal devisee and legatee dying in the lifetime of the testator, there is an intestacy within sect. 5 of the Statute of Distribution, and the provisions of that statute as to children sharing in the residue bringing their advances into hotchpot.

Decision of Buckley, J. ([1902] 1 Ch. 218; 71 L. J. Ch. 24; 50 W. R. 91; 85 L. T. 609), affirmed.

IN RE FORD; *FORD v. FORD*, [1902] 2 Ch. 605; [71 L. J. Ch. 778; 51 W. R. 20; 87 L. T. 113; 18 T. L. R. 809—C. A.

7. *Widow—Husband Dying Intestate—Widow's Right to Property—Contingent Interests—Valuation—£500—Intestates Estate*

**Distribution of Assets—Continued.**

*Act, 1890 (53 & 54 Vict. c. 29), ss. 1, 5, 6.]—Sects. 5 and 6 of the Intestates Estates Act, 1890 (as to valuation of interests), do not control or cut down the general words in sect. 1 "the real and personal estate." The latter words are not confined to interests in possession.*

A husband died intestate, leaving a widow but no issue. Practically his only property was a reversionary interest in certain real and personal property. At the time of his death it had no market value, but ten years later it fell into possession, and proved to be worth £3,500.

**HELD**—that the value of the intestate's real personal estate must be taken at the date of his death, and that, as it was under £500, the whole (including the reversionary interest) passed to the widow.

**IN RE HEATH; HEATH v. WIDGEON**, [1907] 2 Ch. [270; 76 L. J. Ch. 450, 97 L. T. 41—Kekewich, J.

8. *Widow—Her Rights on Death of Husband Intestate—Provision for in Marriage Settlement—Intestates Estates Act, 1899 (53 & 54 Vict. c. 29).—A provision for a wife in a marriage settlement executed before the passing of the Intestates Estates Act, 1890, in discharge of all claims by her on the estate and effects of her husband, bars her right to the sum of £500 given by the Act to a widow out of her husband's assets in the event of his dying intestate and without issue, as well as to the share of his assets to which she is entitled under the Statute of Distribution.*

**HOGAN v. HOGAN**, [1901] 1 Ir. R. 168—M. R.

9. *Executors—Express Trust of Residue—Partial Failure of Beneficial Interests—Children Next-of-Kin—Previous Advancements to—Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10), s. 5—Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), s. 1.]—R. bequeathed the residue of his estate to his executors upon trust, as to £1,500 to invest and pay the income to his daughter A. for life, and after her death to divide the capital amongst her children, and as to the remainder in trust for all his children and their issue.*

Upon A.'s death without children the £1,500, being not disposed of, passed to his next-of-kin, i.e. four daughters and the children of a deceased daughter. In distributing it:

**HELD**—that the Executors Act, 1830, did not apply, and that advances made by R. to his daughters need not be brought into hotchpot.

**IN RE ROBY; HOWLETT v. NEWINGTON**, [1907] 2 Ch. 84, 76 L. J. Ch. 454; 97 L. T. 173—Neville, J.

**DESIGNS.**

*See TRADE MARKS AND DESIGNS.*

**DETINUE AND DETENTION.**

*See COUNTY COURT, Nos. 52, 53, 65.*

**DEVASTAVIT.**

*See EXECUTORS.*

**DEVISE.**

*See WILLS.*

**DIGNITIES.**

1. *Peerage — Surrender — Re-grant to Another Person*—A peer cannot surrender his peerage to the King and so destroy the title of those entitled in remainder.

In 1302 Roger de Bygod, Earl of Norfolk, who left descendants, surrendered his earldom to the King, and in 1312 the King granted the surrendered earldom to Thomas de Brotherton, who sat in Parliament in obedience to summonses. The earldom having fallen into abeyance, Lord Mowbray, who was descended from Thomas de Brotherton, but not from Roger de Bygod, claimed the title.

**HELD**—that the surrender of the earldom in 1302 was invalid, and that therefore the King could not grant the surrendered earldom to Thomas de Brotherton; that a summons to Parliament as an earl could not create an earldom; and that Lord Mowbray had failed to make out his claim.

**THE EARLDOM OF NORFOLK**, [1907] A. C. 10; 76 [L. J. P. C. 9; 95 L. T. 682; 23 T. L. R. 114—H. L. (E.).

**DILAPIDATIONS.**

*See ECCLESIASTICAL LAW; LANDLORD AND TENANT.*

**DIRECTORS.**

*See COMPANIES.*

**DISABILITIES.**

*See HUSBAND AND WIFE; INFANTS; LUNATIC.*

**DISCLAIMER.**

*See BANKRUPTCY, Nos. 21—25.*

## DISCOVERY, INSPECTION & INTERROGATORIES.

### I. DISCOVERY

- (a) In General . . . . . 1031  
 (b) Privilege . . . . . 1036  
 (c) Ships' Papers . . . . . 1039

### II. INSPECTION . . . . . 1040

### III. INTERROGATORIES . . . . . 1041

And see EVIDENCE; HIGHWAYS, No. 100;  
 PLEADING PRACTICE, Nos. 143, 144.

### I. DISCOVERY.

#### (a) In general.

1. *Action against Directors of a Company—Books of Company.*—In an action against two directors of a company, there being other directors, the Court refused to order the defendants to produce the books of the company in the absence of a consent by the company to their production.

WILLIAMS v. INGRAM, (1900) 16 T. L. R. 434—  
 [Byrne, J.]

2. *Action by Assured—Subrogation of Underwriters to Assured's Rights—Underwriters Taking Over Conduct of Action—Report made to Underwriters before Action.*—The plaintiffs, who had consigned a cargo of meat to the defendants for carriage from Buenos Ayres to London, brought an action against them to recover damages for breach of contract in connection with the refrigerating machinery of the ship. The plaintiffs had insured the meat for about three-fourths of its value, and the underwriters having paid to the plaintiffs the amount of the loss covered by the insurance took over the conduct of the action and employed their own solicitors therein. While the ship was loading at Buenos Ayres the underwriters heard that there was something wrong with the refrigerating machinery, and a surveyor, acting upon the instructions of the London Salvage Association, made a report thereon, which report was in the possession of the underwriters' solicitors. The defendants applied for discovery of this report.

Held—that, as the plaintiffs were substantial and not merely nominal plaintiffs, discovery could not be had from the underwriters, who were not parties to the action.

WILLIS & Co. v. Baddeley ([1892] 2 Q. B. 324; 61 L. J. Q. B. 769; 40 W. R. 577; 67 L. T. 206—C. A.) distinguished.

NELSON & SONS, LD. v. THE NELSON LINE, LD., [1906] 2 K. B. 217; 75 L. J. K. B. 895; 54 W. R. 546; 75 L. T. 180; 22 T. L. R. 630; 11 Com. Cas. 228—C. A.

3. *Action of Conspiracy—Tendency to Incriminate—R. S. C., Ord. 31, r. 2.*—The plaintiff, who was a member of the defendant trade union, brought an action against the union and the trustees thereof to recover damages for a conspiracy to persuade and

coerce certain workmen not to fulfil their contracts with the plaintiff, and not to enter into further contracts with him, and for an injunction. The plaintiff, upon a summons for directions, asked for an order for discovery of documents. The defendants contended that an order for discovery should not be made in an action of conspiracy.

Held—that the plaintiff was entitled to an order for discovery, the objection that the discovery might tend to criminate the defendants being one that could only be taken to the production of the documents alleged to have that effect.

SPOKES v. GROSVENOR HOTEL CO. ([1897] 2 Q. B. 124; 66 L. J. Q. B. 598; 45 W. R. 545; 76 L. T. 677—C. A.) approved and followed.

It is not in the first instance a valid objection to an interrogatory that the answer may tend to incriminate; such an objection must be taken on oath.

NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS [AND OTHERS v. SMITHIES, [1906] A C 434, 75 L. J. K. B. 861; 95 L. T. 71; 22 T. L. R. 678—H. L. (E.).

4. *Affidavit of Documents—Claim of Privilege—Sufficiency—Omission of Statement that Documents do not impeach Deponent's own Case.*—Although a carefully drawn affidavit will state that documents, for which privilege is claimed, contain nothing impeaching the deponent's case in addition to the statement that they relate only to his own case, and do not tend to support his opponent's case, yet such statement is not essential even in actions other than those for ejectment.

A.-G. v. NEWCASTLE CORPORATION ([1899] 2 Q. B. 478; 68 L. J. Q. B. 1012; 81 L. T. 311; 48 W. R. 38—C. A., *infra*) discussed.

JOHNSON v. WHITAKER, (1904) 90 L. T. 535—  
 [Kekewich, J.]

5. *Affidavit of Documents—Documents Impeaching the Defendant's Case—Sufficiency* [Where, on an information by the Attorney-General claiming a declaration of title to the foreshore and bed of the Tyne, a defendant, in making an affidavit of documents, claims that certain documents in his possession are privileged from inspection on the ground that they relate solely to his own case, and do not tend to support the plaintiff's case, it is not necessary for him to state further that they do not tend to impeach his own case.

MORRIS v. EDWARDS ((1890), 15 App. Cas. 309; 60 L. J. Q. B. 292; 63 L. T. 26—H. L. (E)) followed.

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION, [1899] 2 Q. B. 478; 68 L. J. Q. B. 1012; 48 W. R. 38; 81 L. T. 311; 15 T. L. R. 495—C. A.

6. *Affidavit of Documents—Documents Referred to in Scheduled Letter—Documents Produced though not Scheduled—"Specific Documents to be Specified in the Application"—R. S. C., Ord. 31, r. 19A (3).*—If a relevant document scheduled to an affidavit of documents is produced and privilege not



**Discovery—Continued.**

claimed for it, letters or documents referred to in it are *prima facie* relevant, and a further affidavit must be made as to them.

The same rules apply to documents in fact produced to the other side, though not scheduled to the affidavit; and, subject to an explanation that they were so produced inadvertently, they must be treated just as if they had been scheduled.

ORMEROD, GRIERSON & Co., LD. v. ST GEORGE'S [IRONWORKS, LD., (1907) 95 L. T. 694—Kekewich, J.

And see No. 13, *infra*.

**7. Affidavit of Documents — Irrelevant Documents.**—The Court will not accede to an application for an order on a plaintiff to make an affidavit of documents, which would not be of the slightest use to anyone for the purposes of the trial of the action.

SOUTH AFRICAN REPUBLIC, &C., &C. v. LA [COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NORD (No. 2), (1898) 14 T. L. R. 403—C. A.

**8. Affidavit of Documents — "Specific Documents"**—*Affidavit in Support of Application*—R. S. C., Ord. 31, r. 19A (3).—The object of Ord. 31, r. 19A (3), is that a litigant who can point to "specific documents," which he is able to name and specify in his affidavit, and who is in a position to swear that in his belief they are or have been in the possession of his opponent, and that they relate to the matters in question in the action, shall have a right to discovery of those particular documents. The rule is not intended to give to the party who is seeking discovery, upon a mere general affidavit, based upon *à priori* reasoning, asserting that he has reason to believe that letters must have passed between his adversary and some third person, or that books or other documents must exist relating to the subject-matter of the action, a right to discovery of those documents.

WHITE v. SPAFFORD & Co., [1901] 2 K. B. 241; [70 L. J. K. B. 658; 84 L. T. 574—C. A.

**9. Evidence — Production of Books — Partnership—Order upon Person not a Party—Ex parte Application—Rules Supreme Court, Ord. 37, r. 7.**—An order may be made *ex parte* against a person not a party to the action to attend before an examiner for the purpose of producing documents.

ZUMBECK v. BIGGS, 48 W. R. 507; 82 L. T. [654—Kekewich, J.

**10. Entries in Books—Disclosure of Customers' Names and Addresses.**—The plaintiffs having brought an action against the defendants for infringement, obtained judgment so far as the patent was concerned, and elected to take an account of profits against the defendants. The defendants went into voluntary liquidation. The question arose whether the entries in books

being *prima facie* material in order to ascertain what the profits were, the wrongdoing defendants were entitled to cover up any part of the entry upon the ground that the plaintiffs might make some use of it which they ought not to make, or which was not actually germane to the proceeding in the action, *c.g.*, the names and addresses of customers.

Held—that when a wrongdoer is being dealt with, the Court must not be very astute to prevent him from giving full discovery, because some consequences may flow from the fact that that discovery has been occasioned by his own wrongful act.

Principle in *Murray v. Clayton* (1872), L. R. 15 Eq. 115; 21 W. R. 118, Bacon, V.-C., applied

*Powell v. Birmingham Vinegar Brewery Co.* (1897), 14 R. P. C. 1 followed.

SACCHARIN CORPORATION, LD. v. CHEMICALS AND DRUGS COMPANY, LD., [1900] 2 Ch. 556, 69 L. J. Ch. 820, 49 W. R. 1; 83 L. T. 206, 16 T. L. R. 564; 17 R. P. C. 612—C. A.

**11. Penal Proceeding — Rivers Pollution Prevention Act, 1876** (39 & 40 Vict. c. 75), s. 10.]—The fact that disobedience to an order of a Court made in a civil proceeding may subject the party disobeying to a penalty does not make such proceeding penal, so that no discovery can be granted.

*Reg. v. Whitchurch* (7 Q. B. D. 534) distinguished by Lord Davey.

Judgment of the Court of Appeal affirmed.

DERBY CORPORATION v. DERBESHIRE COUNTY [COUNCIL, [1897] A. C. 550; 62 J. P. 4; 66 L. J. Q. B. 705; 77 L. T. 107; 46 W. R. 48—H. L. (E.).

**12. Production of Documents—Production at Specified Place—Bank Books**—R. S. C. Ord. 31, rr. 12, 17.]—In a foreclosure action the plaintiffs, in an affidavit filed in answer to a common order (under Ord. 31, r. 12) for discovery and production of documents upon reasonable notice at the office of their London solicitor, enumerated certain bank books in constant use at their Hastings branch. When the defendant applied for inspection the plaintiffs gave notice, under Ord. 31, r. 17, that they would produce the books at Hastings, and refused to produce them elsewhere. When the action came on the defendant objected that the plaintiffs were in contempt in not having complied with the order to produce the bank books at the office of their solicitor.

Held—that if the Court orders the production of books in a specified place, that order must be obeyed, notwithstanding Ord. 31, r. 17; that the plaintiffs could have applied to vary the order, but had not done so, and that they were technically in contempt.

LLOYD'S BANK v. LUCK, [1901] W. N. 130; [111 L. T. Jour. 178—Farwell, J.

**13. Right to take Copies**—R. S. C., Ord. 31,

**Discovery—Continued.**

rr. 14, 15; Ord. 65, r. 27.]—An order was made on the application of plaintiffs for the production of documents in the defendant's possession or power at his solicitor's office, the plaintiffs to be "at liberty to inspect and peruse . . . and to take copies and abstracts and extracts thereof and therefrom . . ."

HELD—that the plaintiffs might insist on being permitted to make copies themselves instead of bespeaking them from the defendant's solicitor.

The object of Ord. 65, r. 27 (18) is merely to fix the charge to be paid when a party prefers to bespeak copies; it does not compel him to adopt that course if he wishes to make his own copies.

ORMEROD, GRIERSON & Co. v. ST. GEORGE'S [IRONWORKS, LD., [1905] 1 Ch. 505; 74 L. J. Ch. 373, 53 W. R. 502; 92 L. T. 541—C. A.

And see No. 6, *supra*

14. *Several Defendants — Discovery by Plaintiff on Application of One Defendant—Right of Co-Defendant to Inspect—R. S. C., Ord. 31, rr. 14–18, 26.*—Where there are several defendants in action, and on the application of one of them the plaintiff files an affidavit of documents, another defendant may apply for leave to inspect such of the documents disclosed in the affidavit as are relevant to the matters in question between the plaintiff and himself. The Court will make an order upon the plaintiff to produce such documents for the inspection of the applicant; but, if there is reason to regard the application as an attempt to evade the provisions of Ord. 31, r. 26, as to deposit, a further deposit may be ordered.

PARDY'S MOZAMBIQUE SYNDICATE, LD. v. ALEXANDER AND OTHERS, [1903] 1 Ch. 191; 72 L. J. Ch. 104; 51 W. R. 295; 88 L. T. 11—Kekewich, J.

15. *Production of Documents — "Specific Documents"—Action for Infringement of Copyright—R. S. C. Ord. 31, r. 19A (3).*—The plaintiff was the owner of a book published in 1899, and registered in 1900, called "The History of the Works of Sir Joshua Reynolds, P. R. A." The defendant about the end of 1900 published a book called "Sir Joshua Reynolds, First President of the Royal Academy." The plaintiff complained that the defendant had made an unfair use of his book, and sued for an injunction. An order having been obtained by the plaintiff for the discovery of his opponent's documents, an affidavit of documents was made which was insufficient. The plaintiff accordingly applied for an order requiring the defendant to state on affidavit whether any one or more of certain documents specified was or were or had been in his possession or power, and if not, when he parted with

and what had become of the same. The plaintiff proceeded under Ord. 31, r. 19A (3).

HELD—that to justify an application under the rule, the applicant must in his affidavit name and specify, so that they could be identified, the particular documents of which he desired discovery, that was to say, that "specific" meant specific, and that it was not sufficient for the applicant to name a class—he must mention a species, and not merely a genus

GRAVES v. HEINEMANN AND ARMSTRONG, (1902) 18 [T. L. R. 115—Buckley, J.

**(b) Privilege.**

See also EVIDENCE.

16. *Accounts — Depositions — Public Property.*—Documents in their original nature privileged are liable to production if such use has been made of them that they have become *publici juris*, but not otherwise. Accounts which had been prepared by a witness's solicitors for purposes of litigation were, in the course of cross-examination of the witness before an examiner, handed to the witness and admitted to be correct, but were not read out in Court. The same accounts were subsequently made an exhibit to an affidavit entered as read on a summons before a judge in chambers to compromise the action. On an application in a subsequent action to produce the accounts and copies of the witness's depositions,

HELD—that the accounts had never been effectually made public, and that the use made of them did not amount to a waiver of privilege, but that the witness's depositions had become public property, and must be produced accordingly.

NORTH AUSTRALIAN TERRITORY CO. v. GOLDSBOROUGH, MORT & CO. ([1893] 2 Ch. 381; 62 L. J. Ch. 603; 41 W. R. 501; 69 L. T. 4; 2 R. 397) followed.

GOLDSTONE v. WILLIAMS, DEACON & CO., [1899] [1 Ch. 47, 68 L. J. Ch. 24; 47 W. R. 91; 79 L. T. 373—Stirling, J.

18. *Communications to Solicitor—"Evidencing" Statute—Innocent or Illegal Object.*—For the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production, but no Court can be called upon to protect communications which are themselves parts of a criminal or unlawful proceeding.

In order to displace the *prima facie* right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge, either by way of allegation or affidavit, or what not, which displaces the privilege.

In May, 1896, a gentleman died, and under the colonial law his estate had to pay certain duty. Some time before he died he

*Discovery—Continued.*

executed some voluntary conveyances, and it was said that under the law of the colony the property comprised in those voluntary conveyances was subject to duty. In order to obtain evidence about those documents a commissioner was sent over here, and under the statute (22 Vict. c. 20) witnesses were called before that commission, and the matter was considered from the point of view of an information in this country, alleging that the voluntary conveyances were executed "with intent to evade the payment of duty" under the colonial Act, and raising certain definite issues in support of which witnesses were called and examined. When the witnesses were called they were asked to produce these documents, and, above all, the instructions given to the solicitor who prepared them. The answer set up was that the documents were privileged. It was said that, the testator being dead, the privilege was gone.

**HELD**—that the mere fact that the testator was dead did not destroy the privilege; that there was no averment of any fraudulent contrivance or any illegal proceeding; that the word "evade" in the Act of Parliament had the double meaning—one innocent, to do something which did not bring the testator within the Act of Parliament, the other to conspire to do that which is illegal; that there was neither proof nor allegation in the information, nor anything which would displace the privilege.

Decision of the Court of Appeal (*sub nom. Reg. v. Bullivant*) ([1900] 2 Q. B. 163; 69 L. J. Q. B. 657; 82 L. T. 493; 16 T. L. R. 342) reversed.

**BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA**, [1901] A. C. 196; 70 L. J. K. B. 645; 50 W. R. 1; 84 L. T. 737; 17 T. L. R. 457—H. L. (E.).

19. *Documents in Previous Action—Secondary Evidence.*—After judgment had been delivered in favour of the plaintiffs in an action, the defendant became aware of certain documents used in the defence of a previous action, dealing with the same subject-matter, and defended at the cost of the plaintiff's predecessor in title. The defendant, having appealed, asked for an order that these documents should be produced, and, on the plaintiffs objecting that they were privileged, asked that he might give secondary evidence of those of which he had copies.

**HELD**—on the authority of *Minet v. Morgan* (28 L. T. Rep. 573; L. Rep. 3 Ch. App. 361), that the documents were protected by privilege; but that, having regard to the decision in *Lloyd v. Mostyn* (10 M. & W. 478), the appellant was not precluded from giving secondary evidence of the contents of the documents.

*Wheeler v. Le Marchant* (17 Ch. Div. 675) distinguished.

**CALCRAFT v. GUEST**, [1898] 1 Q. B. 759; 67 [L. J. Q. B. 505; 78 L. T. 283; 46 W. R. 420]—C. A.

20. *Documents Prepared for use in earlier Action between Different Parties—R. S. C. (Ireland), Ord. 31, rr. 12, 14.*—An action was brought against the defendants in respect of an obstruction caused by their salvage operations upon a wrecked vessel. They claimed privilege for certain confidential reports and correspondence made or procured by them as agents for an insurance company in reference to litigation "then anticipated and afterwards instituted" by the owners of the vessel against the insurance company.

**HELD**—that the documents would not have been privileged in such earlier action, and were not privileged in the present one.

**KERRY COUNTY COUNCIL v. LIVERPOOL SALVAGE [ASSOCIATION]**, [1905] 2 Ir. R. 38—C. A.

21. *Libel—Conspiracy—Inspection of Manuscript of the Libel—Form of Affidavit—Ord. 31, r. 13*—Where separate claims for damages for libel against a newspaper proprietor and other defendants are joined with a joint claim against them for the same libel, and also with a joint claim against them for damages for conspiracy to defame and injure, the proprietor of the newspaper, even where he admits publication of an exact copy of the libel, cannot refuse to produce the manuscript of the libel, either on the ground of privilege, or on the ground that its production might tend to incriminate him, if the Court comes to the conclusion that he does not honestly believe that its production will have that effect. To entitle a defendant to refuse discovery on the last-mentioned ground, his affidavit must show that he believes the production of the document will tend to incriminate him.

**KELLY v. COLHOUN**, [1899] 2 Ir. R. 199—Q. B.

22. *Record of Proceedings in Chambers—Letters between Solicitor and Client—Entries in Bills of Costs—Rules of Supreme Court, Ord. 31, rr. 18 (2), 19A.*—A mere record of what takes place in Chambers in the course of a hostile action in the presence of parties on both sides is not privileged.

Letters of which production was sought, and which were sworn to be "professional communications of a confidential character, having been made solely for the purpose of enabling my solicitors to conduct the said litigation in — v. — on behalf of my co-defendants and myself . . ." were held to be privileged, though they contained statements as to what had been done in Chambers.

Entries in bills of costs were sealed up; and privilege was claimed in respect of those entries on the following ground:—"that the same are copies of or extracts from memoranda or notes that were made by my solicitors, Messrs. —, pending the action of — v. —, solely for the purpose of enabling them to conduct the said litigation on behalf of myself and my co-defendant, and to advise us with reference thereto, and do not relate to any matter in question in this action." There was not a word in the affidavit that

**Discovery—Continued.**

the memoranda or notes were confidential. The Court looked at the entries, and, exercising its discretion under Ord. 31, r. 19A, held them not to be privileged.

*Semble*—There is no valid distinction between notes of proceedings in open Court and of those in Chambers.

*Greenough v. Gaskell* ([1833] 1 My. & K. 98, at pp. 102–104) and *In re Worswick* ([1838] 38 Ch. D. 370, at p. 373, 58 L. J. Ch. 31, 36 W. R. 685; 59 L. T. 399—North, J.) followed.

*AINSWORTH v. WILDING*, [1900] 2 Ch. 315, 69 [L. J. Ch. 693—Stirling, J.

**23. Report by Agent.**—In an action for damages for personal injury by their negligence, the defendant company claimed privilege in respect of a report made by one of their agents who called upon the plaintiff three days after the occurrence complained of, and took down his statement in writing, and obtained his signature to it.

**HELD**—that the document must be produced for the plaintiff's inspection.

*TOBAKIN v. DUBLIN SOUTHERN DISTRICTS TRAMWAY Co.*, [1905] 2 Ir. R. 58—C. A.

**(c) Ship's Papers.**

**24. Marine Insurance—Ship's papers—Action on policy of re-insurance.**—In an action upon a policy of marine insurance upon goods, which is a re-insurance, the usual order for discovery of ship's papers can be made.

*CHINA TRADERS' INSURANCE Co., LD. v. ROYAL [EXCHANGE ASSURANCE CORPORATION]*, [1898] 2 Q. B. 187; 3 Com. Cas. 189; 67 L. J. Q. B. 736; 78 L. T. 783; 14 T. L. R. 423; 46 W. R. 497—C. A.

**25. Marine Insurance—Affidavit of Ship's Papers—Partial Land Transit.**—Where an action is brought against an underwriter on a policy which is substantially one of marine insurance his right to an affidavit of ship's papers is not affected by the fact that a short part of the transit is by land.

*Henderson v. Underwriting and Agency Association* ([1891] 1 Q. B. 557; 60 L. J. Q. B. 406; 39 W. R. 528, 64 L. T. 774—Div. Ct.) doubted.

*HARDING v. BUSSELL*, [1905] 2 K. B. 83; 74 [L. J. K. B. 500; 92 L. T. 531, 21 T. L. R. 401; 10 Com. Cas. 184; 10 Asp. M. C. 50—C. A.

**26. Marine Insurance—Affidavit of Ship's Papers—Inland Transit—Partly on Inland Waters.**—In an action upon a policy covering goods during an inland transit, although part of such transit is by inland waters,

**HELD**—that the defendant is not entitled to an affidavit of ship's papers.

*SCHLOSS BROS. v. STEVENS*, (1905) 10 Com. Cas [224—C. A.

**27. Marine Insurance—Claim by Underwriters for Money Overpaid—Duty of full Disclosure in Contracts of Insurance—Documents not in Defendant's Custody.**—Underwriters brought an action against a firm of shipowners and ship-managers alleging that for a series of years manipulated accounts had been made up and laid before average adjusters, in consequence of which the underwriters had paid sums largely in excess of the amounts actually expended in repairing the vessels insured. Upon the plaintiff's application for discovery,

**HELD**—that the nature of the contract imposed upon the assured the duty of full disclosure, and that they must produce or give full reasons for not producing all the policies in question even though not in their custody, or only in their custody as managers and agents for the shipowners.

*BOULTON AND OTHERS v. HOULDER BROTHERS & [Co.]*, [1904] 1 K. B. 784; 73 L. J. K. B. 493, 52 W. R. 388; 90 L. T. 621; 20 T. L. R. 328 9 Com. Cas. 182; 9 Asp. M. C. 592—C. A.

**II. INSPECTION.**

**28. Bankers' Books—Inspection of—Account of Person not a Party to the Action—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7.**—The Court will not, as a rule, make an order under sect. 7 of the Bankers' Books Evidence Act, 1879, for the inspection of the banking account of a person who is not a party to the action, and has no interest in the litigation.

*POLLOCK v. GARLE*, [1898] 1 Ch. 1, 66 L. J. Ch. [788; 77 L. T. 415; 14 T. L. R. 16, 46 W. R. 66—C. A.

**29. Bankers' Books—Inspection of Bank Account of Person not Party to Action.**—An application for inspection of the bank account of a person not a party to the action ought not, as a general rule, to be granted without notice to such person and to his bankers, and then only upon an affidavit showing, to the full satisfaction of the Court or Judge, that there are good grounds for believing that there are entries in the account which are material to some issue in the action, and which will be evidence at the trial for the party applying for such inspection

*L'AMIE v. WILSON*, [1907] 2 Ir. R. 130—K. B. D.

**30. Inspection of Property—Experiments—Excavations—Flow of Underground Water in Known and Defined Channel.**—The plaintiffs moved for an order that they might enter upon certain lands of the defendants, and that they might be authorised to make the necessary experiments and observations upon the said land for the purpose of ascertaining whether or not the waters which previously issued at a certain spring, before so issuing, flowed in a definite underground channel to enable the plaintiffs to obtain the necessary evi-

**Inspection—Continued.**

dence in support of certain allegations in the statement of claim to the effect that the said water flowed in a defined channel, and that the defendants had wrongfully diverted the plaintiffs' water supply.

**HELD**—that the Court would not be right in making an order to enable the plaintiffs, who did not know that the water ran down in any known channel, to go and search for a defined channel, as the crux of the case was to ascertain whether there was or not such a channel, and the plaintiffs had not even given *prima facie* evidence that there was.

**BRADFORD CORPORATION v. FERRAND**, (1902) 86 [L. T. 497; 67 J. P. 21—Farwell, J.

**31 Written Secret Remedy Lost—Right of a Joint-Owner to a Copy or Inspection**—Where A. and B. each claiming under assignments from C, had been held at the trial of an action between A. and B. to be joint-owners of a secret remedy, and each entitled to make and sell the remedy, but the paper upon which the secret recipe was written had been destroyed.

**HELD**—that A. (to whom the recipe had never been communicated) was not entitled, upon an application made under the liberty to apply given at the trial, to demand from B. either a copy or an inspection of the secret recipe.

Decision of Joyce, J. ((1901) 50 W. R. 1f6; 86 L. T. 302) affirmed.

**POISSON and WOODS v. ROBERTSON and TURVEY**, [(1902) 50 W. R. 260; 86 L. T. 302—C. A.

**III. INTERROGATORIES.**

**32. Affidavit in Answer—Office Copy—Who Must Produce**—Where interrogatories have been administered and answered, and the affidavit in answer has been filed, it is the duty of the party on whose behalf the affidavit is filed to produce an office copy of such affidavit (following *Marshall v. National Provincial Bank of England*, (1892) 61 L. J. Ch. 465).

**LEVI v. TAYLOR**, [1903] W. N. 183—[Kekewich, J.

**33. Company—Member or Officer—Knowledge, Information, and Belief—Inquiries as to Knowledge Acquired Accidentally and not in the Ordinary Course of Business—Rules of Supreme Court, Ord. 31, rr. 1, 5, 24.**—The meaning of Ord. 31, r. 5, is that, if the Judge thinks that a member of a company is in such a position with regard to the company that he is a proper person to answer the interrogatories on their behalf, he may order him to do so, and that his answers will, in that case, bind the company.

A patent had previously belonged to a company, the vendors, to the plaintiffs, and among the officers of the plaintiff company were some who had previously been in the

employment of the vendors, and it was suggested by the particulars of objections which the defendants delivered in the action for the infringement of the patent that, prior to the date of the patent, the patented invention had been worked by the plaintiffs' predecessors, the vendors.

**HELD**—that the secretary of the plaintiff company, who had been ordered to answer interrogatories, assuming him to have honestly made investigation as to the affairs of the company, was not bound to inquire as to things which happened before the company was constituted, or as to matters which came to the knowledge of the company's servants otherwise than in the capacity of servants of the plaintiff company—*e.g.*, accidentally, and not in the ordinary course of business. His answer is the answer of the company and not of the individual, and can be read as an admission against the company, and such answer should be to the best of his knowledge, information, and belief as to the affairs of the company, and not as to any other affairs.

**WELSBACK INCANDESCENT GAS LIGHTING CO. v. [NEW SUNLIGHT INCANDESCENT CO.]**, [1900] 2 Ch. 1; 69 L. J. Ch. 546, 48 W. R. 595; 83 L. T. 58; 17 R. P. C. 401—C. A.

**34. Ejectment—Plea of Possession—What Interrogatories Admissible.**—In an action to recover possession of land on the title where the defence of possession is pleaded, the plaintiff is entitled to interrogate the defendant upon matters tending to support his own case, and is not deprived of that right merely because the discovery has the tendency or effect of disclosing the defendant's case.

**MILLER v. KIRWAN**, [1903] 2 Ir. R. 118—[K. B. D.

**35. "Fishing" Interrogatories—Action for Seduction.**—In an action for seduction the defendant, whilst admitting intercourse, denied paternity of the woman's child.

**HELD**—that he could not be compelled to answer interrogatories asking whether he alleged intercourse between the woman and some other man, and, if so, who such person was. Such interrogatories were inadmissible as being intended to ascertain the names of his witnesses.

**HOOTON v. DALBY**, [1907] 2 K. B. 18; 76 [L. J. K. B. 652; 96 L. T. 537—C. A.

**36. Libel—Fair Comment—Malice—Ord. 31, rr. 1, 2.**—To a claim for libel in respect of a criticism on an opera the defendants pleaded fair comment.

**HELD**—that the plaintiff could not, with a view to proving malice, interrogate them as to

(a) whether they had previously published a statement as to his business engagements;

(b) What information induced them to believe such statements;

## Interrogatories—Continued

(c) Whether such statement and the article now complained of emanated from the same source.

(d) whether they had taken any steps to verify the statement.

CARYLL v. DAILY MAIL PUBLISHING Co., (1904)  
[90 L. T. 307—C. A.]

37. *Libel—Fair Comment—Information upon which Comment Made—Name of Person from whom Information Obtained.*—In an action for libel against the publishers of a newspaper, the defendants pleaded that the words complained of were fair comment made in good faith and without malice on a matter of public interest. The plaintiff administered two interrogatories to the defendants, the first asking them what information they had when they first published the words complained of which induced them to believe that the expressions of opinion therein which they allege were fair comment made in good faith and without malice were true, and whether they believed the opinions were true. The second interrogatory asked from whom the defendants obtained the information upon which they relied in publishing the above-mentioned expressions of opinion.

HELD—that the first interrogatory was relevant upon the issue of fair comment, and should therefore be allowed; but that the second interrogatory should not be allowed, as there were no special circumstances to take the case out of the general rule that a newspaper, which sets up a defence of fair comment, should not be called upon to disclose the name of its informant.

THE PLYMOUTH MUTUAL CO-OPERATIVE AND INDUSTRIAL SOCIETY, LD. v. THE TRADERS' PUBLISHING ASSOCIATION, LD., [1906] 1 K. B. 403; 75 L. J. K. B. 259; 54 W. R. 319; 94 L. T. 258; 22 T. L. R. 266—C. A.]

38. *Libel—Fair Comment—Malice.*—In an action for an alleged libel in a newspaper the defendants pleaded (*inter alia*) fair comment. The defendants administered the following interrogatory to the plaintiffs—"Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as showing actual malice."

HELD—that the interrogatory ought not to be allowed.

Cooper v. Blackmore ((1886) 2 T. L. R. 746) not followed.

LEVER BROTHERS, LD. v. THE ASSOCIATED NEWS-PAPERS, LD.; SAME v. THE PICTORIAL NEWSPAPER Co., LD., [1907] 2 K. B. 626; 76 L. J. K. B. 1141; 97 L. T. 530; 23 T. L. R. 652—C. A.]

39. *Libel—Privileged Occasion—Persons from whom Information Obtained—Improper Motive.*—To an action for libel contained

in a cablegram the defendants pleaded privilege. The plaintiff applied for leave to administer the following interrogatory to the defendants:—"What information, if any, had the defendants received, detrimental or otherwise, to the character of the plaintiff, prior to the despatch of the said cablegram, that induced them to send the same? From whom was such information derived? Did the defendants take any and what steps to verify it?" The defendants objected to the interrogatory upon the ground that it was put, not to rebut the plea of privilege, but to ascertain the names of the informants so as to bring actions against them.

HELD—that, as correspondence between the parties showed that the question as to the persons from whom the information was obtained was not asked *bonâ fide* for the purpose of the action, but with a view to bringing other actions, the interrogatory, so far as it asked from whom the information was derived, and whether the defendants took any steps to verify it, must be disallowed.

EDMONDSON v. BIRCH & Co., LD., [1905] 2 K. B. [523, 74 L. J. K. B. 777; 54 W. R. 52; 93 L. T. 462, 21 T. L. R. 657—C. A.]

40. *Libel—Plea of Privilege—Inquiry as to Name of Person giving Information on which Defendants Relied.*—In an action against a trade protection society for libel in making certain statements in their "credit index" as to the credit and pecuniary strength of the plaintiffs, the defendants pleaded that they published the words complained of in good faith and without malice, and under such circumstances as rendered the occasion of such publication privileged, the publication being to subscribers who were traders and interested in the matter.

The plaintiffs applied for leave to administer to the defendants two interrogatories, the first asking whether they took any and what precautions, or made any or what inquiry before publishing the statement complained of, and from whom they obtained the information on which they relied in making the statement; and the second asking for the name of the companies, firms and persons to whom the credit index had been supplied or shown.

HELD—(1) that the defendants must answer the first interrogatory as being relevant to the issue of malice raised by the pleadings, the question being put *bonâ fide* and not for any ulterior object, *Elliott v. Garrett* ([1902] 1 K. B. 870; 71 L. J. K. B. 415; 50 W. R. 504; 86 L. T. 441; 18 T. L. R. 498—C. A., No. 43, *infra*) followed; but (2) that the second interrogatory was oppressive and ought not to be allowed.

WHITE & Co. v. CREDIT REFORM ASSOCIATION [AND CREDIT INDEX, LD., [1905] 1 K. B. 653; 74 L. J. K. B. 419; 53 W. R. 369; 92 L. T. 817; 21 T. L. R. 337—C. A.]

41. *Slander.*—In an action for slander the defendant pleaded alternatively that he did not speak the words attributed to him, and

**Interrogatories—Continued.**

that, if he did speak them, he spoke them on the plaintiff's invitation and on a privileged occasion.

**HELD**—that although in one paragraph of his defence he denied speaking the words, yet, as he had pleaded the alternative defence, the plaintiff was entitled to interrogate him as to how and when he was invited to utter the words.

**BARRATT v. KEARNS**, (1905) 53 W. R. 356—C. A.

**42. Slander—Interrogatories as to Speaking Words Complained of, "or Words to that Effect"**—*As to whom spoken—R. S. C., Ord. 31, rr. 1, 6.*—The plaintiff, in an action for slander, administered the following interrogatories, amongst others (1) "Did you . . . speak the following words . . . or words to that effect?" (2) "Were the said words spoken in the presence of . . . or other persons, or any and which of them?"

**HELD**—that the defendant was bound to answer the interrogatories; he must take each question by itself, and if he objects to answer he must say why, *e g.*, that he would incriminate himself by his answer.

Decision of Lawrance, J., reversed.

**DALGLEISH v. LOWTHER**, [1899] 2 Q. B. 590; 63 [L. J. Q. B. 956, 48 W. R. 37; 81 L. T. 161—C. A.]

**43. Slander—Privilege—Information inducing Defendant to Believe that the Words were True—Steps taken by Defendant to Ascertain that the Words were True.**—In an action of slander by one borough councillor against another in connection with the election of mayor, for which office the plaintiff was a candidate, the defendant pleaded that the words were spoken to other councillors in answer to inquiries made by them in a matter in which they had a common interest, that the words were spoken in good faith and without malice, and in the honest discharge of his duty as a councillor, and that the occasion was privileged. The plaintiff applied for leave to interrogate the defendant as follows: "What information, if any, had you that induced you to believe that the words were true, or what steps, if any, had you taken before speaking the said words to ascertain whether they were true or not?"

**HELD**—that the interrogatory should be allowed, as it was directed to the plaintiff's case, and the evidence sought lay only within the knowledge of the defendant.

**ELLIOTT v. GARRETT**, [1902] 1 K. B. 870; 71 [L. J. K. B. 415; 50 W. R. 504; 86 L. T. 441; 18 T. L. R. 498—C. A.]

**44 Two Defendants—Admission of Facts by one Defendant—Application to Interrogate him—R. S. C. Ord. 31, rr. 1, 12.**—In an action for a declaration that the plaintiff was entitled to certain shares, it was alleged in the statement of claim that the

shares were registered in the name of the defendant S. as mortgagee, and that the defendant D. claimed to be beneficially entitled to them as against the plaintiff. S., by his defence, admitted the allegations as to the shares, and disclaimed all interest in them. The plaintiff sought (under Ord. 31, rr. 1, 12) to interrogate S. with respect to the shares and other matters.

**HELD**—without expressing an opinion on the rules, that there being no issue between the plaintiff and S., the interrogatories could not be allowed, and that, even if allowed, the answers could not be read against the other defendant.

**CODD v. DELAP**, [1906] W. N. 57, 58—Farwell, J.

**DISEASES.**

*See* ANIMALS, PUBLIC HEALTH.

**DISHONOUR.**

*See* BILLS OF EXCHANGE.

**DISORDERLY CONDUCT.**

*See* CRIMINAL LAW AND PROCEDURE.

**DISORDERLY HOUSES.**

*See* CRIMINAL LAW AND PROCEDURE.

**DISTRESS.**

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*See* AUCTIONS, 9, CRIMINAL LAW AND PROCEDURE (Miscellaneous Offences); LANDLORD AND TENANT, 55; RATES

**I. IN GENERAL.**

1. *Agreement to Grant Reversionary Lease to Lessee—Sub-lease by Lessee for Remainder of Original Term—Right of Lessee to Distrain—Landlord and Tenant Act, 1730* (4 Geo. 2, c. 28), s. 5—*Conveyancing and Law*

**In General—Continued.**

of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44.]—The defendant was the lessee of certain premises for a term. During the term the lessor agreed to grant to him a reversionary lease of the premises for a term to commence at the expiration of the original term. After this agreement, but before the expiration of the original term, the defendant sublet the premises for a term which would expire after the termination of the original term but before the expiration of the reversionary term. During the currency of the original term the rent due to defendant under the sublease became in arrear, and he distrained for it.

**HELD**—that as the defendant had, at the time of distress, no estate under the reversionary lease, but a mere *interesse termini*, and as he had parted with the whole of his estate under the original lease, there was no reversion in him, and he had no right to distrain at common law, or under the Landlord and Tenant Act, 1730, or the Conveyancing Act, 1881.

*Parmenter v. Webber* ((1818) 8 Taunt. 593) and *Preece v. Corrie* ((1828) 5 Bing. 24) followed and applied.

*LEWIS v. BAKER AND OTHERS*, [1905] 1 Ch. 46.  
[74 L. J. Ch. 39; 91 L. T. 744; 21 T. L. R. 17, 54 W. R. 146—Eady, J.]

**2. Bankruptcy of Tenant—Execution—Sale by Sheriff—Proceeds of Sale—Notice of Bankruptcy—Notice of Rent in Arrear—Priority—"Goods of a Debtor"—The Landlord and Tenant Act, 1709 (8 Anne, c. 18), s. 1—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 2.]—The bankruptcy of a tenant does not prevent a distress by a landlord. Bankruptcy does not place the tenant's goods in *custodiâ legis* so as to protect them from distress. A tenant's goods seized by a sheriff under a writ of execution cannot be distrained for rent. They are said to be in *custodiâ legis* and protected from seizure by the landlord. 8 Anne, c. 18, prohibits the removal of the goods seized by the sheriff until the landlord's rent in arrear (not exceeding one year's rent) has been paid by the execution creditor, provided the sheriff has notice that rent is due to the landlord. Goods which belong to a judgment debtor and are seized by the sheriff, but which are impounded by the statute of Anne until the landlord is paid, are not "goods of a debtor" which have to be handed over by the sheriff to the trustee in bankruptcy under sect. 11 of the Bankruptcy Act, 1890. Nor are the proceeds of sale of such goods to be handed over free from the rights of the landlord or of the sheriff for his own indemnity.**

*In re M'Carthy*, ((1881) 7 L. R. (Ir.) 473) followed.

Decision of Divisional Court reversed.

*IN RE MACKENZIE, EX PARTE SHERIFF OF HERTFORDSHIRE*, [1899] 2 Q. B. 566; 68 L. J. Q. B. 1003, 81 L. T. 214; 15 T. L. R. 526; 6 Manson, 413—C. A.

**3. Covenant by Tenant to pay Rates and Assessments—Paving Expenses—Notice to Tenant to pay—Payment by Tenant—Deduction of amount paid from Rent—Landlord's right to Distrain—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 96.]—The lease of a house contained a covenant by the tenant to pay the rent clear of all deductions, except the landlord's property tax, and to pay all tithe or rent-charge in lieu of tithe, all sewers and main drainage rates, education rates, and all taxes, rates and assessments, charged upon the premises or upon the landlord or tenant in respect thereof, and all charges imposed by any local authority upon the frontagers in respect of the taking over and the making and repair of the roads abutting on the premises. The local authority paved the road, and, having apportioned the expenses among the frontagers, gave notice to the tenant under sect. 96 of the Metropolis Management Amendment Act, 1862, not to pay his rent without first deducting the apportioned amount of the paving expenses due from the lessor as owner of the house. The amount of the expenses so claimed from the tenant exceeded the whole sum which he owed to his landlord as rent, and the tenant paid to the local authority the whole rent then due in accordance with the notice. The landlord then demanded the rent from the tenant which the tenant refused to pay, and thereupon the landlord distrained.**

**HELD**—that under sect. 96 of the Metropolis Management Amendment Act, 1862, the payment to the local authority was to be taken not as a payment of the rent, but as a payment of the apportioned expenses, and that, as the tenant had agreed to pay those expenses, the rent remained due and the distress was lawful.

Decision of Ridley, J. (68 J. P. 173; 90 L. T. 430, 20 T. L. R. 176), reversed.

*SKINNER v. HUNT*, [1904] 2 K. B. 452; 73 L. J. [K. B. 680; 68 J. P. 402; 91 L. T. 270; 20 T. L. R. 556, 2 L. G. R. 769—C. A.]

**4. Excessive Charges—Appeal—"Criminal Cause or Matter"—Proceeding before Justices to Recover Treble the Excess—Penalty—Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), ss. 1, 2—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.]—An appeal will not lie from the judgment of the King's Bench Division upon a case stated by justices on a summons to recover treble the amount of the excess alleged to have been illegally charged by a bailiff in respect of the costs of a distress for rent, under sect. 2 of the Distress (Costs) Act, 1817, the matter being a "criminal cause or matter," within sect. 47 of the Judicature Act, 1873.**

*ROBSON v. BIGGAR*, (1907) 24 T. L. R. 125—C. A.

And see No. 18, *infra*.

**5. First Distress Illegal—Second Distress.]—The bailiff, who was carrying out a distress for rent in arrear, illegally broke into the**



*In General—Continued.*

house and seized certain goods. He went out without having sold the goods and was refused re-admission. Subsequently the landlord put in a fresh distress for the same rent upon the same goods.

**HELD**—that the first alleged distress was illegal and void *ab initio*, and was a trespass and not a distress, and that, therefore, the landlord was not thereby prevented from putting in the subsequent distress to recover the rent due.

*Attack v. Bramwell*, ((1863) 3 B. & S. 520, 7 L. T. 740) followed.

*Decision of Div. Ct.* ([1905] 2 K. B. 650, 74 L. J. K. B. 925; 93 L. T. 269, 21 T. L. R. 554) affirmed.

*GRUNNELL v. WELCH*, [1906] 2 K. B. 555, 75 L. J. [K. B. 657; 54 W. R. 581; 95 L. T. 238; 22 T. L. R. 688—C. A.]

6. *Improper Seizure by Bailiff—Ratification.*—The plaintiff's goods were illegally seized under a warrant of distress handed in by the vestry to a bailiff. The plaintiff wrote to the vestry seeking reparation. The vestry replied stating that their solicitors would accept service of process.

**HELD**—that the reply of the vestry indicated that they stood by the act of the bailiff, and that, therefore, there was evidence of ratification by the defendants of the illegal distress which entitled the plaintiff to damages.

*Decision of Ridley, J.* (63 J. P. 487), reversed.

*CARTER v. ST. MARY ABBOTT'S VESTRY*, (1900) 64 [J. P. 548 C. A.]

7. *Illegal Distress—Receiver Appointed by Mortgagee—Distress by Mortgagor without Receiver's Authority—Illegality—Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), ss. 19 (iii.), 24, sub-ss. 1, 2, 3.]—In 1894 the defendant mortgaged certain leasehold houses to A. B. S. In 1896 the defendant, as mortgagor in possession, demised one of the houses to the plaintiff, T. Y. K., who regularly paid his rent to the defendant. On July 12th, 1898, A. B. S., the mortgagee, under sect. 19 (iii.) of the Conveyancing Act, 1881, appointed a receiver of the rents and income of the leasehold property comprised in the mortgage. Notice of this appointment was served on T. Y. K., and all rent subsequently accruing was paid to the receiver. On October 7th, 1899, T. Y. K., with the licence of the defendant, assigned the lease to the plaintiff, W. G. W. On November 11th, 1899, the defendant distrained in respect of unpaid rent without the authority of the receiver, who declined to distrain. The plaintiffs, W. G. W. and T. Y. K., claimed an injunction and damages for unlawful distress.

**HELD**—that the distress was illegal, for so long as the receivership was in force and the notice to the tenant was not withdrawn,

no valid distress could be levied, except by the receiver or by some person, including the mortgagor, authorised by him.

*WOOLSTON v. ROSS*, [1900] 1 Ch. 788; 69 [L. J. Ch. 363, 64 J. P. 264, 48 W. R. 556; 82 L. T. 21—Cozens-Hardy, J.]

## II. EXEMPTIONS.

## (a) Generally.

8. *"Bedding"—Bedstead—County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 147—*Law of Distress Amendment Act, 1888* (51 & 52 Vict. c. 21), s. 4.]—A bedstead, as well as the articles of bedding on it, is exempt from distress under sect. 147 of the County Courts Act, 1888, which is incorporated in sect. 4 of the Law of Distress Amendment Act, 1888, as it is included in the term "bedding" mentioned in sect. 147.

*DAVIS v. HARRIS*, [1900] 1 Q. B. 729; 69 [L. J. Q. B. 232; 64 J. P. 136, 51 L. T. 780; 16 T. L. R. 140—Div. Ct.]

9. *Goods of Crown—Liability to Distress.*—Goods belonging to the Crown, which are upon the land of another person, are not liable to be distrained for rent due from that person to his landlord.

*SECRETARY OF STATE FOR WAR v. WYNNE*, [1905] [2 K. B. 845; 22 T. L. R. 8; 75 L. J. K. B. 25; 50 W. R. 235; 93 L. T. 797—Div. Ct.]

10. *Fixtures—Gas-Engine Affixed to Land.*—A gas-engine was let by a hire-purchase agreement to the tenant of certain premises, the engine being attached to the premises in the following way:—A rectangular hole was excavated in the floor, and at each corner of the hole a spindle was set up, being made fast to the ground and projecting 18 inches, and the hole was then filled with concrete. The gas-engine, which had four holes in its base, was laid upon the spindles, and nuts were placed on the spindles and screwed down. The landlord of the premises distrained upon the gas engine for rent due from the tenant.

**HELD**—that the engine was a fixture and had become part of the freehold, and was therefore not distrainable.

*Hobson v. Gorringe* ([1897] 1 Ch. 182; 66 L. J. Ch. 114, 75 L. T. 610; 45 W. R. 356—C. A.) followed.

*CROSSLEY BROTHERS, LD. v. LEE*, (1907) 24 [T. L. R. 35—Div. Ct.]

11. *Implement of Trade—Sewing Machine Let to Tenant under Hire-Purchase Agreement—Law of Distress Amendment Act, 1888* (51 & 52 Vict. c. 21), s. 4—*County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 147.]—A sewing machine which belonged to the Singer Manufacturing Co. was let by that company to the respondent's husband, an iron foundry moulder, under a hire-purchase agreement. The machine was used by the

*Exemptions—Continued.*

wife in sewing for neighbours from whom she obtained employment, and in making clothing for herself and her family. The bailiff levied a distress at the house for arrears of rent, and seized for arrears of rent, among other things, the sewing machine.

HELD—that dealing with the case on the footing that the machine had been hired by the husband, the case came within the words in sect. 147 of the County Courts Act, 1888, the “tools and implements of his trade,” and was privileged from distress, those words meaning tools and implements the debtor was entitled to the possession of for the purposes of his trade.

HELD ALSO—that the wife was not using the sewing machine independently of her husband within the Married Women's Property Act.

*Churchward v. Johnson* ((1890) 54 J. P. 326—Div. Ct.) followed.

*MASTERS v. FRASER*, (1902) 66 J. P. 100; 85 [L. T. 611; 18 T. L. R. 31—Div. Ct.]

12. “Implement of Trade” — “To the Value of £5”—*Cab Valued at £35—Law of Distress Amendment Act, 1888* (51 & 52 Vict. c. 21), s. 4—*County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 147.]—A cab of the value of £35 was hired by a cab-driver and used by him in his calling. The cab was seized under a distress for rent due from the cab-driver, it being the only chattel upon the premises which could be seized.

HELD—that the cab was an “implement of his trade” within the meaning of sect. 147 of the County Courts Act, 1888; and that, as the landlord was bound to leave tools or implements of trade to the value of at least £5, the exemption from distress contained in that section, taken in conjunction with sect. 4 of the Law of Distress Amendment Act, 1888, applied.

*LAVELL v. RITCHINGS*, [1906] 1 K. B. 480; 75 [L. J. K. B. 287; 54 W. R. 394; 94 L. T. 515; 22 T. L. R. 316—Div. Ct.]

13. *Person Exercising Public Trade—Things Delivered to be Managed in the Way of his Trade—Pictures in an Artists' Club.*—The plaintiff was the sub-lessee of certain premises upon which he carried on a club to which artists, who were members, sent pictures for exhibition. Members and friends introduced by them alone could use the club, and the plaintiff received a commission upon all pictures sold. By the rules of the club the entire management of the pictures and their exhibition was vested in the picture committee. Certain pictures which were being exhibited were distrained upon by the superior landlord for rent due from the head lessee. The plaintiff and the artists who owned the pictures brought an action claiming an injunction to restrain the lessor from proceeding with the distress.

HELD—that the pictures were not delivered to the plaintiff to be managed in the way of his trade, so as to be privileged from distress, his trade being that of a club proprietor, and the committee having the management of the pictures

*CHALLONER v. ROBINSON*, (1907) 71 J. P. 553; 24 [T. L. R. 38—C. A.]

*(b) Lodgers' Goods.*

14. *Declaration—“Subscription” of Inventory—Lodgers' Goods Protection Act, 1871* (34 & 35 Vict. c. 79), s. 1.]—A declaration, under the Lodgers' Goods Protection Act, 1871, by a lodger, whose goods were seized by the superior landlord under a distress for rent due from his immediate tenant, referred to the inventory “hereto annexed,” and was signed by the lodger. Below the signature was the inventory of the goods, the inventory beginning on the same side of the sheet of paper as the declaration, and being continued on the back.

HELD—that the inventory was “subscribed” within the meaning of sect. 1 of the Act, although there was not a second signature at the end of it.

*GODLONTON v. FULHAM AND HAMPSHIRE PROPERTY [Co., Ltd.]*, [1905] 1 K. B. 431; 74 L. J. K. B. 242; 92 L. T. 362; 21 T. L. R. 223—Div. Ct.]

15. *Notice given by Lodger—Goods Sold in face of Notice—Action for Illegal Distress—Lodgers' Goods Protection Act, 1871* (34 & 35 Vict. c. 79), s. 1.—Where a lodger's goods are seized under a distress for rent due to a superior landlord from his immediate tenant, and the superior landlord, after having been served by the lodger with the declaration and inventory required by sect. 1 of the Lodger's Goods Protection Act, 1871, and having been paid the rent due from the lodger, proceeds with the distress, an action for an illegal distress at the suit of the lodger will not lie against the bailiff or other person levying the distress, but only against the superior landlord under sect. 2 of the Act.

*PAGE v. VALLIS AND OTHERS*, (1903) 19 T. L. R. [393—Darling, J.]  
Overruled in *Lowe v. Dorling*, No. 16, *infra*.

16. *Service of Declaration on Bailiff—Bailiff Proceeding with Distress—Action by Lodger against Bailiff—Illegal Distress—Lodgers' Goods Protection Act, 1871* (34 & 35 Vict. c. 79), s. 2.]—Where a lodger's goods are seized under a distress for rent due to the superior landlord from his immediate tenant, and the bailiff levying the distress, after being served by the lodger with a declaration and inventory as required by sect. 1 of the Lodgers' Goods Protection Act, 1871, and being paid the rent, if any, due from the lodger to his immediate landlord, proceeds with the distress on the lodger's goods, an action to recover damages for illegal distress will lie against the bailiff under sect. 2 of the Act.

**Exemptions—Continued.**

So held by C. A., Collins, M.R., dissenting.  
*Page v Vallis* ([1903] 19 T. L. R. 393—*Darling, J., supra*) overruled.

Decision of Div. Ct. ([1905] 2 K. B. 501; 74 L. J. K. B. 794; 54 W. R. 28; 93 L. T. 398; 21 T. L. R. 616) affirmed.

*LOWE v. DORLING*, [1906] 2 K. B. 772; 75 L. J. [K. B. 1019; 95 L. T. 243; 22 T. L. R. 779—C. A.]

17. *Tenant on Sufferance or at Will—Power of such Tenant to Create Relation of Lodger—Lodgers' Goods Protection Act, 1871* (34 & 35 Vict. c. 79), ss. 1, 2.—A tenant at will or on sufferance can create between himself and a third party the relationship of landlord and lodger by letting part of the premises to such third party on a weekly tenancy so as to entitle his lodger to the benefit of the *Lodgers' Goods Protection Act, 1871*.

*BENSING v. RAMSAY*, (1898) 62 J. P. 613; 14 [T. L. R. 344—Div. Ct.]

**III. PROCEDURE.****(a) Bailiff.**

18. *Bailiff's Charges—Distress (Costs) Act, 1817* (57 Geo. 3, c. 93), ss. 1, 2—*Law of Distress Amendment Act, 1888* (51 & 52 Vict. c. 21)—*Distress for Rent Rules, 1888, r. 15*.—A special agreement between a landlord and a certificated bailiff for extra remuneration to the latter, over and above the statutory charges, for making a distress for rent under £20, is not prohibited by the *Distress (Costs) Act, 1817*, the *Law of Distress Amendment Act, 1888*, or the rules made thereunder.

So held by Lord Alverstone, C.J., and Ridley, J., *Darling, J.*, dissenting.

*ROBSON v. BIGGAR*, [1907] 1 K. B. 690; 76 [L. J. K. B. 248; 71 J. P. 164; 96 L. T. 271; 23 T. L. R. 276—Div. Ct.]

Affirmed on the ground that, the matter being a "criminal" one, no appeal lay (24 T. L. R. 125—C. A., see No. 4, *supra*).

20. *Uncertificated Bailiff—Seizure of Strangers' Goods—Liability of Landlord—Law of Distress Amendment Act, 1888* (51 & 52 Vict. c. 21), s. 7.—Sect. 7 of the *Law of Distress Amendment Act, 1888*, which provides that no distress for rent shall be levied by any one except a certificated bailiff, applies not only as between landlords and tenants, but also as between landlords and third persons whose goods may be on the demised premises.

A third person, whose goods are seized by an uncertificated bailiff, may therefore recover damages against the landlord who authorised the distress.

*PERRING & Co. v. EMERSON*, [1906] 1 K. B. 1; [75 L. J. K. B. 12; 54 W. R. 47; 93 L. T. 748; 22 T. L. R. 14—Div. Ct.]

**(b) Possession.**

21. *Goods Impounded on Premises—Possession—Pound Breach—Abandonment—Distress for Rent Act, 1737* (11 Geo. 2, c. 19), s. 10—*Practice—Leave to Appeal on One Point—Other Points not to be Argued*.—Where a landlord, in distraining for rent, has, under sect. 10 of the *Distress for Rent Act, 1737*, impounded goods on the premises, it is not necessary that anyone on his behalf should remain in possession of the goods.

Where leave to appeal on one point has been given by the Divisional Court, the Court of Appeal will not allow the appellant to argue other points which have been raised in the County Court and in the Divisional Court.

Decision of the Divisional Court ([1899] 1 Q. B. 470; 68 L. J. Q. B. 267; 47 W. R. 239; 80 L. T. 157; 15 T. L. R. 164) affirmed.

*JONES v. BIERNSTEIN*, [1900] 1 Q. B. 100; 69 [L. J. Q. B. 1; 48 W. R. 232; 81 L. T. 553; 16 T. L. R. 30—C. A.]

22. "Man in Possession"—*Constructive Possession—Abandonment of Possession—Costs and Charges of Distress—The Distress (Costs) Act, 1817* (57 Geo. 3, c. 93), s. 1—*The Distress (Costs) Act, 1827* (7 & 8 Geo. 4, c. 17)—*Taxes Management Act, 1880* (43 & 44 Vict. c. 19), s. 81.—The *Distress (Costs) Act, 1817*, by sect. 1, provides that any person making a distress for rent where the sum demanded and due does not exceed £20 shall not take any other costs and charges than those fixed in the schedule, and shall not "make any charge whatsoever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done." The schedule specifies 2s. 6d. per day for "man in possession." These provisions are by the *Distress (Costs) Act, 1827*, extended to distresses for taxes where the sum demanded and due does not exceed £20.

A collector of taxes distrained for taxes amounting to less than £20, and for a period of five days kept constructive possession of the goods by a man who occasionally went to see that the goods were not removed. The collector, upon first making the distress, had obtained an agreement that he should be entitled to charge for a man in possession, although the man was not left in actual possession, but this agreement was made by a person who was not authorised to make it by the person whose goods were distrained.

HELD—that the collector was not entitled to make a charge for "man in possession," although he would have been entitled to make this charge if the agreement had been made by the person whose goods were distrained on, or by his agent.

It is a question of fact in each case whether possession of a distress has been abandoned.

*LUMSDEN v. BURNETT*, [1898] 2 Q. B. 177; 67 [L. J. Q. B. 661; 78 L. T. 778; 14 T. L. R. 403; 46 W. R. 664—C. A.]

**Procedure—Continued.****(c) Rescue.**

**23 Pound Breach—Treble Damages—Proof of Damage—2 Will. & M. c. 5, s. 4.]—**An action for treble damages for "pound breach" or rescous of goods distrained for rent, under sect. 4 of 2 Will. & M., c. 5, is maintainable by the landlord without proof of any special damage suffered by him.

**KEMP v. CHRISTMAS, (1898) 79 L. T. 233; 14 [T. L. R. 572—C. A.]**

**(d) Sale.**

**24. Sale of Goods by Auction—Purchase by Distraint Landlord—Invalidity—2 Wm. & Mary (Sess. 1, c. 5), s. 1]**—A distraint landlord may sell after appraisal, but there must be a sale to a third person. If the landlord purports to buy the goods distrained himself, or by an agent, he acquires no title to them.

**Reg. v. England ((1864) 33 L. J. Q. B. 145, 4 B. & S. 782; 12 W. R. 308)—dictum of Blackburn, J., followed.**

**Decision of Div. Ct. ([1903] 2 K. B. 168; 62 L. J. K. B. 577; 51 W. R. 698; 88 L. T. 739; 19 T. L. R. 489) affirmed.**

**MOORE, NETTLEFOLD & Co. v. SINGER MANUFACTURING Co., [1904] 1 K. B. 820; 73 L. J. K. B. 457; 68 J. P. 369; 52 W. R. 385, 90 L. T. 469; 20 T. L. R. 366—C. A.]**

**DISTRIBUTION.**

*See* DESCENT AND DISTRIBUTION.

**DISTRICT COUNCILS.**

*See* LOCAL GOVERNMENT.

**DISUSED BURIAL GROUND.**

*See* BURIAL AND CREMATION.

**DITCHES.**

*See* HIGHWAYS.

**DIVIDEND WARRANT.**

*See* COMPANIES.

**DIVIDENDS.**

*See* BANKRUPTCY, 93—95; COMPANIES.

**DIVORCE.**

*See* HUSBAND AND WIFE.

**DOCKS.**

*See* RAILWAYS AND CANALS; SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

**DOCTORS.**

*See* MEDICINE AND PHARMACY.

**DOGS.**

*See* ANIMALS.

**DOMESTIC ANIMALS.**

*See* ANIMALS.

**DOMICIL.**

*See* BANKRUPTCY, 3, 4; CONFLICT OF LAWS.

**DONATIO MORTIS CAUSA.**

*See* GIFTS.

**DRAINAGE.**

*See* METROPOLIS; PUBLIC HEALTH; SEWERS AND DRAINS.

**DRAMATIC COPYRIGHT.**

*See* COPYRIGHT AND LITERARY PROPERTY.

**DRUGGISTS.**

*See* MEDICINE AND PHARMACY.

**DRUNKENNESS.**

*See* INTOXICATING LIQUORS.

**DURESS.**

See CONTRACTS; CRIMINAL LAW; WILLS.

**DYING DECLARATIONS.**

See CRIMINAL LAW AND PROCEDURE.

**EASEMENTS AND PROFITS À PRENDRE.**

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**I. IN GENERAL.**

1. *Creation of Easement—Construction of Instrument—Personal or Real Right—Agreement—Tramway.*—The terms of an agreement made between the proprietors of the estate of W., the feuars of a portion of that estate, and the pursuers, provided for the construction of a tramway by the pursuers through the lands of W., including those of the feuars.

HELD (Lord Morris dissenting)—that the privilege of working the tramway was intended to, and did in fact, bind all singular successors of the feuars in their lands so long as the tramway continued.

The fact that the contract or writing to which the origin of a servitude is ascribed is conceived in terms which might appropriately be employed in the constitution of a personal obligation, is not conclusive against the constitution of a proper burden upon the land, if it be matter of reasonable inference from the terms of the document, taken as a whole, or from the circumstances of the case, that the constitution of a real servitude was what the parties contemplated (per Lord Watson).

NORTH BRITISH RAILWAY CO. v. PARK YARD CO. [1898] A. C. 643; H. L. (Sc.)

2. *Disturbance of Easement—Nuisance—Exercising Power conferred by Statute—Gas B.D.—VOL. I.*

*Company—Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 9.*—The fact that a gas company has conferred upon it by statute the right to purchase certain land and to erect thereon gasworks does not justify it in inflicting injury upon neighbouring property. *London, Brighton and South Coast Railway Co. v. Trueman* ((1885) 11 App. Cas. 45) distinguished.

The disturbance of an easement amounts to a nuisance under the Gasworks Clauses Acts, 1845 and 1871.

JORDISON v. THE SUTTON, SOUTHCOATES AND DRY [POOL GAS CO., [1898] 2 Ch. 614; 67 L. J. Ch. 666; 14 T. L. R. 567; North, J.]

3. *Easement in Gross—Custom—Right to place and let Chairs on the Sands for Profit—Prescription Act, 1832 (2 & 3 Will. 4, c. 71).*—A prescriptive right to go upon the foreshore and to place and let on hire chairs and seats on the sands for profit cannot be claimed under the Prescription Act, 1832, which does not apply to easements or profits à prendre in gross.

*Shuttleworth v. Le Fleming* ((1865) 19 C. B. (n.s.) 687) followed.

HELD ALSO, upon the facts—that no custom had been proved.

RAMSGATE CORPORATION v. DEBLING AND OTHERS [(1906), 70 J. P. 132, 22 T. L. R. 369; 4 L. G. R. 495—Buckley, J.]

4. *Easement of Necessity—Light to a Pantry Window—Grant of One of Two Adjoining Tenements—Implied Reservation.*—An easement of necessity means an easement without which the property cannot be used at all, and not merely one necessary to the reasonable enjoyment of that property.

A. the owner of two adjoining tenements granted one to B. without reserving expressly any rights over the tenement granted. B. built a wall which blocked out all light from A.'s pantry window, rendering the room useless as a pantry, but not for all purposes.

HELD—that there was no implied reservation of the right of light to the pantry window.

*Union Lighterage Co. v. London Graving Dock Co.* ((1902) 2 Ch. 557; 71 L. J. Ch. 791; 87 L. T. 351; 18 T. L. R. 754—C. A., No. 52, *infra*) *hazeldine*.

RAY v. HAZELDINE, [1904] 2 Ch. 17; 73 L. J. [Ch. 537; 90 L. T. 703—Kekewich, J.]

5. *Profit à Prendre—Inhabitants of Parish—Taking Gravel from Bed of River—Inclosure Act—Waste of Manor—River—Several Fishery in River.*—An alleged right in the inhabitants of a parish to take gravel without stint from the bed of a river, the property in which was in the plaintiff, held bad in law.

*Constable v. Nicholson* ((1863) 14 C. B. (n.s.) 230) followed.

In an action to restrain interference with a several fishery in a river, formerly flowing through the waste of a manor, by dredging

*In General—Continued.*

gravel from the bed of the river, the defendants set up a right to the bed of the river by reason of an inclosure award by which eight yards on each bank of the river were allotted to the inhabitants for the purpose of throwing mud and weeds thereon and for other purposes.

HELD—that the defendants had no such right as that claimed.

HOUGH v. CLARK AND HALL, (1907) 23 T. L. R. [682; 5 L. G. R. 1195—Eady, J.

6 *Profit à Prendre—Turbary—Enjoyment as of Right—Lost Grant—Mistake.*—Subtenants of lands, held under a lease for lives renewable for ever, cut turf, during a period exceeding sixty years, for their own use, on lands of the lessor not included in the demised premises. They believed that the lease contained words giving them leave to thus cut turf on other lands of the lessor. The lease, in fact, contained no such words, but a lease of adjoining lands, made between the same parties, did contain such words. The cutting was permitted by the lessor, whose agent believed that the right existed under the lease. An injunction was sought to restrain the tenants from cutting turf.

HELD—that a lost grant should be presumed.

*De la Warr v. Miles* (17 Ch. D. 535) applied.

DAWSON v. M'GROGGAN, [1903] 1 Ir. R. 92—[C. A.

7. *Recreation—Immemorial user of Land by Inhabitants for Recreation — Proof of Dedication—Encroachment.*—The appellants had, with the approval of the magistrates of a burgh, made use of a strip of land which the respondent alleged to have been dedicated by the magistrates to the use of the inhabitants for purposes of recreation, and for drying of clothes, &c.

HELD—that there had in fact been no such dedication.

To establish such a right of recreation by immemorial user, user for at least forty years must be proved, and it must be user *nec vi, nec clam, nec precario*, just as in a claim to a prescriptive right.

Decisions of the Court of Session ([1899] 2 F. 107; [1902] 4 F. 771) reversed.

MONTGOMERIE & Co., LD. v. WALLACE-JAMES, [1904] A. C. 73; 73 L. J. P. C. 25—

H. L. (Sc.).

8. *Severance of Tenements — Easement passing by Implication of Law—Agreement—Interpretation—“House let to A.”—“Forthwith conveyed” — Formed Road over a Tenement for Apparent Use of the Adjoining Tenement—Ord. 54A.*—Bedeburn and Stanley Villas were two adjoining houses fronting Park Road, each having a front entrance from that road. Along one side of Stanley

Villa, and commencing from Park Road, ran a private side road, which met another road at right angles, which ran at the back of the two houses.

Under an agreement for the distribution of an estate devised by will, it was agreed that the plaintiff should have “forthwith” conveyed to him “Bedeburn let to A. F.,” and the defendant should have “forthwith” conveyed to him “Stanley Villa let to J. H.” A dispute arose as to whether the plaintiff was entitled to use the side or back road.

On a summons under Ord. 54A,

HELD—that the agreement was executory, and in consequence a conveyance was to be executed “forthwith,” and such conveyances ought to be executed simultaneously, but ought to be treated as if they were contemporaneous, that the formed road over Stanley Villa to and for the apparent use of Bedeburn Villa fell within the rule that upon a severance of tenements easements used as of necessity, or in their nature continuous, passed by implication of law without words of grant.

*Polden v. Bastard* ((1865) L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; 13 L. T. (N.S.) 164) applied.

NICHOLLS v. NICHOLLS, (1900) 81 L. T. 811—[Stirling, J.

## II. PARTICULAR EASEMENTS.

### (a) Rights of Way.

#### (i) Abandonment.

9. *Evidence—Excessive User—User in respect of Additional Premises.*—In considering whether the grantee of a right of way has abandoned it by non-user, the actual duration of the non-user is not so important as the nature of the grantee's acts indicative of his intention (*Reg. v. Chorley*, (1849) 12 Q. B. 515—Q. B.).

Where there is an express grant of a right of way to a particular place, the grant is not to be impliedly restricted to access to the land for purposes for which access was required at the date of the grant (*Finch v. G. W. Ry. Co.*, (1880) 5 Ex. Div. 254; 28 W.R. 229; 41 L. T. 751; 44 J. P. 8), but a right of way appurtenant to one close cannot be used for access to another close not part and parcel of it.

In 1891 M. bought certain premises “X.,” together with a right of way thereto over land “A.” M. owned adjoining land “Y.,” and erected assembly rooms partly on “Y.,” but mainly on “X.” He built a wall fencing his land from “A.” with an opening in it for a gateway, but this was never used as the licensing justices required it to be fenced up.

In 1894 M. sold to F.; in 1896 the justices insisted on the opening being walled up; in 1903 the then owner restricted the licensed premises to the front part of his land, and opened the gateway as a means of access to the building at the back, standing partly on “X.” and partly on “Y.” In an action by the owners of “A.,”

**Particular Easements—Continued.**

**HELD**—(1) that M and his successors had never abandoned their right of way over "A," but (2)—that he and they were not entitled to use the right of way for obtaining access to the premises "Y," to which such right of way was not appurtenant.

*Skull v Glenister* ((1864) 16 C. B. (N.S.) 81) and *Williams v. James* ((1867) L. R. 2 C. P. 577; 36 L. J. C. P. 256, 16 L. T. 664; 15 W. R. 928) approved

**Decision of Eady, J.** (90 L. T. 669; 20 T. L. R. 501), reversed on the second point.

*HARRIS v. FLOWER & SON*, (1904) 21 T. L. R. 13, [74 L. J. Ch. 127; 91 L. T. 816—C. A.]

10. *Non-user—Lease—Uncertainty*—By a lease of the 1st of August, 1878, the Corporation of London, with the privy of the Great Western Railway Company, granted the north part of Smithfield station to the plaintiffs, together with a right of way or passage for their workmen, &c., with or without horses and waggons, at all times over the land demised to the Great Western Railway Company, and through a circular road leading to the south of the station, for a term of one hundred years. By a lease of even date the Corporation demised the south part of the station to the Great Western Railway Company. The whole station was completed in 1869, and at the date of the leases a platform and sidings belonging to the Great Western Railway Company divided the south from the north part of the station. In 1897 the plaintiffs wished to use the right of way from the circular road over the south part of the station to the part belonging to them, and brought this action to enforce their right of way. The station was substantially in the same state as it was in 1878, and had never been used as a station.

**HELD**—that the action failed, and the plaintiffs were not entitled to any declaration whatever, as during upwards of twenty years from the time the arrangements were first considered, and from the date of the lease, the land of the plaintiffs had not been and was not being used as a station, and until and so far as it might be used as a station the right of way did not arise, and that they had not shown any right of way.

**Decision of Kekewich, J.** ((1900) 64 J. P. 472; 82 L. T. 541) reversed.

*METROPOLITAN RAILWAY CO. v. GREAT WESTERN [RAILWAY CO. AND CORPORATION OF LONDON]*, (1901) 84 L. T. 333—C. A.

11. *Partial Abandonment—Obstruction—Mandatory Injunction—Damage.*—The plaintiffs were entitled to a right of way over certain lands in the occupation of the defendant company adjoining the land of the plaintiffs. The defendants' predecessors in title purchased the land in question in 1879 subject to that right. Some years before action brought a summer-house had been erected on the plaintiffs' lands which projected over the path to a distance of

2 feet 4 inches. In October, 1900, the defendants built a stable across the path. No evidence of damage was given except "that the preservation of this right is important to the trustees." The plaintiffs brought an action for a declaration and injunction.

**HELD**—that there had been only a partial abandonment of the right of way by the plaintiffs, and this constituted no defence to the action, that as the stable had been erected and the right of way had been thereby interfered with for eight months before the writ was issued and no sufficient reasons given for the delay in seeking a remedy the plaintiffs were awarded 40s. damages and costs, and an injunction to restrain further interference with the right of way, but the Court could not order the stable to be pulled down.

*YOUNG AND OTHERS v. STAR OMNIBUS CO., LD.*, [1902] 86 L. T. 41—Farwell, J.

*(ii) Conveyance*

And see *COMPULSORY PURCHASE*, No. 1.

12. *General Words—Way over Vendor's Adjoining Property—Enjoyed only by Leave—Right Passed by the General Words—Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), s. 6 (2).—The "general words" in sect. 6 (2) of the Conveyancing Act, 1881, will (if their operation be not expressly excluded) pass to a purchaser a way over other property of the vendor actually enjoyed in respect of the conveyed premises, though only so enjoyed by his leave and licence.

The owner of adjoining premises, A. and B., let A. in 1891 on a long lease, continuing to occupy B. himself; in 1895 the lease of A. was assigned to the plaintiffs, who subsequently bought the freehold. By leave of the owner, the managers of the original lessees and the manager of the plaintiffs were, for the purposes of business and during business hours on week-days, in the habit of using a road dividing A. from B., and forming part of the yard of B. The lease of 1891 gave them no right to use this way at all.

**HELD**—that it made no difference that this way was only enjoyed precariously; that, as it was in fact enjoyed, the right passed to the plaintiffs under the general words imported into their conveyance by the Conveyancing Act, 1881; and they were entitled to use it for the same purposes and during the same hours as they had hitherto done.

*Kay v. Oaley* ((1875) L. R. 10 Q. B. 360; 44 L. J. Q. B. 210, 33 L. T. 16) followed

*INTERNATIONAL TEA STORES CO. v. HOBBS*, [1903] 2 Ch. 165; 72 L. J. Ch. 543; 51 W. R. 615; 88 L. T. 725—Farwell, J.

13. *Conveyance of Land subject to Reservation of Right of Way—Purchaser Bound in Equity—Specific Performance.*—The owner of adjacent farms, A. B. and C., offered farm A. for sale. In the contract of

**Particular Easements—Continued.**

the sale, which was signed by the duly authorised agent of the purchaser, there was a clause reserving to the vendor, his heirs and assigns, the owners and occupiers of farms B. and C. all rights of way hitherto exercised by them in respect of farms B. and C. over farm A.

The subsequent conveyance excepted and reserved "all rights of way," etc., and was executed by the vendor alone. The purchaser entered into possession of farm A., and the defendant, who claimed as transferee of a mortgage executed by the purchaser, blocked the ways, which had in fact been occupied for many years by the occupiers of farms B. and C.

In an action for an injunction to restrain the defendant from hindering the plaintiffs, the owner and occupiers of farms B. and C., in the free exercise of these rights of way,

**HELD**—that the purchaser, and those deriving title from him, were bound in equity to give effect to the excepting clause, although at the time of the contract of sale there were no legal rights of way in existence over farm A., but only *de facto* ways used by the owner and occupiers of farms B. and C.

**HELD ALSO**—that as the conveyance was not executed by the purchaser, the contract of sale remained executory with regard to the obligation of the purchaser to grant these rights of way.

MAY AND OTHERS v. BELLEVILLE, [1905] 2 Ch. [605; 74 L. J. Ch. 678; 54 W. R. 12; 93 L. T. 241—Buckley, J.

**(iii) Excessive User.****14. Purpose for which Way Dedicated.]—**

At the back of a number of houses facing a street in the City of London ran a private passage, about 10ft. wide, which communicated with a street called West Street, and which was used by the occupiers of the houses for the purposes of their business. The houses had been built by one man, who had devised them to different owners, without giving any express rights of way over the passage. A railway company acquired the sites of two of the houses and constructed a station thereon, with an entrance for passengers from the passage into the station. Large numbers of passengers used the passage as a means of going to and from the station, and interfered with the user of the passage by the other owners for their businesses. Kekewich, J., held ([1907] 1 Ch. 208; 75 L. J. Ch. 807; 95 L. T. 321, 22 T. L. R. 706) that the grant of a right of way to the devisees for domestic and business purposes must be implied, but that the user of the passage as a means of access for passengers to and from the station was a user in excess of and different from that for which the passage was intended and had been theretofore used, and that the railway company must be restrained from so using it.

*Wimbledon and Putney Commons Conservators v. Dixon* ((1875) 1 Ch. D. 362; 45 L. J. Ch. 353, 33 L. T. 679, 24 W. R. 466—C. A.); *Pearson v. Spencer* ((1863) 3 J. & S. 761); and *Philipps v. Low* ([1892] 1 Ch. 47; 61 L. J. Ch. 44; 65 L. T. 552—Chitty, J.) applied.

Upon appeal, the case was settled, the parties agreeing to an order restraining the defendants, their servants and agents, from licensing or inviting any persons using or intending to use their railway station, as travellers by the railway or otherwise, to pass either to or from West Street along the passage, the order not to preclude the defendants from using the passage for the purpose of their officers, clerks, or servants going to and from the station, or for the purpose of any person delivering or removing, with carts or otherwise, goods or materials not intended for transit by the railway or communicating with the defendants or their clerks.

MILNER'S SAFE CO., LD. v. GREAT NORTHERN [ & CITY RY. CO., [1907] 1 Ch. 208; 76 L. J. Ch. 99; 96 L. T. 130; 23 T. L. R. 88—C. A. And see *Harris v. Flower*, No. 9, *supra*.

**(iv) Grant of Right.**

**15 Non-Tidal River—Fishing Way—Right of Way Appurtenant to Several Fishery—True Test.]—**A right of way along the banks of a non-tidal river for the purpose of fishing may be appendant or appurtenant to a right of several fishery in the river. The dictum of Lord Coke (Co. Litt. 121 b.), that an incorporeal hereditament cannot be appendant or appurtenant to an incorporeal hereditament not followed. The true test is whether the principal and adjunct so agree in nature and quality as to be capable of union without incongruity.

HANBURY v. JENKINS, [1901] 2 Ch. 401; 70 L. J. [Ch. 730; 65 J. P. 631; 49 W. R. 615; 17 T. L. R. 539—Buckley, J.

**16. Construction—Right Extended to Persons not Named in the Grant—Members of a Club.]—**In the ordinary case of a grant of a right of way to a house and premises which may only be used as a private dwelling-house, the right of way extends not only to the grantee, but to members of his family, servants, visitors, guests, and tradespeople, even though none of these persons be expressly named in the grant.

A lease of Whiteacre was granted by the common owner of Blackacre and Whiteacre to the predecessor in title of the defendant club, "together with a full and free right and liberty for the lessee, his executors, administrators, and assigns, undertenants and servants, from time to time and at all times hereafter at his and their will and pleasure, for all purposes connected with the use and enjoyment of the said premises, to go, return, pass and repass in, along and over" a passage across Blackacre. The lease con-



**Particular Easements—Continued.**

templated the erection of buildings, and there was nothing to prohibit their user for the purposes of a workmen's club

**HELD**—that the right of way extended to the members of a workmen's club built on Whiteacre who numbered 374 and honorary members, and to all persons lawfully going to and from the club, and included tradespeople and servants.

**BAKENDALE v. NORTH LAMBETH LIBERAL AND [RADICAL CLUB, LD., [1902] 2 Ch. 427, 71 L. J. Ch. 806, 50 W. R. 650, 87 L. T. 161; 18 T. L. R. 700—Eady, J.**

**17. Construction—Part of Building—Access to Entrance Hall**—The defendants, who were the owners of a large building in the City of London, containing business offices, granted to the plaintiffs a lease for twenty-one years of a set of offices in the building, and the defendants covenanted to keep in good repair the main walls of the building and the passages and other internal parts used in common by the tenants of the various offices. The building had an entrance door 10 ft wide, leading to a hall 17 ft. 9 in. wide, which opened by an archway 6 ft. wide into an inner hall. The defendants, for the purpose of making shops, proposed to reduce the passage way from the entrance door through the hall to a uniform width of 6 ft. In an action for an injunction to restrain the defendants from so doing,

**HELD**—that the plaintiffs had not a right to go over every part of the surface of the hall, but had a right to a reasonable user of the way for the purpose of the reasonable enjoyment of their offices, and that upon the evidence a passage 6 ft. wide was not sufficient for the purpose.

**F. C. STRICK & Co., LD. v. THE CITY OFFICES [Co., LD., (1906) 22 T. L. R. 667—Eady, J.**

**18. Implied Grant—"Abutting on an Intended Road"—Duty of Vendor to Preserve such Roadway.**—In a lease of two plots of land, lot A was described as bounded "on the east by an intended road to be 38 feet wide intersecting said lot from B hereinafter demised." Lot B was described as bounded on the west "by said intended road 38 feet wide, and intersecting said lot from lot A."

**HELD**—that from the words of abuttal there was to be implied a grant of a right of way to and from and across an intersecting space of the specified width, and that the lessor was not at liberty to use the intersecting space for any purpose inconsistent with such grant.

**GOGARTY v. HOSKINS, [1906] 1 Ir. R. 173—[Barton, J.]**

**19. "Visitors"—Pupils at School.**—By a deed the plaintiffs' predecessor in title

granted to the defendant, as lessee or owner of St. Winifred's (where the defendant was then carrying on a girls' school), and her tenants, visitors, and servants, the right to pass and repass on foot over a certain way, to the end and intent that the right of footway should be appurtenant to the defendant's premises for all purposes connected with the use, occupation, and enjoyment of the premises

**HELD**—that the pupils at the school were "visitors" within the meaning of the deed, and were entitled to use the footway.

**THORNTON v. LITTLE, [1907] W. N. 68, 97 L. T. [24, 23 T. L. R. 357—Kekewich, J.]**

**(v) Prescription.**

*And see HIGHWAYS, 17—20.*

**20. Annual Payment for more than Forty Years—Enjoyment "as of Right"—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2**—A temporary permission, although often renewed, will prevent an enjoyment from being "as of right"; a permanent irrevocable permission will not have the same effect.

Where an annual payment has been made in respect of the user of the way, the plaintiff (the payer) has to get rid of the obvious significance of such payment, and he cannot, without definite evidence, ask the Court to regard it as a perpetual payment in return for an irrevocable grant of a right of way for all time.

The plaintiff was the occupier of premises with a yard and stable at the back, the only access to the yard and stable from the street being through a yard belonging to the defendants. For more than forty years before action brought the plaintiff and her predecessors at the end of each year had paid the defendants 15s. in respect of the user of the way.

**HELD**—that the proper inference was that each annual payment was made for permission to use the way during the preceding year, and that therefore the plaintiff had acquired no right of way under sect. 2 of the Prescription Act, 1832.

**Decision of C. A. ([1901] 2 Ch. 198; 70 L. J. Ch. 504, 84 L. T. 373; 17 T. L. R. 380) affirmed.**

**GARDNER v. HODGSON'S KINGSTON BREWERY [Co., LD., [1903] A. C. 229; 72 L. J. Ch. 558; 52 W. R. 17; 88 L. T. 698; 19 T. L. R. 458—H. L. (E.).**

**(vi) Private Right of Way.**

**21. Unity of Possession of Dominant and Servient Tenements—Right against Reversioner—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 2, 4**—From 1877 until his death in 1898, one A., as tenant, was in occupation, not only of S. Farm, but of the adjoining H. Farm, and his representatives remained in occupation until Michaelmas, 1899. The plaintiffs, the owner in fee simple of S. Farm,

**Particular Easements—Continued.**

and her tenant, brought an action of trespass against the defendant, the owner and occupier of H. Farm, for driving a horse and cart from H. farm across S. Farm. The defence was that the act complained of was done in exercise of a private right of way under the Prescription Act, 1832.

**HELD**—that the claim failed as well by reason of the fact that there could not possibly have been any continuous user of the kind required by the Act for either twenty years or forty years next before the action, as also because the enjoyment would not have been effectual as against the plaintiffs.

*Onley v. Gardiner* ((1838) 4 M. & W. 496; 1 H. & H. 381; 8 L. J. Ex. 102; 51 R. R. 704).  
*Battishill v. Reed* ((1856) 18 C. B. 696; 25 L. J. C. P. 290; 4 W. R. 603) and *Baxter v. Taylor* ((1832) 4 B. & Ad. 72; 1 N. & M. 14; 38 R. R. 227) followed.

*DAMPER v. BASSFITT*, [1901] 2 Ch. 350; 70 [L. J. Ch. 657, 49 W. R. 536, 84 L. T. 682; 17 T. L. R. 537—Joyce, J.

**(vii) Way of Necessity.**

**22. Door out of Garden—Path across Waste Ground—Implied Grant—Derogation.**—In 1886, A. let to B. a house and garden. In the end wall of the garden was a door opening into land belonging to A. and not yet built on; such land was surrounded by a wall with two locked gates opening into a highway there was no defined path from the door to either gate. A. gave to B. a key of the door in order that he might bring in coal to the coalhouse to which there was no access from the front except through the hall door and the house. B. asked for a right of way over the land in question, which A. declined to give, but said that he might bring in coals through the door. A. used to unlock one of the gates whenever B. wanted to bring in coal.

**HELD**—upon all the facts, that the lease was made upon the terms that the occupiers of the house should have the right to bring in coal through the door, and for that purpose to cross the piece of land into the highway by such route and by such gate as A. might from time to time direct.

*DONNELLY v. ADAMS*, [1905] 1 Ir. R. 154—C. A.

**23. Not "Landlocked" by Land of Vendor—Unity of Ownership.**—Where land is sold which is surrounded, partly by other land of the vendor, but partly by the land of a stranger, a grant of a right of way, as of necessity, will not be implied over the other land of the vendor.

The plaintiff was lessee of a farm with a private road leading up to the farmhouse on the south side of the farm. The owner in fee of the farm sold six acres, forming part of the farm, to a water company, taking £6 a year off the plaintiff's rent. The six acres were bounded on the north and east by the

farm land, on the south by the private road, and on the west by the main road. There was no gate or opening to the piece of land from either road.

**HELD**—that the private road was not a way of necessity, because the defendant water company could cut a way from the public road.

*TITCHMARSH v. ROYSTON WATER CO.*, (1900) 64 [J. P. 56; 48 W. R. 201; 81 L. T. 673—Kekewich, J.

**24. Right of Access ex propinquitate—Access by River.**—The only access to the northern half of an island, which belonged to the pursuer, was by the River Tay, or through the lands of Bolfracks, which belonged to the defender. The pursuer claimed an access of necessity.

**HELD**—that the defender, the pursuer's neighbour, was not bound to dedicate a part of his own property to afford an access—that was, the neighbour was not, to his own loss, to do something which would enhance the value of the property of another, where there was no relationship such as seller and buyer or superior and vassal between the two, and nothing but mere neighbourhood.

*MENZIES v. BREADALBANE*, (1902) 4 F. 59—[2nd Div.

**(b) Rights of Water and Watercourses**

*See also* WATERS AND WATERCOURSES.

**25. Artificial Watercourse—Enjoyment of, for Twenty Years—Tenants of Common Landlord—Prescription Act, 1832** (2 & 3 Will. 4, c. 71).—Prior to 1894 (when they purchased their holdings through the Irish Land Commission) H. and P. were tenants of adjoining farms on the same estate. In 1861 the predecessor of H., for the better drainage of his holding, constructed a drain through his lands to a neighbouring river, and at the same time a weir was constructed on the course of this drain, and a "carry" or conduit, by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, and lower down its course. In 1896 H. altered the drainage of his lands and removed the "carry," so that it no longer supplied P.'s tank. P. entered on H.'s land and restored it. H. sued for damages for trespass, obstruction of the watercourse, and for flooding the lands. P. justified under an alleged lost grant, and by prescription. At the trial the jury found a lost grant, but found there was no flow of water as of right prior to the drainage operations in 1861, and the Judge directed a verdict for the defendant.

**HELD** (by Fitzgibbon and Walker, L.J.J., dissentiente Holmes, L.J.)—that the drain was merely an artificial drain not of a permanent character, but open to alteration or removal at H.'s pleasure, and that P.'s enjoyment must be regarded as permissive only.

**Particular Easements—Continued.**

**HELD ALSO** (by Walker and Holmes, L.J.J.)—that a lost grant of an easement may be presumed from enjoyment for twenty years between two tenants, whether holding under the same landlord or not

**HELD** (by Fitzgibbon, L.J.)—that since the Prescription Act a fictitious grant cannot be presumed as the foundation of a right upon less than forty years' user by a termor against a termor.

*Bright v. Walker* ((1834) 1 C. M. & R. 211, 40 R. R. 536) and *Wilson v. Stanley* ((1861) 12 I. C. L. R. 345) followed.

*HANNA v. POLLOCK*, [1900] 2 Ir. R. 664—

[C. A. Ir.

**26. Artificial Watercourse — Escape of Water — Injury to Adjoining Lands—Right to Flow of Water.**—Adjoining properties on the bank of a river were owned by the plaintiffs and the defendants. Originally both properties were held by the same owner who, in 1803, constructed a goit, or watercourse, from the river and through the plaintiffs' lands, for the purpose of supplying water to a cotton mill, that had been erected on the defendants' lands. In 1812, the plaintiffs' lands were conveyed in fee to their predecessor in title, but the goit and sluice gate or scuttle at the head of it, with a right to enter on the land so conveyed, for the purpose of repairing same, were expressly reserved. In 1815, the defendants' lands were conveyed to their predecessor in title, the goit being included in the conveyance. In 1874 a right to the flow of water in the goit had been acquired by the plaintiffs' predecessor in title for the use of the cotton mill that had been built on the plaintiffs' lands. The defendants' land with the goit were conveyed to them in 1890. In 1895 the scuttle at the head of the goit being out of repair, the water overflowed the goit and escaped on to the plaintiffs' land, who thereupon brought an action against the defendants to recover damages for injury done to their premises. The Court held that although the plaintiffs were entitled, on the authority of *Pomfret v. Ricroft* ((1669) 1 Wms. Saund. 321), to repair the scuttle so as to enable them to enjoy their easement to the flow of water in the goit, this did not relieve the defendants, as owners thereof, of the duty to repair the scuttle, and that they were accordingly liable to the plaintiffs.

**BUCKLEY AND SONS, LD. v. N. BUCKLEY AND SONS**, [1898] 2 Q. B. 608; 67 L. J. Q. B. 953—C. A.

**27. Artificial Watercourse — Temporary Purpose — Precarious Character — Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6.**—The defendant was the owner of property on which an artificial watercourse and pond had been constructed for the purposes of a mill situate thereon, the water being diverted from and

ultimately returned to a natural stream forming the western boundary of the property. The supply was regulated by a hatch at the intake sluice. The plaintiff was the owner of a farm lying to the east of the defendant's property, and abutting for a short distance on the pond, which, as well as the watercourse, lay wholly on the defendant's property. Prior to 1886 both properties were in one ownership for fifty-five years. During that period the farm cattle used to drink from the pond at the common boundary. The defendant cut off the water at the intake sluice, and fenced off the pond along the common boundary. The plaintiff brought an action for an injunction to restrain him from so doing.

**HELD**—that no right had been shown to compel the continuance of the flow of water; that the plaintiff had no right to take water if and when it was in the pond; and that no such right could pass under sect. 6 of the Conveyancing Act, 1881, by reason of its precarious nature.

*Birmingham, Dudley and District Banking Co. v. Ross* ((1888) 38 Ch. D. 295, 57 L. J. Ch. 601; 36 W. R. 914, 59 L. T. 609—C. A.) followed.

*Watts v. Kelson* ((1871) L. R. 6 Ch. 166, 40 L. J. Ch. 126, 19 W. R. 338; 24 L. T. (N.S.) 209) distinguished.

**HELD ALSO**—that the artificial watercourse was made for a temporary purpose.

*Arkwright v. Gell* ((1839) 5 M. & W. 207 2 H. & H. 17, 8 L. J. Ex. 201) applied.

**BURROWS v. LANG**, [1901] 2 Ch. 502; 70 L. J. [Ch. 607; 49 W. R. 564; 84 L. T. 623; 17 T. L. R. 514—Farwell, J.

**28. Artificial Watercourse—Prescription—Railway Company's New Artificial Stream.**—

—Prior to 1849 the plaintiff's predecessors had enjoyed the right to take water from a natural stream flowing near their building. In 1849 the defendant railway company, in the course of the construction of their line, interfered with or tapped the subterraneous sources of this stream, which ceased thenceforward to flow, the water that had supplied it finding its way to the surface at a cutting on the company's line. The water the company conveyed along and away from their line in a new artificial channel. The water of this new stream was not until 1898 used by, nor was it of any use to the company. In 1898 the company commenced to make use of this water supply for their own purposes, and the plaintiff, who had been taking the water thereof since 1849 for domestic purposes, brought an action for disturbance of a prescriptive right. The jury found that the new stream was substituted for the old, and that the company had not constructed the new channel until they should require to use the water for their own purposes. On new trial motion:

**HELD**—that this new artificial watercourse being made for the benefit of the company

**Particular Easements—Continued.**

on the company's own land, no enjoyment of the water thereof while the water was of no use to the company could create a prescriptive right in the plaintiff; and, further, that the existence of such a right would be inconsistent with the purposes of the incorporation of the company, and with the obligations of the company to provide for the security of their permanent way and the safety of the public; and that, the new artificial stream not being the same as the stream formerly in existence, no contract in regard thereto, as an "accommodation work" within sect. 16 of the Railways Clauses Act, 1845, could be presumed.

*M'Evoy v. Great Northern Ry. Co.*, [1900] 2 [Ir. R. 325—Q. B. Div.

**29. Pump—Right to Use—Right of Way for—Prescription—Enjoyment as between Tenants of same Landlord—Dominant and Servient Tenements—Forty Years' User—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2.]—**A right of way cannot be acquired under the Prescription Act by a tenant over land occupied by another tenant of the same landlord. The user cannot be "as of right," for a reversioner cannot acquire a right against himself, and a tenant can only acquire an easement for his landlord.

*Dictum in Harris v. De Pinna* ((1886) 33 Ch. D. 238; 50 J. P. 486; 54 L. T. 770—Chitty, J.) not followed.

*Quære*, whether, under any and what circumstances a tenant can acquire for his landlord a right of way by user over land occupied by the tenant of another landlord.

The plaintiff and defendant both held adjoining premises from the same landlord under leases more than fifty years old; and the jury found that before the grant of these leases the occupiers of the defendant's house had made use of a pump on the plaintiff's premises, and that since the date of these leases they had done so for more than forty years.

**HELD**—that the right to use the pump did not pass, either by the express words of the defendant's lease with "all ways, paths, passages, easements and appurtenances," nor by implied grant as an apparent and continuous easement: and that it had not been acquired under the Prescription Act by the forty years' user.

Decision of *Walton, J.* (89 L. T. 444; 19 T. L. R. 697), reversed on the latter point.

*Kilgour v. Gaddes*, [1904] 1 K. B. 457; 73 [L. J. K. B. 233; 52 W. R. 438; 90 L. T. 604; 20 T. L. R. 240—C. A.

**30. Well—Right to Take Water from—Tenants of same Landlord—Prescription.]—**M. was owner in fee of two holdings divided by a road, on one of which was a well. In 1875, after having been held together, the holdings were divided, one being let to the present tenant G., the other (containing the well) being retained by M. In 1878 a barn

on G.'s holding was converted into a dwelling-house, and occupied by cottier tenants of G.; it had now been so occupied by the defendant for nineteen years. Since 1878 these cottier tenants had always used the well as of right.

In an action for trespass against the defendant who asserted his right to use the well,

**HELD**—that as against his landlord the defendant could not acquire such right by prescription, and that it was impossible to presume an implied or lost grant in his favour.

*Gayford v. Moffat* ((1868) L. R. 4 Ch. 133) followed.

*Macnaghten v. Baird*, [1903] 2 Ir. R. 731—[C. A.

**(c) Right to Light.**

*And see* COMPULSORY PURCHASE, 20.

**31. Acquisition—Twenty Years' Enjoyment—Computation of Twenty Years—Next before Action—Enjoyment during Part of Period under Written Agreement—Agreement of Tenant—Effect of—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 3, 4.]—**The twenty years' enjoyment during which confers a right to light under the Prescription Act, 1832, must in general be the twenty years next preceding some action or suit in which the right is called in question.

Although it may be that a period of time during which there has been unity of possession may be simply excluded in calculating the twenty years, that exception cannot be extended to cases where for a period the light has been enjoyed by express agreement in writing: such a period forms a "break."

An agreement in writing entered into and signed by the tenant of the dominant tenement *bonâ fide* for the purpose of securing the enjoyment of light to that tenement is a sufficient agreement in writing within sect. 3 of the Prescription Act, 1832.

*Simper v. Foley* ((1862) 5 L. T. 669; 2 J. & H. 555) discussed.

Decision of *Parker, J.* ([1907] 2 Ch. 516; 76 L. J. Ch. 554; 97 L. T. 297) affirmed.

*Hyman v. Van den Bergh*, [1908] 1 Ch. 167; 77 [L. J. Ch. 154—C. A.

**32. Adjoining Houses held under Leases from Same Lessor—Effect of Twenty Years' Enjoyment—Surrender of One Lease and Grant of New Lease—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.]—**Where adjacent buildings are occupied by lessees holding under a common lessor, a right to light may be acquired in respect of one building as against the other. Such right enures in favour of one lessee and his successors against the adjoining lessee and their common landlord.

*Frewen v. Phillips* ((1861) 11 C. B. (n.s.) 449; *Mitchell v. Cantrill* ((1888) 37 Ch. D.

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56; 57 L. J. Ch. 72; 36 W. R. 229; 58 L. T. 29; approved and followed; *Colls v. Home and Colonial Stores, Ltd.* ([1904] A. C. 179, 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475—H. L., No. 37, *infra*) explained.

Decision of C. A. ([1906] 2 Ch. 406; 75 L. J. Ch. 787; 95 L. T. 167) affirmed.

*FEAR v. MORGAN*, [1907] A. C. 425; 76 L. J. Ch. [660—H. L. (E.).

**33. Ancient Lights—Alteration of Building—Preservation of Right—Identity of Light, not of Aperture—Alteration Before Right Indefeasibly Acquired—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.]**—Where a building which has enjoyed a right of light to one window is altered, the question whether the right is thereby lost or not depends upon the identity of the light, not on that of the aperture.

Where light comes to a window at an angle over the roof of adjoining premises, and the wall containing the window is advanced, the right to light will be preserved if some window in the new wall intercepts a substantial part of the light which passed through the old window.

An alteration which would not destroy a right to light already acquired will not interrupt the running of the period necessary for the acquisition of such a right.

*Scott v. Pape* ((1886) 31 Ch. D. 554; 55 L. J. Ch. 426; 50 J. P. 645; 54 L. T. 399; 34 W. R. 465—C. A.) followed.

*ANDREWS v. WAITE*, [1907] 2 Ch. 500; 76 L. J. [Ch. 676; 97 L. T. 428—Neville, J.

**34. Ancient Lights—Prescription—Extraordinary Use—Sufficient Light for Ordinary Purposes of Habitation or Business—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.]**—The Prescription Act, 1832, has not altered the character of the right to light, though it has altered the method by which it can be acquired. The right will not be interfered with if there is no substantial diminution of the light such as to cause substantial damage to the tenant or owner. In considering what will be a substantial diminution and substantial damage, the proper point of view is to pay regard, not to what some person having fantastic or peculiar views may choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment. And, in particular, in considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put. If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or occupier, then that tenant or occupier is entitled to relief. It is not the law that the statutory right is not interfered with merely because

after the interference the house may still come up to some supposed standard as to what a house ordinarily requires by way of light for purposes of habitancy or business. Some houses, owing to their having numerous or particularly advantageous ancient lights, are extremely valuable for purposes of habitation or of business. In these cases an owner of the servient tenement cannot justify a substantial interference with these lights, or (it may be) a complete stoppage of some of them, causing great damage to the house, on the ground that other houses in the neighbourhood, or even the majority of those houses, or some imaginary standard house, are or is not better lighted than the injured house after the injury. Nor is the fact that, owing to the house being well lighted, certain special businesses requiring much light are being or can be carried on, to be wholly disregarded in considering the effect of an interference, merely because after the interference other businesses not requiring much light can be carried on.

The law is not that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light: it is essentially a question of comparison, whether by reason of deprivation of light the house is substantially less comfortable than it was before.

*Kelk v. Pearson* ((1871) L. R. 6 Ch. 809; 19 W. R. 665, 24 L. T. (n.s.) 890) approved.

*Lanfranchi v. Mackenzie* ((1867) L. R. 4 Eq. 421; 36 L. J. Ch. 518; 15 W. R. 614; 16 L. T. (n.s.) 114—V. C. M.); and *Dickinson v. Harbottle* ((1873) 21 W. R. 115; 28 L. T. (n.s.) 186—V. C. M.) overruled.

Certain of the plaintiffs' ancient lights had been substantially interfered with by the defendants' new building. The plaintiffs had, in fact, thereby suffered substantial damage, which the Judge assessed, as to the tenant a loss of £100, and as to the reversioners a loss of £200. The darkened house was still as useful for purposes of habitation or business as the average run of houses.

**HELD**—that the plaintiffs were entitled to judgment for the damages assessed.

Decision of Wright, J. ([1900] 2 Q. B. 722; 69 L. J. Q. B. 842, 49 W. R. 206; 83 L. T. 318; 16 T. L. R. 549) reversed.

*WARREN v. BROWN*, [1902] 1 K. B. 15; 71 [L. J. K. B. 12; 50 W. R. 97; 85 L. T. 444; 18 T. L. R. 55—C. A.

Overruled by *Colls v. Home and Colonial Stores*, No. 37, *infra*.

**35. Ancient Lights—Prescription—Particular Business—Opening New Windows—Reasonable Light Required for Business—Mandatory Injunction.]**—The plaintiffs were photographers, and claimed a mandatory injunction for the removal for so much of the defendant's building as caused a substantial interference with their light. The lights in question were ancient in 1890, when the plaintiff's tenancy began. The lights con-

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cerned were two windows, or rather skylights, in the studio and the dark-room, and there had been substantial interference with the dark-room lights. As to the studio, when the plaintiff took the premises it had a window placed across the apex of the roof, like a saddle, the roof itself being in a continuous line with the rest of the building. The plaintiffs glazed over the whole of the roof, so that the new glass covered the space formerly occupied by the old windows. Less than twenty years ago there was a building on the west which obstructed the light to that window. The building was irregular in outline, and the defendants had filled up the interstices, and had materially obstructed the access of light to the old window.

**Held**—that the plaintiffs were entitled to complain, because they were injured in the particular business which they carried on; that as photographers they were well within their rights in opening new windows, and it was quite impossible to take the new lights into consideration upon the question of the reasonable light required for the business; and that a mandatory injunction must be granted.

*Warren v. Brown* ([1902] 1 K. B. 15; 71 L. J. K. B. 12, 50 W. R. 97, 85 L. T. 444; 18 T. L. R. 55—C. A., No. 34, *supra*) discussed.

*Parker v. W. F. Stanley & Co., Ltd.*, (1902) [50 W. R. 282—Farwell, J.

**36. Ancient Lights—Conservatory—Windows—Skylights—“Consent or Agreement”—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.]**—In 1873 E., the owner and occupier of an hotel, erected on the northern side of his premises a conservatory adjoining the defendant's property, and entered into an agreement, dated July 13th, 1873, with the defendant's predecessor in title, whereby E. agreed to pay 1s. a year to defendant's predecessor for allowing “the window” of his conservatory to overlook and open on to the defendant's property. The sloping top of the conservatory was of glazed glass, as also was the whole of the vertical side adjoining the defendant's property above a few feet from the ground. Portions of the glazed side of the conservatory were movable, so that when opened they overhung the defendant's property. The yearly rent was duly paid until 1888, when the conservatory was converted into a passage or corridor of the hotel, the glazed side being bricked up, but the sloping top being retained in its former position, thus giving light to, and forming the roof of, the corridor. The defendant erected certain buildings which obstructed the access of light to the corridor through the glazed roof; and the plaintiff, E.'s successor, brought an action for an injunction and damages.

**Held**—that the agreement of July 13th, 1873, referred to the sloping roof of the conservatory as well as the vertical side.

**Held also**—that E. and his successor, the

plaintiff, enjoyed light only by virtue of the said agreement, which was a “consent or agreement” within the meaning of sect. 3 of the Prescription Act, 1832, and therefore that the plaintiff's action failed.

Decision of Joyce, J. (71 L. J. Ch. 442, 50 W. R. 472; 86 L. T. 442), affirmed.

*Easton v. Isted*, [1903] 1 Ch. 405; 72 L. J. Ch. [189; 51 W. R. 245; 87 L. T. 705—C. A.

**37. Ancient Lights—Substantial Interference—Nuisance—“Angle of 45 Degrees”—Damages—Injunction**—The Prescription Act, 1834, did not alter the nature or extent of a right to light, but only the conditions or length of user by which such a right may be acquired.

An action to preserve ancient lights is in the nature of an action for a nuisance: a trifling diminution of light is not sufficient to support an action: there must be a substantial loss of light rendering a house uncomfortable according to ordinary notions of householders, or preventing the owner of business premises from carrying on his business as beneficially as before.

The particular purpose for which the plaintiff desires in the future to use his room or building does not affect the right already acquired.

The rule as to an angle of 45 degrees is not a rule of law, but in most cases is a good working rule.

Principles upon which damages may be given in lieu of an injunction and the proper form of injunction discussed.

*Warren v. Brown* ([1902] 1 K. B. 15; 71 L. J. K. B. 12; 50 W. R. 97; 85 L. T. 444; 18 T. L. R. 55—C. A., No. 34, *supra*) overruled.

Decision of C. A. ([1902] 1 Ch. 302; 71 L. J. Ch. 146; 50 W. R. 227, 85 L. T. 701; 18 T. L. R. 212) reversed.

*Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179; 73 L. J. Ch. 484, 53 W. R. 30; 90 L. T. 687, 20 T. L. R. 475—H. L. (E.).

See also No. 49, *infra*.

**38. “Building”—Greenhouse—Mandatory Injunction—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.]**—A greenhouse is a “building” within sect. 3 of the Prescription Act, 1832, and the owner thereof is entitled to a mandatory injunction to restrain the obscuration of light to his greenhouse.

*Harris v. De Pinna* ([1886] 33 Ch. D. 238; 56 L. J. Ch. 344; 50 J. P. 308, 486; 54 L. T. 770) considered.

*Clifford v. Holt*, [1899] 1 Ch. 698; 68 L. J. [Ch. 332; 63 J. P. 22; 80 L. T. 48; 15 T. L. R. 86—Kekewich, J.

**39. Consent or Agreement in Writing—“Expressly given or made for that purpose”—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.]**—In 1716, R. M., the owner of a house and adjoining land, sold the house to J. A., and a stone was built into the

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house with this inscription: "1816: this stone was placed by J. A. to perpetuate R. M.'s right to build within nine inches of this and any other building."

**HELD**—that, having regard to the various possible reasons for putting up this stone, the inscription could not be regarded as "a consent or agreement expressly made or given for that purpose" within the meaning of sect. 3 of the Prescription Act, 1832; and that, therefore, R. M.'s successors could not now build so as to obstruct the access of light to the windows of the house, such light having been enjoyed without interruption from 1816 to 1901.

*RUSCOE v. GROUNDSELL*, (1904) 89 L. T. 426; 20 [T. L. R. 5—C. A.]

**40. Derogation from Grant—Lease—Building Lots—Interference with Access of Light—Injunction—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6.]**—By an agreement of 24th August, 1883, A. B., whose legal personal representative was the plaintiff, contracted with the freeholders of the vacant land, the subject of the agreement, as well as of the vacant land adjoining, afterwards acquired by the defendant, that A. B. should, within a specified time, build on the land, the subject of the agreement, a house of a specified character, and on the completion of such house, and in consideration thereof, the freeholders contracted to grant A. B. a lease of the land with the house thereon on certain terms. The house was erected, and the lease accordingly granted, on 29th September, 1884. The defendant some time after, October, 1896, proceeded to erect on the adjoining land a blank hoarding at a distance of about six feet from the side wall of the plaintiff's house, and of such a height as to obstruct the access of light to the kitchen window of the plaintiff's house. The estate, of which the land formed part, was marked out on the plan in building lots, and there was also a building line marked on the plan so as to extend through all the lots.

**HELD**—that the doctrine that a grantor cannot derogate from his own grant applied, not to the vacant land, but to the land with the house on it, according to the contract, which must be taken for this purpose to have been fulfilled; that there was nothing from which it could be inferred that the grantors were at liberty to build so as to interfere with the access of light to the plaintiff's house; that sect. 6 of the Conveyancing Act, 1881, should be read into the lease of 1884, and the plaintiff was entitled to an injunction.

*Broomfield v. Williams* ([1897] 1 Ch. 602; 66 L. J. Ch. 305; 45 W. R. 469—C. A.) applied.

*POLLARD v. GARE*, [1901] 1 Ch. 834; 70 [L. J. Ch. 404; 65 J. P. 204; 84 L. T. 352—Kekewich, J.]

**41. Deed of Acknowledgment—Agreement for Sale—Non-disclosure—Specific Performance—Compensation—Costs.]**—A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land.

Prior to an agreement for the sale of a new house which had windows overlooking a recreation ground belonging to the town council, the vendor by deed covenanted for himself and the owner for the time being of the house to pay to the town council 1s a year, and declared each of such payments to be a fresh acknowledgment that the owner was not entitled to any right of light or air to any windows overlooking the ground in question. The vendor did not disclose this deed when the agreement for sale was entered into. The purchaser, upon hearing of the deed, refused to complete.

In an action for specific performance;

**HELD**—that the purchaser was not bound by the covenant to pay contained in the deed, and its effect, as against the purchaser, was merely to postpone the commencement of the statutory period until she had given notice of repudiation, which she could do as soon as she had completed the purchase; that there was no ground for refusing to grant specific performance or for giving compensation, but no order would be made as to costs, as the vendor ought in fairness to have informed the purchaser before the contract of his covenant with the corporation.

*Bonner v. Great Western Railway Co.* ((1883) 24 Ch. D. 1; 47 J. P. 580; 32 W. R. 190; 48 L. T. 619—C. A.) followed.

*GREENHALGH v. BRINDLEY*, [1901] 2 Ch. 324; 70 [L. J. Ch. 740; 49 W. R. 597; 84 L. T. 763; 17 T. L. R. 574—Farwell, J.]

**42. Derogation from Grant—Building Agreement—Conveyance of Lots—General Words—Plans—Mortgage—Adjoining Ground—Implied obligation—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6.]**—By a building agreement dated January 19th, 1884, between O., who was the owner of a building estate, and S., a builder, it was agreed that during twenty-seven calendar months from the date thereof S., for the purpose only of building and executing works as therein stipulated, might enter upon certain plots of land. Some of these plots were built upon and purchased by S., pursuant to an option of purchasing the fee simple of any plot instead of taking a lease thereof. S. then built Addison Mansions upon some other of the plots not in accordance with the original scheme, and exercised his option to take a conveyance in fee instead of a lease. That conveyance was executed on May 5th, 1886, on which was a plan showing the foundations on the adjoining ground for another and correspond-

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ing block of mansions, the western wall of Addison Mansions abutting on the adjoining ground for about half its length built as a party wall, and the remainder of the wall being set back from the western boundary of the site, so as to leave unbuilt upon an open space or area of about four feet in width next the adjoining ground. The foundations on the adjoining ground were laid so as to leave or provide a similar and equal area on the adjoining ground in such a manner that the two areas together would, when both blocks of mansions were completed, form a space or court in the shape of a parallelogram with no buildings thereon. There were no express general words in any of the conveyances. On May 6th, 1886, a mortgage of Addison Mansions was made to a mortgagee, in which the parcels were practically the same as those on the conveyance, and the plans on both were identical. The defendants were the owners of the adjoining ground, and derived their title under conveyances by O. and S., neither of which contained or purported to contain any reservation of any right to light over the adjoining ground for the windows of Addison Mansions then vested in the mortgagees. O. bought from the mortgagees under a power of sale in the mortgage, and the plaintiffs were the trustees of a settlement made by O. of the property, and under which he was interested. The defendants erected buildings so as to obstruct the light coming to the windows of Addison Mansions. The plaintiffs claimed an injunction.

**HELD**—that, under the circumstances, the conveyance of May 5th, 1886, did not as against O. pass to S. any right to leave the access of light to the windows of Addison Mansions looking into the area over the adjoining ground unobstructed by any future building on the adjoining ground, and not within the area contemplated as to be left thereon; that there did not result from the mortgage of May 6th, 1886, any implied obligation on S. not to interfere with the lights of Addison Mansions to the extent required for building upon the adjoining ground pursuant to the building agreement, or even for building the corresponding block of mansions; and that transferees of the mortgage or any purchaser from them would not be in a better position than the original mortgagees.

*Birmingham, Dudley and District Banking Co. v. Ross* ((1888) 38 Ch. D. 295; 57 L. J. Ch. 601; 36 W. R. 914; 59 L. T. 609—C. A.) followed.

*GODWIN v. SCHWEPES, LD.*, [1902] 1 Ch. 926; [71 L. J. Ch. 438; 50 W. R. 409; 86 L. T. 377—Joyce, J.]

**43. Discontinuance of User—Adverse Obstruction—"Interruption"—Occupation—Fixedness and Mobility of Obstacles—Evi-**

**dence of Intention—Abandonment—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 3, 4.]**—Where a substantial quantity of useful light, which would have passed through portions of old windows of a building if they still existed, now penetrated through the corresponding portions of new windows, the temporary use for more than one year of interior boarding and open shelving, by which a material interference with the light had been caused, is a mere discontinuance of user, and not an adverse obstruction or "interruption" within the meaning of sects. 3 and 4 of the Prescription Act, 1832. It is not necessary, to the acquisition of a right of the access of light under the said sect. 3, that the building in respect of which the light is claimed should be occupied, or even fit for occupation, during the specified period. Continuous user is not necessary. Fixedness and mobility of obstacles are important elements to be considered, but the decision must turn on all the circumstances of each case.

Evidence of the intention of those who rebuild to preserve ancient lights is admissible, but may be unnecessary. Non-user, which would not be sufficient to establish an abandonment of a right acquired, may be enough to prevent the acquisition of the right under the Prescription Act, 1832. The user or non-user cannot be entirely determined by simply considering whether an obstacle interposed to the light is fixed or movable.

*SMITH v. BAXTER*, [1900] 2 Ch. 138, 69 L. J. Ch. [437; 48 W. R. 458; 82 L. T. 650—Stirling, J.]

**44. Injunction to Restrain Interference—Form of Order when Building in Progress.]**

—In an action for an injunction to restrain the defendants from building in such a manner as to interfere with the plaintiff's lights, it was admitted that the building if completed would cause some obstruction.

**HELD**—following the form suggested by Lord Macnaghten in *Colls v. Home and Colonial Stores*, [1904] A. C. 179, 194, that the defendants should be restrained from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiffs' ancient windows as the same existed prior to the commencement of the alterations in the defendants' building. Liberty to the plaintiffs to apply not later than three months after notice of completion for further relief by way of mandatory injunction or otherwise.

*ANDERSON v. FRANCIS*, [1906] W. N. 160; 121 [L. T. Jo. 292—Eady, J.]

**45. Injunction—View by Judge—Reference of Question of Damages to Independent Surveyor.]**—In an action for obstruction of ancient lights the judge himself inspected the premises and intimated that the plaintiffs should accept an offer made by the defendants. An order was then made by consent under which the question as to the amount of damage done by depreciation was to be settled by an independent surveyor, his fees



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to be borne by the parties equally; the surveyor not to be attended by either party or to take evidence

ABBOTT v. HOLLOWAY, [1904] W. N. 124; 39 [L. J. N. C. 302; 48 Sol. J. 525—Buckley, J

46. *New Buildings on Dominant Tenement—Increased Burden on Servient Tenement—Right to Light.*—The defendant was the owner of certain buildings which had some ancient lights overlooking the adjoining land, but which derived most of their light from other directions. He pulled them down and erected new buildings dependent for light upon such ancient lights. The plaintiff erected on his adjoining land a building which blocked out the remaining light, but which would not have been actionable in view of the decision in *Colls v. Home and Colonial Stores*, if the defendant's buildings had been left in their original condition.

HELD—that the plaintiff was entitled to so build

*Colls v. Home and Colonial Stores, Ltd.* ([1904] A. C. 179; 73 L. J. Ch. 484; 53 W. R. 462; 92 L. T. 209; 21 T. L. R. 128—H. L., No. 37, *supra*) applied.

Decision of Warrington, J. ([1906] 2 Ch. 544; 75 L. J. Ch. 804; 95 L. T. 717; 22 T. L. R. 743) affirmed.

ANKERSON v. CONNELLY, [1907] 1 Ch. 678; 76 [L. J. Ch. 402; 96 L. T. 681; 23 T. L. R. 486 —C. A.

47. *Ordinary User—Light Necessary for Special Business—Knowledge of Owner of Servient Tenement.*—The terms "ordinary user" or "ordinary business" as used in the judgments in *Colls' case (infra)* mean a user or business which in fact requires only an ordinary amount of light. In this connection it cannot be said as a matter of law that any particular business is, or is not, an "ordinary" business. In each case it is a question of fact.

A right to a special amount of light required for an "extraordinary" purpose cannot be acquired by twenty years' enjoyment even if it has been so enjoyed to the knowledge of the owner of the servient tenement

*Colls v. Home and Colonial Stores, Ltd.* ([1904] A. C. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475—H. L., No. 37, *supra*) discussed.

AMLER AND ANOTHER v. GORDON, [1905] 1 K. B. [417; 74 L. J. K. B. 185; 53 W. R. 300; 92 L. T. 96; 21 T. L. R. 205—Bray, J.

48. *Substantial Nuisance—Mandatory Injunction—Damages.*—The defendant sought to replace his old building by one which was found as a fact to seriously interfere with the light of the plaintiff's premises, making them less suitable for business and occupation. A mandatory injunction was granted. Deprivation of light is on a par with other

cases of nuisance, and an injunction will be granted if a substantial nuisance is caused thereby. The Court must look at the amount of light left to a plaintiff and not at the amount taken away from his easement by the defendant's operations. The question is, whether so much is left as is sufficient for the comfortable use of the house according to ordinary requirements.

The judgments of the House of Lords in *Colls v. Home and Colonial Stores* ([1904] A. C. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475, No. 37, *supra*) explained.

HIGGINS AND ANOTHER v. BETTS, [1905] 2 Ch. [210; 74 L. J. Ch. 621; 53 W. R. 549; 92 L. T. 850; 21 T. L. R. 552—Farwell, J.

49. *Substantial Nuisance—Ancient Light in Sitting Rooms—Nuisance by Obstructing—Cause of Action.*—In an action for obstruction of ancient lights in a suburban villa, it appeared that the room principally affected was lighted by two windows, one to the N. and one to the W. The defendant's building did not obstruct the N. window, and only partially obstructed the W. window, leaving more than 45 deg. of light

Kekewich, J., found that although the room was still well lighted, there was a large obstruction of light, and that the letting and selling value of the premises was substantially diminished.

HELD (by Lord Loreburn, L.C., and Lord James, Lords Robertson and Atkinson dissenting)—that upon these findings the plaintiff had a cause of action.

The effect of *Colls v. Home and Colonial Stores, Ltd.* ([1904] A. C. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475—H. L., No. 37, *supra*) discussed.

Decision of the majority of the C. A. ([1905] 1 Ch. 480; 74 L. J. Ch. 174; 53 W. R. 462; 92 L. T. 209; 21 T. L. R. 128) affirmed.

JOLLY v. KINE, [1907] A. C. 1; 76 L. J. Ch. 1; [95 L. T. 656; 23 T. L. R. 1—H. L. (E.)

50. *Threatened Injury—Injunction or Damages—Jurisdiction—Special Circumstances—Oppression—Lord Cairns' Act* (21 & 22 Vict. c. 27), s. 2.—Where no wrongful act has been committed, but an injunction is sought to restrain the commission of one, Lord Cairns' Act confers no jurisdiction to award damages instead of granting an injunction.

The plaintiff was the owner of a cottage possessing ancient lights and adjacent to ground whereon the defendant threatened and intended to erect valuable buildings which would (as the Court found) materially obstruct the lights and cause the plaintiff substantial damage. The plaintiff had been unwilling to sell his property for a less sum than the cottage, together with its easement of light, would, having regard to its situation in relation to the adjacent ground, in fact command. In an action for an injunction to restrain the erection of the proposed building,

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**HELD**—that the plaintiff's conduct had not been extortionate, and that there were no circumstances such as would induce the Court to award him damages in lieu of an injunction, and so compel him, in effect, to sell his property against his will.

*Dreyfus v. Peruvian Guano Co.* ((1889) 43 C. D. 333; 62 L. T. 581—C. A.) applied.

*COOPER v. LAIDLER*, [1903] 2 Ch. 337; 72 L. J. [Ch. 578; 51 W. R. 539—Buckley, J.

**(d) Right to Support.**

*And see* HIGHW. YS, No. 67.

**51. Adjoining Buildings—Right to Lateral Support—Knowledge of Support—Prescription—Evidence**—Where an easement of support is claimed by the owner of one of two adjoining houses, which have not a common origin, against the owner of the other, it must be shown that the owner of the servient tenement knew, or had the means of knowing, that his house was affording support to the other.

*GATELY v. MARTIN*, [1900] 2 Ir. R. 269—[Q. B. Div.]

**52. Adjoining Land—Implied Reservation—“Easement of Necessity”—Prescription—Rods and Ties Underground—Enjoyment Openly or Clam—Sufficient Notice of Existence of Special and Unusual Support**—There must be some knowledge or means of knowledge on the part of the person against whom there is claimed a right of support for the building of another.

*DALTON v. ANGUS* ((1881) 6 App. Cas. 740; 50 L. J. Q. B. 689; 30 W. R. 191, 44 L. T. 844—H. L. (E.) considered).

The owner in fee of land in his own occupation who was also owner of an adjacent wharf in the occupation of his tenants, constructed a graving dock on his own premises, with timber sides, and, in or about 1861, under some arrangement with his tenants, carried rods or ties through the boundary fence under the wharf to a distance of about 15 ft. 6 in., piles being placed there, and the rods or ties being fastened to the piles by nuts. The rods or ties were not visible under the wharf, but two nuts, a few inches above the ground, were occasionally visible. More than twenty years before action brought the owner conveyed the wharf to the plaintiffs, the conveyance being silent as to the support. The owner subsequently conveyed the graving dock to the defendants. This conveyance was also silent as to the support. Everything was honestly and (as far as it could be) openly done, without any deception or concealment.

**HELD** (Vaughan Williams, L.J., dissenting)—that the tie-rods which passed through the plaintiff's property were reasonably necessary to the enjoyment of the defendant's dock in its then present condition; but the dock was capable of use without them, and there could not be implied any reserva-

tion in respect of them; that the tie-rods did not form part of the corporeal structure of the dock, and could not be held not to have passed by the conveyance of the adjoining property; that notice of the existence of the supports ought not to be attributed to the plaintiffs, nor were they put on inquiry; and that the plaintiffs might remove the ties.

*Decision of Cozens-Hardy, J.* ([1901] 2 Ch. 300; 70 L. J. Ch. 558; 84 L. T. 527, 17 T. L. R. 447), affirmed.

*UNION LIGHTERAGE CO. v. LONDON GRAVING [DOCK CO.]*, (1902) 2 Ch. 557, 71 L. J. Ch. 791; 87 L. T. 381; 18 T. L. R. 754—C. A.

**53. Subsidence—Asphalt—Injury to Buildings—Loss of Asphalt—Injunction—Damages**—Rights of property must be respected, even when they conflict, or seem to conflict, with the interests of the community. If private property is to be sacrificed for the benefit of the public, it must be done under the sanction of the Legislature, which can, and generally does, provide compensation. Asphaltum is a mineral, and not water. The defendants interfered with the plaintiffs' right of support, they let down the surface of the plaintiffs' land, and consequently did injury to the plaintiffs' adjacent lands, buildings, and a fence, and the plaintiffs also suffered injury by the loss of the asphaltum which, on the removal by the defendants of the lateral support of their land, passed into the defendants' land, and was appropriated by them to their own use.

**HELD**—that the plaintiffs were entitled to an injunction restraining the defendants from digging and winning or otherwise removing the asphaltum, and to damages.

*TRINIDAD ASPHALT CO. v. AMBARD*, [1899] A. C. [594, 48 L. J. P. C. 114, 48 W. R. 116; 81 L. T. 132—P. C.]

**ECCLESIASTICAL CHARITY.**

*See* CHARITIES

**ECCLESIASTICAL LAW.**

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## I CHAPELS.

1. *Consecrated Public Chapel — Domestic Oratory—Evidence of User.*—A chapel in the grounds of Waddeton Court, which was part of the original mansion-house, but was now a separate building, had been used by the vicar of the parish church for Divine service.

HELD—upon the evidence of user and the documentary evidence, not to be a consecrated public building, but a domestic oratory, to the possession of which the vicar had no right and of which he was not incumbent.

NEVILL v. STUDDY, (1906) 22 T. L. R. 349—  
[Buckley, J.]

## II CHURCH OF ENGLAND.

## (a) Discipline and Ecclesiastical Offences.

2. *Deprivation of Preferment by Bishop—Separation Order—"Persistent Cruelty"—"Aggravated Assault"*—*Judicial Separation*—*Clergy Discipline Act, 1892* (55 & 56 Vict. c. 32), s. 1, sub-s. 1 (d) (e)—*Summary Jurisdiction (Married Women) Act, 1895* (58 & 59 Vict. c. 39), ss. 4, 5, 12.]—On January 23th, 1902, the plaintiff's wife applied for and obtained a separation order against the plaintiff under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of his "persistent cruelty."

On March 7th, 1902, the defendant caused a notice to be sent to the plaintiff under the Clergy Discipline Act, 1892, which recited that a separation order had been made against the plaintiff under the Summary Jurisdiction (Married Women) Act, 1895, "which Act revoked and re-enacted with modifications the fourth section of the Matrimonial Causes Act, 1878," and that the order had become conclusive within the meaning of the Clergy Discipline Act, 1892, and gave notice of the defendant's intention to declare the plaintiff's preferment of the Vicarage of Cowlinge vacant, and on March 7th, 1902, the defendant declared the living vacant accordingly.

HELD—that the provision in the Act of 1895 which authorises the making of a separation order on the ground of "persistent cruelty" was not a re-enactment with modification of the provision in sect. 4 of the Act of 1873, enabling a separation order to be made upon the ground of conviction for an "aggravated assault"; that the separation order was not an order for "judicial separation" against a clergyman in a divorce or matrimonial cause within sect. 1, sub-sect. 1 (d), of the Clergy Discipline Act, 1892; that the declaration made by the bishop was not authorised, and was invalid.

SWEET v. BISHOP OF ELY, [1902] 2 Ch. 508; 71 [L. J. Ch. 771; 50 W. R. 520; 86 L. T. 679; 18 T. L. R. 632—Joyce, J.]

3. *Fraudulent Collection of Alms—Immoral Act—Clergy Discipline Act, 1892* (55 & 56 Vict.

c. 32), s. 2.]—To unlawfully go about as a collector of alms under false and fraudulent pretences is an immoral act within the meaning of sect. 2 of the Clergy Discipline Act, 1892

FITZMAURICE v. HESKETH, [1901] A. C. 266; 73 [L. J. P. C. 55; 90 L. T. 216; 20 T. L. R. 302—P. C.]

4. *"Immoral Conduct"—"Dangerous to the Reputation and Unworthy of the Character of Ministers of Religion"—"Offence against Morality"*—*Evidence of—Immoral and Riotous Behaviour with Prostitutes—Clergy Discipline Act, 1892* (55 & 56 Vict. c. 32), ss. 2, 3, 12—*Canons 71 and 109 of 1603*—The 2nd section of the Clergy Discipline Act, 1892, enacts that "If a clergyman . . . is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality, and not being a question of doctrine or ritual, he may be prosecuted" under the Act

A certain club was, before it was closed as a disorderly house, a well-known club frequented by men and prostitutes, where dancing was carried on very late at night after all respectable places of entertainment had been closed. The defendant—a rector—went there after 12 at night at the end of an evening spent at different places of entertainment, and then, after realizing the character of the place, stayed there three-quarters of an hour, talking and joking with prostitutes, and behaving himself in an immoral and riotous manner with the prostitutes.

HELD—that the defendant's presence and action at the club constituted conduct so "dangerous to the reputation and unworthy of the character of ministers of religion," as to be contrary to the 75th and 109th canons, and therefore "an offence against the laws ecclesiastical," as well as "an offence against morality" within the meaning of the Clergy Discipline Act, 1892.

*Beneficed Clerk v. Lcc* ([1897] A. C. 226 at pp. 229, 230; 66 L. J. P. C. 8; 75 L. T. 461—P. C.) followed.

SWEET v. YOUNG, [1902] P. 37; 50 W. R. 96—  
[L. T. Dibdin, Esq., K.C. (Chancellor of the Diocese of Rochester.)]

5. *Indecent Behaviour in Church—Conviction by Magistrates—Offence against General Ecclesiastical Law—Jurisdiction of Consistory Court—Ecclesiastical Courts Jurisdiction Act, 1860* (23 & 24 Vict. c. 32), s. 2—*Clergy Discipline Act, 1892* (55 & 56 Vict. c. 32), s. 2—The provisions of the first part of sect. 2 of the Clergy Discipline Act, 1892, by which proceedings can be taken following up a conviction in a temporal Court, are quite distinct from the subsequent provisions relating to general charges of immoral acts and immoral conduct.

Where a clergyman has been convicted by

**Church of England—Continued**

a temporal Court of an act constituting an ecclesiastical offence, he must, on the conclusive proof prescribed by the statute being given, be convicted also in the Ecclesiastical Court under the Clergy Discipline Act, 1892, whether the act committed by him be an offence against morality or not, provided it is not a doctrinal or ritual offence.

The defendant was convicted in petty sessions of having been guilty of indecent behaviour in church during the celebration of divine service therein, and was fined, and this conviction was confirmed by the quarter sessions. The indecent behaviour was this: Having come to the church with a number of followers, in accordance with a pre-concerted scheme, he, during the prayer of consecration in the celebration of Holy Communion, rose from his seat, and, referring to the way in which the celebrant was acting, said, "This is idolatry!" Protestants, leave the house of Baal!" and proceeded to leave the church with his followers.

HELD—that the defendant was guilty of a deliberate and wholly unjustifiable breach of the law, both civil and ecclesiastical, and ought to be admonished to refrain from such conduct for the future.

**GIRT v. FILLINGHAM**, [1901] P. 176—Chancellor [of the Diocese of St. Albans (A. B. Kempe, Esq.).

**6. Indecent Behaviour in Church—Brawling in Church—Interfering with Divine Service—Evidence—Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2.]**—Where it is proved that anybody has used loud expressions or interfered with the proper and orderly conduct of the service by expressions indicating his own disapproval, tribunals ought to hold that it was indecent behaviour.

Where the majority of the justices came to the conclusion that the evidence could not be relied upon, and that the word "idolatry" was uttered by the respondent not loudly and not in an indecent manner, and no disturbance was caused by the use of the word, but by the appellant's ejecting the respondent, the case was not sent back to the justices, as it could only have been sent back for a statement of the evidence on which the justices found their conclusion, and that would have been contrary to the established practice.

**JONES v. CATERALL**, (1902) 18 T. L. R. 367—[Div. Ct.]

**7. Occasional Swearing and Ribaldry—Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32) s. 2.]**—Habitual swearing and ribaldry is an "immoral habit" or "immoral conduct" within the meaning of the Clergy Discipline Act, 1892, s. 2; but the occasional use of such language is not an "immoral act" within the meaning of that section.

**MOORE v. BISHOP OF OXFORD**, [1904] A. C. 283; 73 L. J. P. C. 443; 90 L. T. 425—P. C.

**8. Officiating in Unconsecrated Room in another Clergyman's Parish—Private Ministration—Inhibition of Diocesan of Parish—Church Discipline Act, 1840 (3 & 4 Vict. c. 86)]**—The respondent, a clerk in holy orders of the Church of England, was charged with having officiated in an unconsecrated parish room contrary to the wish and without the consent of the promoter, the vicar of the parish, and notwithstanding the inhibition of the Archbishop, the diocesan of the parish. The parish room was the private property of M., who was using the same as a private chapel. The persons who attended the services, and were not members of M's family, were a good many, and were either his tenants or admitted to be present by his permission.

HELD—that the attendance of such persons in the parish room could not be accounted as an attendance of that domestic character which was necessary to legalise the services held there, that the respondent must be further admonished to abstain from offending in like manner for the future; and that he must be condemned in the costs of the proceedings.

**NESBITT v. WALLACE**, [1901] P. 354; 17 T. L. R. 727—Dean of Arches (Sir Arthur Charles).

**9. Officiating Outside Parish—Prohibition by Bishop.]**—It is an ecclesiastical offence for a priest of the Church of England to ordain a presbyter or priest to officiate and to administer the Holy Communion.

A parish priest after holding service in a Nonconformist chapel in another parish purported to ordain a layman. In so acting he disregarded the express prohibition of his Bishop.

HELD—that he was guilty of an offence punishable by deprivation, but that in view of his submission he should only be suspended for two years, admonished and condemned in costs.

**BISHOP OF ST. ALBANS v. FILLINGHAM**, [1906] P. 163; 22 T. L. R. 293, 332—Dean of Aiches.

**10. Practice—Appeal—Special Leave—Idle and Frivolous Application.]**—Where it is only suggested that some evidence might, or peradventure might, be forthcoming which might to some extent qualify the evidence given before, and no definite proposition placed before the Privy Council, and no definite evidence suggested, leave to appeal under the Clergy Discipline Act, 1892, s. 4, sub-s. 2, will be refused.

**IN RE EVANS & WOODS, EX PARTE WOODS**, [1900] A. C. 338; 69 L. J. P. C. 82—P. C.

**11. Reservation of Sacrament over Altar—Act of Adoration—Ecclesiastical Offence]**—The reservation of the Blessed Sacrament is an ecclesiastical offence against the laws of the Church of England. The vicar of a parish church reserved the Blessed Sacrament in a tabernacle placed above the altar in the church with a lamp burning before it, and the choir were trained to genuflect before it.

HELD—that the vicar had committed an ecclesiastical offence.

**BISHOP OF OXFORD v. HENLY**, [1907] P. 88; 23 T. L. R. 152—Court of Arches.

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## (b) Ornaments and Erections in Churches.

12. *Chancel Screen—Figures, Crucifixion, Virgin Mary, and St. John—Decoration—Superstitious Reverence and Regard.*—Sculptured representations of sacred subjects, if set up for the purposes of decoration only, are not in themselves unlawful in the Church of England; but they are unlawful if set up under circumstances which induce a just and reasonable apprehension that they are likely to be made the object of superstitious reverence and regard.

An application was made to the Court to decree a faculty authorizing a chancel screen of oak to be set up in a chapel, with the figure of Our Lord on the Cross upon the centre of it, and the figure of the Virgin Mary on one side and of St. John on the other. It was not intended that any of these figures should surmount the screen. It was proposed that they should be attached to the upper portion of the tracery, the central figure being placed immediately over the entrance archway, and the other two on the right and on the left, at a somewhat less elevation, upon pedestals or stands affixed to the woodwork. The Chancellor of the Diocese refused the application which was made by the vicar, churchwardens of the parish church, and the chapel wardens of the chapel, one of whom was the donor of the screen. On appeal:

Held—as neither from its character nor proposed position the screen could be regarded as unlawful, and as no evidence was given leading the Court to suppose that it was likely to be treated otherwise than simply as an architectural decoration, the faculty applied for might be granted; and that the mere suggestion that it might cause offence was not enough to cause the Court to refuse the faculty.

IN RE ST. ANSELM, PINNER, [1901] P. 202; 17 [T. L. R. 342—Sir Arthur Charles, Court of Arches.

13. *Crucifix—Faculty—Parishioners.*—The Court ordered the removal of a movable crucifix standing on the re-table in the chancel of a church, and also of a crucifix fastened to the north wall, just above and at the side of the pulpit, on the ground that they were illegal church ornaments, and not architectural decorations; and that, even if they were lawful church ornaments, the Court would not authorize their retention, as they had been used for superstitious purposes.

KENSIT v. ST. ETHELBURGA, BISHOPSGATE [WITHIN (RECTOR OF), [1900] P. 80; 15 T. L. A. 549—Dr. Tristram, Chancellor.

14. *Decoration—Organ—Screen—Figure of Christ—Representation of Historical Event set up for Purpose of Decoration only.*—On an unopposed application by a vicar and churchwardens the Ordinary granted a faculty for:

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(1) The removal of the organ from the east end of the north aisle to a new position—as being an improvement for the parish;

(2) A screen separating the old organ chamber or chapel from the rest of the church, and the decoration of such chamber in accordance with the decoration of the rest of the church—as being desirable and advantageous; and

(3) The erection of a figure of Christ in the act of blessing, sculptured in stone in high relief, and surrounded by a frame having representations of angels, the whole standing on a single stone pedestal—as being a representation of an historical event set up for the purpose of decoration only.

IN RE CHRIST CHURCH, EALING, [1906] P. 239 [—Dr. Tristram, Chancellor.

15. *Holy Table—Marble Table—Wooden Table with Marble Slabs on Front and Sides.*—A faculty ought not to issue for the erection in a church of a holy table of marble.

*Faulkner v. Litchfield* ((1845) 1 Rob. Ecc. Rep. 134—Court of Arches) and *Liddell v. Beale* (Moore, p. 132) followed.

But it is permissible to erect a wooden table with decorative marble slabs screwed to the front and sides.

IN RE ST. LUKE, CHELSEA, [1904] P. 257; 20 [T. L. R. 422—Dr. Tristram, Chancellor.

16. *Holy Table in Side Chapel—Proviso enabling Court to order Removal of such Holy Table—Unlawful Ornaments or Services.*—The Court, upon the evidence, was satisfied that the celebration of the early Communion in a side chapel instead of in the chancel would be a convenience to the clergyman and to the attending communicants, and some saving of expense to the parish, and that it was the general wish of the parishioners that a Holy Table should be placed in a side chapel for this purpose, granted a faculty for its erection; but under the circumstances inserted therein a proviso reserving to the Court, on being satisfied that any ornaments other than those sanctioned by the present or future faculty have been introduced into the chapel, or unlawful services performed in it, to order the removal of the Holy Table from the chapel.

ST. ANNE'S (RECTOR OF), LIMEHOUSE v. PARISHIONERS OF SAME, [1901] P. 73; 17 T. L. R. 27—Tristram, Q.C., Consistory Court (London).

18. *Lighted Candles placed on Re-table—Not required for Light.*—This case raised the question of the legality of burning lighted candles on the Holy Table when not required to give light. The Chancellor of the Diocese of London, after calling attention to the conflict between the judgments of the Archiepiscopal Courts and the Judicial Committee, refused to discuss and determine which of these superior Courts had

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arrived at a correct solution of the question, but made an order in such terms as to enable either party to the suit to bring the question before the Judicial Committee for its final determination.

*Martin v. Maconachie* (L. R. 2 A. E. 116; Bishop of Lincoln's Case, (1891) P. 9) considered.

ST. PAUL'S, CAMDEN SQUARE, (1898) Consistory [Court of London 14 T. L. R. 85, 156—Dr. Tristram, Q.C., Chancellor of Diocese.

19. *Removal of Ornaments—Civil Suit—Benefice Vacant—Insufficiency of Interest—Secretary to Archbishop—Sequestrator of Benefice*—In a civil, as distinguished from a criminal suit, the promoter, not being a parishioner, must show that he has some special interest.

The secretary to the diocesan has not, as such, sufficient interest in a parish, of which he is not a parishioner, to enable him to promote a civil suit calling upon the churchwardens of the parish (the benefice being vacant) to show cause why they should not be ordered to remove from the church certain ornaments introduced without the authority of a faculty.

*Lee v. Fagg* (1874) L. R. 6 C. P. 38) followed.

*Semble*, the fact that he is also sequestrator of the vacant benefice would not give him sufficient interest.

NOBLE v. REAST AND ANOTHER, [1904] P. 34—[Chancellor of York Diocese.

20. *Removal of Illegal Erections—Interest in Subject-matter—Parishioner of New Ecclesiastical Parish—Non-resident Ratepayer—Removal of Illegal Erections in a Church—Confessional Boxes—Images—Holy Water Stoups*.—It is settled law that the promoter of a civil suit in the Ecclesiastical Courts must, if called upon by the opposite party, satisfy the Court that he has a present interest, or the possibility of an interest in the subject-matter of the suit, and that unless he so satisfies the Court his suit is dismissed.

The petitioner's brother was owner of a cottage in a parish of the Annunciation in the town of Brighton. The petitioner became his weekly tenant of it on 26th September, 1898, at 10s. per week. He paid the first week's rent on 3rd October, 1898. He procured his entry on the rate-book on 29th September, 1898. He took the house for the sole purpose of giving himself a *locus standi* to bring the suit.

HELD—that though the parish of the Annunciation had been created a separate parish for all ecclesiastical purposes, the petitioner was entitled to attend and vote in the vestry of the new ecclesiastical parish notwithstanding he did not reside there.

Confessional boxes and other articles of church furniture appropriate for receiving

confessions, an image of the Good Shepherd on a pedestal with candles on each side of it, and a lighted lamp in front of it, other images, and two holy water stoups were ordered to be removed from the church as illegal erections in a church.

HELD ALSO—that consent of the Lord Bishop of Chichester was not necessary to the hearing and determination of the cause.

DAVEY v. HINDE, [1901] P. 95—Dr. Tristram, [Consistory Court of Chichester.

21. *Removal of Illegal Church Ornaments—Non-Resident Ratepayer—Right to Promote Faculty Suit—Stations of the Cross—Confessional Boxes—Crucifixes—Tabernacles—Holy Water Stoups—Images*.—D. took on a weekly tenancy a six-roomed house in an ecclesiastical parish formed under Lord Blandford's Act: he sublet five of the rooms, and furnished one room which he occasionally used, but in which he never slept: he was entered in the rate-book of the civil parish out of which the ecclesiastical parish had been formed, and he paid all the rates.

HELD—that he had sufficient interest to entitle him to promote a suit for a faculty to remove illegal ornaments from the church of the ecclesiastical parish, although he admitted that his only object in renting the house was to obtain a *locus standi* for such purpose.

The following ornaments were ordered to be removed—

(1) Stations of the Cross; (2) Confessional boxes; (3) Crucifixes with a canopy or crown over them; (4) Tabernacles with lamps burning before them; (5) Holy water stoups; (6) Images of The Good Shepherd, The Virgin Mary, St. Joseph and The Sacred Heart, with their lamps, vases, curtains and crowns, &c.

DAVEY v. HINDE (Second Hearing), [1903] P. [221—Dr. Tristram.

22. *Reredos—Removal of Ten Commandments to the West End—Faculty*.—The Court granted a faculty for the removal of the Ten Commandments from a reredos which was about to be placed at the east end of a church, and the placing of them in the west end, it being impossible to place them at the east end without removing certain monuments which were there already, and the west end being the place where they could be most conveniently read.

*Liddell v. Beal* ((1860) 14 Moore, P. C. 7, 15; 8 W. R. 569—P. C.) followed.

ST. GILES'S, CRIPPLEGATE, (1901) 17 T. L. R. 672.

23. *Second Communion Table—Chancel Screen with Gates—Crucifix and Figures upon Screen—Ancient Rood-stairs and Rood-loft Door—Restoration of pre-Reformation Screen Rood*.—Upon the application of the vicar and churchwardens of a parish church, there being no opposition and no complaint as to irregularities in the mode of conducting services, a faculty was granted for: (1)

**Church of England—Continued.**

A second communion table in a side chapel, (2) A chancel screen; and (3) Gates in such screen, as it was proved that, the church being left open and unattended, some protection to the books, organ, etc. in the chancel was desirable, but not (4) for placing a group of life-size figures of Christ, the Virgin Mary, and St. John upon the top of the screen. It was proposed to place these figures in the identical positions occupied before the Reformation by similar figures, virtually, indeed, to restore the pre-Reformation screen and rood in front of the existing old rood door; and the Court considered that it would be unlawful (or, if not unlawful, inexpedient), to permit this, there being a danger that the figures might become objects of "superstitious reverence."

IN RE PAIGNTON (VICAR AND CHURCHWARDENS), [1905] P. 111—Exeter Consistory Ct.

24. *Second Communion Table—Legality of.*—A second Communion table may legally be permitted in a church, and if introduced with the sanction of the ordinary by means of a faculty is a legal fitting of the church. The circumstances which warrant such a faculty and the structural or other arrangements which should be made in any particular church where a second holy table is sanctioned are matters to be decided by the authority granting the faculty in each case.

A second table was allowed to be placed in a side chapel so as to economise warming and lighting expenses at daily services attended by small congregations.

ST. JOHN THE BAPTIST, BUXTON, [1907] P. 368; [23 T. L. R. 694—Dean of Arches.

25. *"Stations of the Cross"—Darkening of Chancel Windows — Placing Curtains over Ten Commandments — Lord's Prayer and Apostles' Creed — Reredos — Side Chapel—Communion Table in.*—Without having obtained a faculty and in opposition to the wishes of his parishioners an incumbent of a parish church introduced into it pictures representing the "Stations of the Cross," which were proved to have been used superstitiously, and four crucifixes. He had, also, placed curtains over the Ten Commandments, the Lord's Prayer, and the Apostles' Creed engraved on the east chancel wall, and by affixing permanent blinds on the east window and a side chancel window darkened the chancel. The Court ordered that the incumbent should, within three months, remove the "Stations of the Cross," the crucifixes and the curtains, and should take down the blinds; and expressed itself prepared to issue a faculty to the parishioners' churchwarden to carry out this order, if the incumbent should fail to comply with it.

The Court sanctioned (subject to certain alterations) by a confirmatory faculty the erection of a Communion table with a rere-

dos in the chancel in place of a Communion table formerly there, though erected by the incumbent in opposition to a vote of the vestry, on the ground of its being an artistic improvement to the church.

The erection in the church of a side chapel with a Communion table in it, though not approved of by the parishioners, was also sanctioned by the Court, subject to certain alterations

RE ST. MARK'S, MARYLEBONE; ST. MARK'S VICAR [v. PARISHIONERS, [1898] P. 114; 14 T. L. R. 103 — Consistory Court of London — Dr. Tristram, Q.C., Chancellor of Diocese.

26. *Stations of the Cross—Crucifix over Pulpit—Figure of the Good Shepherd—Confirmatory Faculty—Dedication or Consecration by Bishop no Sanction to Ornaments—Practice—Rules of Arches Court.*—The Court ordered the removal of fourteen pictures, known as the Stations of the Cross, which had been hung upon the walls of a church without a faculty obtained for that purpose, upon the ground that, upon the evidence, they were not put up for the purpose of decoration only, but in order to take a place or play a part in devotions paid to the Deity before them, whether in public services or by individuals in private devotions. The Court refused to order the removal of an image of the Good Shepherd which had been fixed without a faculty, upon the east wall on the south side of the old chancel arch of the church, it being a mere architectural decoration, and there being no proof of superstitious reverence being paid to it.

The Court ordered the removal of two crucifixes, which were placed in the church, one over each of the pulpits, upon the ground that they were erected without a faculty.

Where ornaments, not illegal in themselves, have been erected in a church without a faculty first obtained, a confirmatory faculty ought not to be granted authorising their erection unless there is a very general desire on the part of the church-going parishioners in favour thereof; in other words, an application for a confirmatory faculty cannot be treated any more favourably than would have been an application for a faculty in the first instance before the erection of the ornaments

A Bishop by consecrating or dedicating a church gives no episcopal sanction to ornaments in the church at the time of such consecration or dedication.

Explanation of the practice where an appeal *apud acta* is asserted in a case governed by the Arches Court Rules and Regulations of September, 1903.

IN RE HOLY TRINITY, SHIREBROOK, [1906] P. 239; [22 T. L. R. 278—Consistory Ct.

27. *Enlargement of Parish Church Window—Re-erection of Chancel East Wall containing Historical Painted Window presented by House of Commons — Consents*

**Church of England—Continued.**

*Required to Removal and New Position of Military Colours affixed to Chancel Walls under Faculty—Evidence of Assent of House of Commons to Application for Faculty.*—On the application of the rector and churchwardens, with the consent of the parish vestry, a faculty was granted for the enlargement of the parish church of St. Margaret's, Westminster, by taking down and re-building the east wall of the chancel of the church six or seven feet further to the east and for other alterations in the church including the re-erection and re-leading of the historical painted window at the east end of the chancel erected by the House of Commons. Evidence was given that official notice of the application had been given to the Speaker of the House of Commons, and that the "leaders" of the House approved of the proposal.

The temporary removal of certain military colours affixed to the walls of the chancel under a previous faculty was authorised by the Court with the consent of the representative of the regiment to which the colours belonged.

IN RE ST. MARGARET'S, WESTMINSTER, [1905] P. 286—Tristram, Chancellor.

**III. CHURCHWARDENS.**

**28. Admission of by Archdeacon—Period of Bishop's Visitation—Jurisdiction—Ministerial Act—Mandamus** ] — During the period of a bishop's visitation the bishop alone has jurisdiction—or ministerial duty—with regard to the admission of churchwardens.

A person, having a majority of votes at an election of a people's churchwarden, applied to the archdeacon for admission to the office within the period of the bishop's triennial visitation. The archdeacon refused to make the admission, on the ground that it was the year of the bishop's triennial visitation. Thereupon a rule *nisi* for a mandamus to the archdeacon was applied for and granted.

**HELD**—that the rule *nisi* ought to be discharged as having been granted against the wrong person, and that the judgment of the Divisional Court did not dispose of the real question.

Order of Divisional Court ([1901] 1 Q. B. 66; 70 L. J. Q. B. 87; 49 W. R. 170; 83 L. T. 584; 17 T. L. R. 47) reversed.

*Rex v. Simpson* ((1725) 1 Str. 609; 2 Ld. Raym. 1379; 8 Mod. 325) discussed.

**REG. V. SOWTER**, [1901] 1 Q. B. 396; 70 L. J. K. B. 322; 65 J. P. 355; 49 W. R. 338; 84 L. T. 36; 17 T. L. R. 211—C. A.

**29. Election of—Incumbent and Parishioners being unable to agree—Incumbent's Right to vote at Election of Parishioners' Churchwarden—Canon 89—Vestries Act, 1818 (Sturges Bourne) (58 Geo. 3, c. 69), s. 3.]**—If the minister and parishioners cannot agree upon the choice of churchwardens, then the

minister—if there is no special custom in the parish—shall choose one and the parishioners (excluding the minister) the other.

Section 3 of Sturges Bourne's Act applies only to the mode of conducting the ordinary business of vestries, in which the incumbent attends as a member of the vestry and votes as such, and is not intended to interfere with the personal incapacity which the incumbent, who has already chosen one churchwarden, is under to vote at the election of the other.

Judgment of the Queen's Bench Division ([1901] 1 Q. B. 573; 70 L. J. K. B. 423; 65 J. P. 373; 49 W. R. 399; 84 L. T. 320; 17 T. L. R. 251) affirmed.

*REX v. SALISBURY (BISHOP)*, [1901] 2 K. B. 225; [70 L. J. K. B. 593; 65 J. P. 531; 49 W. R. 529; 84 L. T. 553; 17 T. L. R. 465—C. A.

**30. Nature of Office.**—Churchwardens are merely annual officers and not a corporation in the full sense of the word; they are not a corporate entity and cannot sue or be sued by any corporate name; they are a quasi-corporation for the purpose of holding land and the devolution of property.

*FELL v. CHARITY LANDS (OFFICIAL TRUSTEE)*, [1898] 2 Ch. 44; 62 J. P. 805, 67 L. J. Ch. 385; 78 L. T. 474; 14 T. L. R. 376—C. A.

**31. Refusing to Allow Churchwarden to Perform Duties—Jurisdiction of Ecclesiastical Court.**—At the election at an Easter vestry of a people's warden for a parish a woman was proposed and seconded, and a poll was demanded on her behalf. The chairman refused a poll, but the King's Bench Division granted a mandamus directing the vicar and inhabitants of the parish to hold a poll. On such poll she was chosen people's churchwarden, but the vicar's churchwarden refused to allow her to perform the duties of the office.

**HELD**—that her remedy was to institute a criminal suit in the Ecclesiastical Court against the other churchwarden for the purpose of enforcing her right to perform her official duties.

*GORDON v. HAYWARD*, (1905) 21 T. L. R. 298—[Chancellor of Consistory Ct.

**IV. CLERGY.**

And see INCOME TAX, Nos. 6—10.

**32. Bishop-Elect—Confirmation of—Objections on Ground of Ecclesiastical Offences, False Doctrine, or Similar Objections—Jurisdiction of Archbishop and Vicar-General—Mandamus—Costs—Crown—25 Hen. 8, c. 20.]**—There is no jurisdiction in the Archbishop or the Vicar-General, upon the confirmation of the election of a bishop-elect, to entertain objections to the confirmation alleging ecclesiastical offences, false doctrine, or similar objections to the bishop-



*Clergy—Continued.*

elect, and a writ of mandamus will not lie to the Archbishop or Vicar-General to compel them to hear and determine such objections.

*Reg. v. Archbishop of Canterbury* ((1848) 11 Q. B. 483; 12 Jur. 862; 17 L. J. Q. B. 252) discussed.

On the argument of a rule for a prerogative writ of mandamus to the Archbishop of Canterbury and his Vicar-General to hear and determine certain objections to the confirmation of the Bishop-elect of Worcester, the Archbishop and the Vicar-General appeared by counsel and showed cause against the rule. Notice of the rule was not served on the Crown, but the Attorney-General appeared on behalf of the Crown and showed cause against the rule. The rule was discharged, costs being allowed to the Archbishop and Vicar-General.

**HELD**—that though the Crown was entitled to be heard on the rule, as its rights were affected, no order could be made for payment of costs to or against the Crown.

*REX v. ARCHBISHOP OF CANTERBURY*, [1902] 2 [K. B. 503; 71 L. J. K. B. 894, 932; 66 J. P. 455; 50 W. R. 476; 86 L. T. 79, 450; 18 T. L. R. 300, 380—Div. Ct.

33. *Incumbent — Resignation — Pension—One-third of Annual Value of Benefice—Declaration of Bishop—Jurisdiction to Review—Incumbents' Resignation Acts*, 1871 (34 & 35 Vict. c. 44), ss. 5–11, and 1887 (50 & 51 Vict. c. 23), s. 5.]—The Court has no power to review a declaration by a bishop under the Incumbents' Resignation Act, 1871, fixing the amount of the pension payable to a retiring incumbent out of the revenues of the benefice, though the amount so fixed may be shown to exceed the *maximum* allowed by the Act, namely, one-third part of the annual value of the benefice.

*MANING v. HARDY*, (1904) 20 T. L. R. 776—[Darling, J.

34. *Licence to Curacy—Refusal of Bishop to "Examine"—Mandamus—Canon 48 of 1803.*]—The Court will not grant a mandamus ordering a bishop to examine an applicant with a view to his admission to a particular curacy, when the bishop declines to do so on the ground that, after careful inquiry, he considers it inexpedient that the applicant should officiate in the diocese at all.

*REX v. BISHOP OF LIVERPOOL*, (1904) 20 T. L. R. [485—Div. Ct.

35. *Nomination to Chaplaincy—Inquiry by Bishop into Conduct of Nominee—Appeal to Privy Council—Jurisdiction.*]—A bishop withdrew the nomination of W. to a civil chaplaincy in his Colonial Diocese after inquiry into W.'s character and behaviour.

**HELD**—that there was no jurisdiction to entertain an appeal from the finding and report of the bishop.

*WARD v. THE BISHOP OF MAURITIUS*, (1906) 23 [T. L. R. 52; 95 L. T. 854—P. C.

36. *Priest—Ordination of—Exhortation of Bishop to show "Impediment" to Ordination—Protest as to Practices of Candidate Against Ritual of Church of England—"Disturbing" a Clergyman Celebrating a Divine Service—Ecclesiastical Courts Jurisdiction Act*, 1860 (23 & 24 Vict. c. 32), s. 2.]—At an ordination service held by the Bishop of London in St. Paul's Cathedral, London, on the bishop reading the exhortation in the Prayer Book—"But yet if there be any of you who knoweth any impediment or notable crime in any of them, for the which he ought not to be received into this holy ministry, let him come forth in the name of God and show what the crime or impediment is," the appellant read from a written paper a protest against the ordination of several persons, one of whom was then a candidate for ordination, alleging that the candidate had been a party to or taken part in services in a church of the Church of England in which breaches of prescribed ritual and adoration of the elements had taken place.

The appellant was convicted by a Court of summary jurisdiction for "disturbing" a clergyman celebrating Divine service contrary to sect. 2 of 23 & 24 Vict. c. 32, and quarter sessions affirmed the conviction, but stated a case for the opinion of the High Court as to whether the practices alleged in the appellant's protest constituted an "impediment" to ordination within the meaning of the rubric, in which case they were of opinion that the appellant had not contravened the section.

**HELD**—that such practices on the part of a candidate did not constitute an "impediment" to ordination within the meaning of the rubric.

The Court was also of opinion that such practices did not constitute a "notable" or "great crime" within the meaning of the rubric.

*KENSIT v. DEAN AND CHAPTER OF ST. PAUL'S*, [1905] 2 K. B. 249; 74 L. J. K. B. 454; 69 J. P. 250; 53 W. R. 622; 92 L. T. 601; 21 T. L. R. 426; 20 Cox C. C. 829—Div. Ct.

37. *Vicarage House—Purchase of—Mortgage of Revenues of Benefice—Money Borrowed before Mortgage Executed—Lien on House—Clergy Residences Repair Act*, 1776 (17 Geo. 3, c. 53)—*Parsonages Act*, 1838 (1 & 2 Vict. c. 23).]—A mortgage of the revenues of a benefice for the purpose of buying a vicarage house for the incumbent, in order to be valid under the Clergy Residences Act, 1776, and the Parsonages Act, 1838, must be made before the money is advanced, and is not valid if made subsequently. The appointment of a nominee who, and not the incumbent, is to have the application of the money, is also essential under the Act.

The lender of money, who has not complied with the above-mentioned requirements, has an invalid mortgage; nor, if another vicarage house is subsequently

*Clergy—Continued.*

bought in place of the one professedly mortgaged to him, has he any lien on such new house.

LIDBETTER *v* HATCH, [1907] 1 Ch. 404; 76 L. J. [Ch. 202; 96 L. T. 880; 23 T. L. R. 260—Warrington, J.]

## V. DILAPIDATIONS

38. *Failure on Part of the Incumbent—“Shall Refuse or Neglect”*—*Ecclesiastical Dilapidations Act, 1871* (34 & 35 Vict. c. 43), ss. 22, 23]—Where a bishop or patron requires dilapidations to be made good by an incumbent, and the latter does not within the prescribed period raise objection to the surveyor's report, the mere fact that he has tried unsuccessfully to get a loan and is himself not in a financial position to pay the money, gives the bishop or patron, under sect. 23 of the Act of 1871, power to issue sequestration, the “failure” to repair being equivalent to a “refusal” or “neglect” to do the repairs within the meaning of that section.

RE LOUGHEMAN, (1907) 52 Sol. Jo. 47—Div Ct.

39. *Report of Surveyor—Objections to—Order for Payment*—*Ecclesiastical Dilapidations Act, 1871* (34 & 35 Vict. c. 43), ss. 32, 35, 69.]—The executor of a deceased incumbent of a benefice, upon being sent a report of the surveyor appointed by the bishop as to the dilapidations in the buildings of the benefice, wrote to the bishop that he had received a communication purporting to be a copy of a report from the diocesan surveyor relative to dilapidations, and that he objected that the communication did not comply with the requirements of sects. 29 and 31 of the *Ecclesiastical Dilapidations Act, 1871*, on the ground, *inter alia*, that the communication ordered works to be done for which the executors were not liable, and the letter went on to say “I must object to pay any additional costs by reason of an alleged report having been sent to me, and though it will probably be to the advantage of all parties that this matter shall be settled by your Lordship, I write this letter without prejudice and without in any way waiving any right I may have of applying to have the surveyor's present report amended or quashed elsewhere by injunctions or otherwise.” The registrar of the diocese wrote to the executor that if he wished to object to the report he must proceed under sect. 32 of the Act. The executor made no further objection, and the bishop, treating the case as uncontested, made an order under sects. 34 and 35 for payment of the sum found due.

HELD—that the letter was an objection to the report of the surveyor within the meaning of sect. 32 of the Act, which the bishop must take into consideration.

Decision of Lawrence, J (22 T. L. R. 816), reversed.

DE BEAUVAIS *v* GREEN, (1907) 24 T. L. R. 43—[C. A.]

## VI. ECCLESIASTICAL COURTS.

40. *Consistory Court—Letters Patent appointing Chancellor—Reservation—Chancellor consulting Bishop—Jurisdiction—Procedure.*—In the appointment, by letters patent, by the bishop of a chancellor of a diocese, power was given the chancellor to determine all ecclesiastical suits, “nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment.” The respondent, in an ecclesiastical suit in the Consistory Court, in his answer craved the bishop's judgment. The chancellor, without consulting the bishop, gave judgment granting the prayer of the suit. Upon an application for a prohibition on the ground that the chancellor had no jurisdiction to try the suit after the respondent had craved the bishop's judgment.

HELD—that, the limiting words went to jurisdiction, and that under the patent the grantee did not acquire jurisdiction to determine the case when either party craves the bishop's judgment, unless the bishop has been consulted and has consented; that the word “nevertheless” at the beginning of the clause, coming as it does after a general delegation of authority, points to an exclusion from the jurisdiction of a certain class of cases, unless the bishop, after consultation, consented to his grantee entertaining them, and without such consent there is no jurisdiction at all; that the limitation to the grant in the patent was itself not void; that the want of jurisdiction was sufficiently apparent on the proceedings; and that the prohibition should go *quousque* against the chancellor until consultation with the bishop and consent by him to the judgment, and as against the applicant for a faculty until there had been such consultation and consent, or until the bishop agreed to hear the cause himself.

Judgment of Divisional Court ([1901] 2 K. B. 141; 70 L. J. K. B. 565; 84 L. T. 473; 17 T. L. R. 367) reversed.

REX *v* TRISTRAM, [1902] 1 K. B. 816; 71 [L. J. K. B. 418; 50 W. R. 477; 86 L. T. 515; 18 T. L. R. 406—C. A.]

41. *Jurisdiction—Lay Rector Neglecting to Repair Chancel—Criminal Suit.*—A criminal suit cannot be entertained by the Ecclesiastical Courts against a lay rector, charging him with neglecting to repair the chancel of the church of which he is rector, unless, when the suit was instituted, the chancel was out of repair.

NEVILLE *v* KIRBY, [1898] P. 160—Consist. Ct. [of Lichfield.]

42. *Practice—Costs—Court Fees to be Paid by Solicitors into Court—Order for Reimbursement of Successful Party.*—In the Ecclesiastical Courts the solicitors (as in former days the proctors) are personally liable for the Court fees, &c., and must pay

**Ecclesiastical Courts—Continued.**

them into Court. The solicitor for the successful party can then ask for an order on the respondent to recoup him.

PEARSON *v.* STEAD; *STEAD v. PEARSON*, [1903] P. 166—*Dr. Tristram* (Consistory Court).

43. *Practice — Faculty — Application to Revoke—No Jurisdiction.*—A decree granting a faculty in a suit after citation, whether made in chambers, or in open Court, binds all persons who appeared in the suit, or might have done so; such a person cannot afterwards initiate fresh proceedings in order to obtain a re-hearing and a revocation of the faculty. This is so, even though it may be clear that the faculty was granted in error.

LONDON COUNTY COUNCIL *v.* DUNDAS AND [OTHERS], (1903) 19 T. L. R. 670; [1904] P. 1—Dean of Arches.

44. *Jurisdiction of County Court—Sequestration Opening Sequestrator's Account.*—A County Court has no jurisdiction to hear an action, the object of which is to re-open the certificate which has been given by the Bishop's Chancellor in his Court, and to have the sequestrator's account taken over again notwithstanding that certificate.

BURROW *v.* TILSON, (1898) 14 T. L. R. 215—[C. A.]

**VII. ENDOWMENTS.**

45. *Annuities—Receipt of Redemption Money by Rector—Irregular Purchase by Rector of Land—Sale of Land by Successor—Misappropriation by Rector—Trust—Notice—Eleemosynary Corporations*—13 Eliz. c. 10, s. 3.]—In pursuance of the private Act, 31 Geo. 2, c. 2, South Sea Annuities were vested in D., the rector of a parish, as a corporation sole. In 1853 these annuities were redeemed, and the redemption money paid to the rector. In 1881 I., the then rector of the parish, irregularly invested part of the money in the purchase of land. On I.'s retirement in 1892 he passed on to H., his successor, the unsold property. H. sold this by public auction to the defendant, who paid the purchase-money to H. H. subsequently stole the money.

Held—that the statute of 31 Geo. 2 vested the South Sea stock in the rector; that I. did not purport or intend to create a trust of the land for the benefit of himself and his successors as a corporation sole; that the conveyance by H. to the defendant was not void under the statute 13 Eliz. c. 10; that the purchase-money got into the proper hands, and purchasers from H. could not be affected with the consequences of any subsequent misappropriation by H., assuming the defendant to be a purchaser for value without notice.

POWER *v.* BANKS, [1901] 2 Ch. 487; 70 L. J. [Ch. 700, 49 W. R. 679, 85 L. T. 376; 17 T. L. R. 621; 66 J. P. 21—Cozens-Hardy, J.]

**VIII. FACULTIES.**

And see under **SECT. II. CHURCH OF ENGLAND**—(b) ORNAMENTS, COL. 1469.

(b) *Ornaments, etc.*

46. *Footpath Crossing Churchyard for the Use of the Parishioners, with Right of Way for Public—Proviso for Closing Same One Day in Each Year.*—In a faculty granted for a proposed footway for the parishioners with an easement or right of way over it for the public, so long as the same should be required for public convenience, a proviso was added "that the path should be closed once a year" to show that it was still an integral portion of the churchyard.

THE VICAR AND CHURCHWARDENS OF ST. JOHN [THE BAPTIST, CARDIFF, *v.* THE PARISHIONERS OF THE SAME], [1898] P. 155—Consistory Ct. of Llandaff.

47. *Pews—Re-allotment of Pews Previously Allotted to Children—Creation of Pew Rents—Subscription to Church Expenses—Powers of Churchwardens—The Church Buildings Acts, 1818* (58 Geo. 3, c. 45), ss. 75, 77, 84, 85, and of 1822 (3 Geo. 4, c. 72), ss. 36, 37.]—In 1885 the Ecclesiastical Commissioners allotted seats in a new parish church in the following manner:—(a) Two pews for the vicar and his family; (b) 315 sittings to be let at rents to be paid to the vicar as part of his income; (c) 222 sittings as free seats; and (d) 72 sittings as seats for children. The large allotment of free seats and of sittings for children were made on the assumption that the population of the new parish would be mainly composed of the working classes, whereas, as a matter of fact, it was composed almost wholly of persons who could well afford and were anxious to rent sittings. On an application by the vicar and churchwardens in 1898 to the Ordinary to authorise by faculty pews for adults in substitution for the 72 sittings which had been allotted as children's seats, and the letting of such pews at pew rents, to be collocated to improvements and expenses of the church, it was held that the Ordinary had no jurisdiction to allow the appropriation to other purposes of seats that had been allotted as free seats by the Commissioners, nor could he authorise the letting of any seats to pew-renters; but that he might by a faculty decree a substitution of pews for adults in which parishioners might have seats in place of the 72 sittings allotted for children, this allotment having been made without proper statutory authority by the Commissioners.

In the case of a church built under the Church Building Acts, it would seem that there is no objection to the churchwardens, when allotting seats to the parishioners, which are not appropriated to pew-renters or allotted as free by the Commissioners, giving a preference to those parishioners

**Faculties—Continued.**

who are prepared to subscribe towards a fund for the improvements and repairs of the church.

ST. SAVIOUR, WESTGATE-ON-SEA (VICAR OF), v. [PARISHIONERS OF SAME, [1898], p. 217—Consistory Ct. of London.

**IX. FIRST FRUITS AND TENTHS.**

48. *Apportionment—Crown Debt—Predecessor and Successor in Bishopric—Apportionment Act, 1870* (33 & 34 Vict. c. 35), s. 2.]—The Apportionment Act, 1870, apportioned liabilities as well as rights.

First fruits and tenths of a bishopric are still Crown debts, and payment may be enforced by writ of extent, although the amounts are collected by the Treasurer and administered by the Governors of Queen Anne's Bounty, and therefore they are not apportionable as against the Crown.

The payments are apportionable as between an incoming Bishop and his predecessor in the See.

BISHOP OF ROCHESTER v LE FANU, [1906] 2 Ch. [513; 75 L. J. Ch. 743; 95 L. T. 602; 22 T. L. R. 800—Eady, J.

**X. GLEBE.**

49. *Contract by Vicar to Sell Glebe Land to Trustee of Settled Estates—Ecclesiastical Commissioners—Title Accepted—Possession Taken—Interest on Unpaid Purchase-money Paid—Specific Performance—Ecclesiastical Leasing Acts, 1842* (5 & 6 Vict. c. 108), and 1858 (21 & 22 Vict. c. 57).]—By an agreement made in July, 1873, D., a vicar, agreed to sell to trustees of settled estates, with the consent of the tenant for life and also of the Ecclesiastical Commissioners and the patron of the living, certain glebe lands for the sum of £24,963. The Ecclesiastical Commissioners were parties to and executed the contract. The title was accepted, and the tenant for life went into possession. Interest on the unpaid purchase-money (which was more than an investment would have produced) was paid regularly to the vicar and his successors in office until 1896, when the Ecclesiastical Commissioners brought an action claiming specific performance of the contract, or damages, or, in the alternative, the enforcement of a vendor's lien.

HELD—that the Ecclesiastical Commissioners, by virtue of the Ecclesiastical Leasing Acts, 1842, 1858, were bound to see that the purchase-money was paid and secured, and that, therefore, they had a good cause of action.

Decision of Byrne, J. ([1899] 1 Ch. 99; 68 L. J. Ch. 30; 47 W. R. 136; 79 L. T. 604) affirmed.

ECCLESIASTICAL COMMISSIONERS v. PINNEY, [1900] [2 Ch. 736; 69 L. J. Ch. 844; 49 W. R. 82; 83 L. T. 384; 16 T. L. R. 556—C. A.

50. *Grant to Dignitary or Prebendary for Life by the Bishop—Appointment of Trustees—Sale—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-s. 1.]—Four messuages situate in the market-place in Wells had from time immemorial been granted or given by the bishop for the time being to some one of the dignitaries or prebendaries of the cathedral church of Wells for life. They had never been assigned to any particular dignity or prebend, nor had the enjoyment of them carried with it any obligation to perform any ecclesiastical or spiritual duty. They had never been held by any corporation sole as such corporation.

A summons was taken out by the Archdeacon of Wells asking that trustees might be appointed for the purposes of the Settled Land Act, 1882, of a settlement of the four messuages, the object being that the houses might be sold and the proceeds invested in the names of the trustees, and the income paid to the person who would have been entitled from time to time to the rents.

HELD—that though it might be a wise step to take, the case was not one to which the Settled Land Act applied, as the property was ecclesiastical land.

*Ex parte Vicar of Castle Bytham* ([1895] 1 Ch. 348; 64 L. J. Ch. 116, 43 W. R. 156; 71 L. T. 606; 11 R. 449—P. C.) approved.

IN RE BISHOP OF BATH AND WELLS, [1899] 2 Ch. [138; 68 L. J. Ch. 524; 81 L. T. 69; 15 T. L. R. 421—North, J.

51. *Sale of Glebe Land—Consent of Patron—Infant Tenant in Tail of Advowson—Trustees of Settlement of Advowson with Power to Present during Minority—Guardian.*]—A private Act was passed in 1843, for the purpose of dividing the parish of Walton-on-the-Hill, and the glebe lands were vested in trustees with power to sell with the consent of (*inter alia*) the patron or patrons seized by the advowson "for an estate of inheritance or any less estate" and the guardians of an infant.

In 1886 a settlement conveyed to trustees "the advowson and perpetual right of patronage and presentation of and to the rectory or parish church of Walton-on-the-Hill, in the county of Lancaster, to hold the same under the said trustees and their heirs to the use of" the plaintiff in tail male with remainders over, and during his minority. It was provided that the trustees might present. The question was whether the consent of the patron to a sale of glebe land of the rectory must be given by the trustees, or by the infant's guardian.

HELD—that the trustees of the settlement were not entitled to the advowson "for an estate of inheritance or for any less estate;" but that the infant was tenant in tail in possession of the advowson; that the advowson did not consist solely of the right of presentation, but conferred other rights, such as the right to an injunction to restrain

**Glebe—Continued.**

waste; and that, therefore, the consent should be given by the guardian, and not the trustees.

LEIGH v. LEIGH, [1902] 1 Ch. 400, 71 L. J. Ch. [195; 50 W. R. 380, 86 L. T. 219—Eady, J.

**XI. TITHE.**

52. *Charge upon Lands Allotted in Lieu of Tithes—Sale by Ecclesiastical Commissioners of Lands*—11 Geo 4, c. 4, s. 66 (*Private Act*).]—An annual payment of one quarter of wheat and two quarters of barley had long been made for the benefit of the poor of a parish. An order made by the Charity Commissioners showed that the origin of it was nearly three centuries ago.

HELD—that the payment constituted a charge or incumbrance to which the tithes, along with the other emoluments of the benefice, were subject, and consequently a charge or incumbrance to which the lands allotted in lieu of the tithes became subject, by virtue of sect. 66 of the Inclosure Act, 1830; and that on the sale by the Ecclesiastical Commissioners, by the terms of the conveyance, the land remained subject to the payment, as being a payment or outgoing charged upon and payable out of the hereditaments.

IN RE ALMS CORN CHARITY; CHARITY COMMISSIONERS v. BODE, [1901] 2 Ch. 750; 17 T.L.R. 102; 71 L. J. Ch. 76; 85 L. T. 533—Stirling, J.

53 *Collectors—Nomination of Collectors—Mandamus—Local Act.*]—By a local Act for the commutation of tithes for a fixed rent-charge, it was provided that four, three, or two substantial householders (not being of the people called Quakers) to be nominated yearly by the inhabitants of the township should be tithe collectors for the township, to levy the several sums chargeable by the Act upon the tenements within the township as and for the proportion of the township, with all reasonable expenses attending the same. The inhabitants resolved that no persons should be appointed who did not pledge themselves to comply with certain conditions, and particularly not to charge more than 15 per cent. for expenses of collection. No one could be found to accept these conditions.

HELD—that the conduct of the inhabitants amounted to a refusal to fulfil the statutory duty of nominating collectors, and that since no other remedy was provided by the Act, a mandamus should issue to compel them to perform it.

REG. v. LANCASTER INHABITANTS, (1900) 64 J. P. [280—Div. Ct.

54. *Great Tithe — Custom for Owner to Provide Common Bull and Common Boar—Inclosure Act (Haddenham Parish) 1830* (11 Geo. 4, c. 4), ss. 37 and 38.]—A custom that

the parson as owner of the great tithes of a parish, and as a charge thereon, shall provide and keep within the said parish a common bull and a common boar for the common use of the kine and sows of the parishioners at any time, is a good custom in law, but where under an Inclosure Act lands have been allotted, in satisfaction and discharge of the great tithes, the burden of keeping up the custom is not shifted from the owners of the great tithes to the owners of the lands substituted for them, in the absence of express words in the Act to that effect.

LANCIBURY v. BODE, [1898] 2 Ch. 120, 62 J. P. [248, 67 L. J. Ch. 196; 78 L. T. 14; T. L. R. 178—Kekewich, J.

FOR SEQUESTRATION. *see* BANKRUPTCY, 31.

**EDUCATION.**

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**I. IN GENERAL.**

*And see* CHARITIES.

1. *Division of Area — Adjustment—Award—Necessity for—Education Act, 1902* (2 Edw. 7, c. 42), *Sched. II. (1).*]—An old school board district was divided into two parts. One, containing three schools, was within the borough of W., and one, also containing three schools, was without the borough of W. The county council contended that upon the appointed day the three school-houses which were not within the borough became absolutely vested in the county council, subject only to so much of the liabilities of the school board for the united district as represented the balance unpaid of moneys borrowed for the purpose of those three schools, and that no award of an arbitrator on this point and no adjustment was necessary.

HELD—that an award and adjustment by an arbitrator of the liabilities between the two authorities was necessary.

RE WALLSEND CORPORATION AND NORTHUMBERLAND COUNTY COUNCIL, [1906] 2 Ch. 506; 75 L. J. Ch. 813; 70 J. P. 434; 95 L. T. 259; 22 T. L. R. 773; 4 L. G. R. 1141—Eady, J.

2 *Division of Area—Adjustment of Property and Liabilities—Compromise of Dispute—Education Act, 1902* (2 Edw. 7, c. 42), s. 1, *Sched. II., cl. 22.*]—A school board dis-

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district ceased to exist, by reason of the provisions of sect. 1 of the Education Act, 1902, part of the district becoming, for educational purposes, part of an urban district, and the rest coming under the jurisdiction of the county council. A dispute having arisen between the county council and the urban district council as to the proportion which each were to contribute towards the cost of education in the added parts, an agreement was arrived at by which separate accounts of the cost of education in the added parts were to be kept, excluding establishment and capital expenditure, the amounts shown by such accounts were to be added together, and the net charge for the same was to be annually divided between the county council and the urban council in the proportion that the rateable value of the added parts bore to each other. In an action to have the agreement declared *ultra vires*:

**HELD**—that the agreement was a compromise of the dispute, and was therefore binding.

**ATTORNEY-GENERAL v. ESSEX COUNTY COUNCIL**,  
[1907] 71 J. P. 557; 24 T. L. R. 22—  
Kekewich, J.

**3. Division of Area—Adjustment—School Board for United District—Severance of District—Transfer to Different Local Educational Authorities—Different Appointed Days for Transfers—Adjustment of Property and Liabilities of Part of School Board—Appointment of Arbitrator—Education Act, 1902 (2 Edw. 7, c. 42), s. 27, Sch. II.]**—Under the provisions of the Education Act, 1902, a united district school board was to be transferred to three different local educational authorities. The appointed day for transfer to the first authority was June 1st, 1903, but to the other two authorities April 1st, 1904. Matters requiring adjustment having arisen between the board and the first authority, the latter, in default of agreement, gave notice on October 24th, 1903, to appoint an arbitrator. The board objected that no adjustment should be made until the day appointed for the other two authorities had arrived.

**HELD**—that upon the construction of the Education Act, 1902, s. 27 (2), and Schedule II., clauses 1, 22, an arbitrator must be appointed forthwith.

**HEBBURN URBAN DISTRICT COUNCIL v. HEDWORTH**,  
[MONKTON AND JARROW UNITED DISTRICT SCHOOL BOARD, (1904) 68 J. P. 232; 90 L. T. 145; 20 T. L. R. 244; 2 L. G. R. 821—  
Kekewich, J.

**4. Education Committee—Scheme—Publication by Board of Education—Disapproval of Scheme—Education Act, 1902 (2 Edw. 7, c. 42), s. 17, sub-s. 6.]**—Where a scheme for the establishment of an education committee has been submitted by the local education

authority to the Board of Education, and is not approved by them, there is no duty imposed upon the Board by sect. 17, sub-s. 6, of the Education Act, 1902, to publish the scheme.

**EX PARTE THE CORPORATION OF CARDIFF**, (1904)  
[20 T. L. R. 317—Div. Ct.

**5. Education Committee—Scheme—Retirement of Members in Rotation—Resolution by Local Education Authority—Power to vary Resolution—Necessity for New Scheme—Education Act, 1902 (2 Edw. 7, c. 42), ss. 17, 21.]**—In 1903 a district council, as the local education authority, prepared a scheme for the establishment of an education committee, who were to hold office for three years subject to a proviso that one-third of the members should retire on the 1st May in each year, and “the council shall determine the order in which they shall retire.”

After the Board of Education had sanctioned the scheme the council appointed M. and others as members of the committee and resolved that M. should retire on the 1st May, 1905.

Subsequently the council purported to vary their resolution by selecting M. as a member to retire in 1904.

**HELD**—that such variation was invalid; the council, having once determined the order of retirement, could not vary it except by the adoption and sanction of a new scheme.

**MILWARD v. BARRY U. D. C.**, [1904] 2 Ch. 481;  
[73 L. J. Ch. 804; 53 W. R. 21; 91 L. T. 290; 20 T. L. R. 705; 68 J. P. 569—

Buckley, J.

**6. Improvement of Schools—Expenses Incurred by County Council—Charge of Part on Parish—“Capital Expenditure”—Education Act, 1902 (2 Edw. 7, c. 42), s. 18 (1) (c).]**—The words “capital expenditure” in sect. 18 (1) (c) of the Education Act, 1902, refer, not to the expenditure of money taken from capital or raised by loan, but to the expenditure of money which, on being laid out, becomes capital, irrespective of the source from which it comes.

**REX v. WRAITH, EX PARTE KENT COUNTY COUNCIL**, [1907] 2 K. B. 756; 76 L. J. K. B. 881; 71 J. P. 447; 97 L. T. 577; 5 L. G. R. 1091—Div. Ct.

**7. Management—Vested in Subscribers—Bonâ-fide Subscribers.]**—In a case in which the management of a school and the right to appoint the teachers were, under a deed, vested in the subscribers to the school to the amount of twenty shillings and upwards;

**HELD**—that certain persons, on behalf of whom subscriptions were sent to the treasurer of the school on the day of the election, and whose subscriptions were returned by him to the person sending the same, were not *bonâ-fide* subscribers with a right to vote at such election.

*In General—Continued.*

It appears to be a right inherent in such a body of subscribers to refuse to admit a new subscriber for good cause.

*NOTT v. WILLIAMS*, (1900) 48 W. R. 316—  
[Byrne, J.]

8. *New Education Authority—Transfer of Property—Annuities standing in Books of Bank of England—National Debt Acts*, 1870 (33 & 34 Vict. c. 71), ss. 18, 22, and 1892 (55 & 56 Vict. c. 39), s. 4, *Education Act*, 1902 (2 Edw. 7, c. 42), ss. 5, 25; *Schedule II., clause 1.*—The effect of sect. 5 of the *Education Act*, 1902, is to abolish school boards—for all purposes—as from the appointed day, and by sect. 25 and *Schedule II., clause 1*, the property as well as the powers, rights, and liabilities of the school boards was automatically transferred to—that is, vested in, the new local education authorities without the necessity for the execution of any further instrument of transfer.

*Decision of Farwell, J.* (20 T. L. R. 758), reversed.

*THE CORPORATION OF OLDHAM v. THE BANK OF [ENGLAND]*, [1904] 2 Ch. 716, 73 L. J. Ch. 785, 20 T. L. R. 787, 68 J. P. 584, 53 W. R. 243; 91 L. T. 582—C. A.

9. *Pupil Teachers' Centres in Separate Buildings—Higher Education—Providing Funds out of Rates—Ultra vires—Elementary Education Act*, 1870 (33 & 34 Vict. c. 75).—The judgment in *Reg. v. Cockerton* (see No. 10, *infra*), ([1901] 1 K. B. 726; 70 L. J. K. B. 441, 65 J. P. 435; 49 W. R. 433, 84 L. T. 488; 17 T. L. R. 402—C. A.) in substance decides that the only schools which are to be paid for out of the rates, whether in respect of buildings, or instruction, or anything else, are elementary schools which are devoted to the elementary education of children. The defendants proposed to erect pupil teachers' centres, where pupil teachers from fifteen to twenty-four years of age would receive an education which was not limited to elementary education.

*HELD*—that whatever instruction might be given in those schools to pupil teachers beyond the elementary instruction was a mere accessory of the public elementary schools, and that the defendants should be restrained by perpetual injunction from making any payment for the building of any school other than a public elementary school out of the school board fund.

*DYER v. LONDON SCHOOL BOARD*, [1902] 2 Ch. 768; 51 W. R. 34; 87 L. T. 225; 18 T. L. R. 804; 72 L. J. Ch. 10—C. A.

10. *Science and Art Schools or Classes in Day Schools or in Evening Continuation Schools—Providing Funds out of the Rates—Elementary Education Acts*, 1870 to 1891 (33 & 34 Vict. c. 75), 36 & 37 Vict. c. 86; 39 & 40 Vict. c. 79; 54 & 55 Vict. c. 56)—*Technical Instruction Acts*, 1889 and 1891 (52 &

53 Vict. c. 76; 54 & 55 Vict. c. 4)—*Education Code* (1890) Act, 1890 (53 & 54 Vict. c. 22).—It is not within the power of a school board to provide, out of the rates levied under the *Elementary Education Acts*, science and art schools or classes, either in day schools or in evening continuation schools. But, in both, such educational work may be carried on by the school board, provided the whole of the funds required for it are furnished from sources other than contributions from the rates.

*Semble*, it is not within the power of a school board to educate adults in public elementary schools at the expense of the rates.

*Decision of Div. Ct.* ([1901] 1 Q. B. 322; 70 L. J. Q. B. 280, 65 J. P. 115; 49 W. R. 252, 83 L. T. 595, 17 T. L. R. 105) affirmed.

*REG. v. COCKERTON*, [1901] 1 Q. B. 726; 70 [L. J. K. B. 441; 65 J. P. 435; 49 W. R. 433; 84 L. T. 488; 17 T. L. R. 402—C. A.]

## II. ENDOWED SCHOOLS ACTS.

*And see CHARITIES.*

11. *Scheme—Effect on Earlier Statutes—Cathedral School—Head Master—Right to Stall in Cathedral—Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56), ss. 9, 19, 46.—The head master of a school, maintained as part of the Cathedral Foundation at Chester, was under the statutes entitled to a stall in the cathedral.

In 1873 a scheme under the *Endowed Schools Act*, 1869, reconstituted and amalgamated this school and two other charities. The scheme did not, as it might have done, preserve any of the existing statutes.

*HELD*—that under the circumstances the school had been entirely severed from the cathedral, and was no longer governed by the statutes, but by the scheme; that the head master had no right to a stall, and that the bishop, as visitor of the dean and chapter, had no right to hear his petition in the matter.

*Decision of C. A.* (17 T. L. R. 533) reversed.

*DEAN AND CHAPTER OF CHESTER v. BISHOP OF [CHESTER AND ANOTHER]*, (1903) 87 L. T. 618; 12 T. L. R. 131—H. L. (E.).

12. *Schoolmaster—Scheme—Dismissal of Assistant Master by Head Master without Notice—Right of Action against Governors—Endowed Schools Acts*, 1868 (31 & 32 Vict. c. 32) and 1869 (32 & 33 Vict. c. 56), ss. 9, 10, 22.—The plaintiff was an assistant master in a school which came within the provisions of the *Endowed Schools Acts*, 1868 and 1869, and was regulated by a scheme made by the Charity Commissioners under the latter Act. Rule 30 of the scheme empowered the governors to dismiss at pleasure the head master without assigning cause after giving six calendar months' written notice. Rule 37 defined the powers

**Endowed Schools Acts—Continued.**

of the governors as to prescribing subjects of instruction, fixing the number of assistant masters to be employed, and fixing each year the amount to be paid out of the income of the foundation for the purpose of maintaining assistant masters and school plant. Rule 40 provided that "The head master shall have the sole power of appointing and may at pleasure dismiss all assistant masters in the school, and shall determine, subject to the approval of the governors, in what proportions the sum fixed by the governors for the maintenance of assistant masters and school plant and apparatus shall be divided among the various persons and objects for which it is fixed in the aggregate. The governors shall pay the same accordingly, either through the hands of the head master or directly, as they think best." The plaintiff having been dismissed by the head master without notice, sued the defendants as the governors of the school for wrongful dismissal.

**HELD**—(1) that, notwithstanding proof of a custom to give a term's notice, the plaintiff was under the scheme entitled to no notice; and (2) that the governors were not responsible for his dismissal by the head master, whether such dismissal was wrongful or not.

Decision of Lawrence, J. (23 T. L. R. 709), affirmed.

WRIGHT *v.* MARQUIS OF ZETLAND, [1908] 1 K. B. [63; 77 L. J. K. B. 152; 97 L. T. R. 867; 24 T. L. R. 48—C. A.]

**III. RELIGIOUS INSTRUCTION.**

13. *Non-provided Schools—Expenses of Denominational Religious Instruction—Duty of Local Education Authority to Pay—Education Act, 1902* (2 Edw. 7, c. 42), ss. 5, 7.]—The Education Act, 1902, imposes upon local education authorities the obligation of paying the expenses of denominational religious instruction in non-provided schools.

The obligation is limited to the amount which is reasonably necessary for that purpose, and the amount of the expenditure is under the control of the local education authority with a reference in case of difference to the Board of Education.

Decision of the C. A. ([1906] 2 K. B. 677; 75 L. J. K. B. 933; 70 J. P. 451; 95 L. T. 248; 22 T. L. R. 783; 4 L. G. R. 992) reversed.

ATTORNEY-GENERAL *v.* WEST RIDING OF YORKS [COUNTY COUNCIL, [1907] A. C. 29; 75 L. J. K. B. 97; 71 J. P. 41; 95 L. T. 845; 23 T. L. R. 171; 5 L. G. R. 89—H. L. (E)].

14. *Non-provided School—Hours for Religious Instruction—Directions as to Secular Instruction—Managers not Obeying—Jurisdiction of Court—Elementary Education Act, 1870* (33 & 34 Vict. c. 75), s. 7—*Education Act, 1902* (2 Edw. 7, c. 42), s. 7, sub-s. 1 (a), 3.]—The plaintiffs were the managers of a non-provided elementary school, in which

the ordinary school hours were from 10 a.m., except on saints' days and holy days, when the hours were from 9 a.m., so as to enable the children to attend church at 11 a.m., and the time tables showing this were approved by the inspectors. In September, 1904, the defendants, who were the local education authority under the Education Act, 1902, issued directions as to the instruction to be given in public elementary schools, one of which was as follows:—"Time of religious instruction.—Secular instruction in all schools shall commence not later than 9.43 a.m., and occupy the school hours for the rest of the day." The plaintiffs still continued to begin school hours at 9 a.m. on saints' days and holy days, and to take the children (except such as claimed exemption) to church on those days at 11 a.m. The defendants in consequence gave them notice that financial assistance would be withdrawn, and their inspector went down to the school and made an entry in the school books that the school was closed. The defendants offered other appointments to all the teachers, and directed the children to attend other schools. The plaintiffs appealed to the Board of Education, which confirmed the action of the defendants. The plaintiffs then brought an action for a declaration that they were entitled to have the school maintained by the defendants as a public elementary school, and for damages for trespass and illegal acts in closing the school.

**HELD**—that the above direction was a direction by the defendants as to secular instruction in the school within the meaning of sect. 7, sub-sect. 1 (a), of the Education Act, 1902, and that the dispute must be determined by the Board of Education under sub-sect. 3, and the Court had no jurisdiction to entertain the question.

**HELD ALSO**—that the managers had not as such (there being no special agreement with the owner proved) a possession of the school premises entitling them to maintain an action for trespass.

**HELD ALSO**—on the facts that the defendants had not without justification induced teachers to break their contracts with the plaintiffs.

BLENCOWE *v.* NORTHAMPTONSHIRE COUNTY COUNCIL, [1907] 1 Ch. 504; 76 L. J. Ch. 276; 71 J. P. 258; 96 L. T. 385; 23 T. L. R. 319; 5 L. G. R. 551—Warrington, J.]

15. *Ward of Court—Welfare of the Infant—Religion of Father—Change of Religious Education—Discretion of Court.*]—In 1904 the orphan son and daughter of a Jewish father, then aged respectively ten and eight years, were directed by a Judge to be brought up in their father's religion, and were placed in a Jewish household. In 1907 the boy wrote to his guardian that he no longer wished to be educated as a Jew. The Judge, to whom this letter was sent, after interviews with the boy and further



**Religious Instruction—Continued.**

inquiries, came to the conclusion that the welfare of the boy called for a change in his religious education, and he accordingly made an order that both infants should be henceforth brought up in the Christian religion.

**Held**—that it would be morally injurious to the welfare of the boy not to give effect to his wishes, but that there was no evidence to justify any order changing the religious education of the girl.

In all orders relating to the religious education of a ward of Court the words "until further order" are deemed to be inserted.

IN RE W.; W. v. M., [1907] 2 Ch. 557—C. A.

#### IV. SCHOOL ATTENDANCE AND CHILD LABOUR.

See also under FACTORIES AND WORKSHOPS.

16. *Absence from School—Reasonable Excuse—Education (Scotland) Act, 1872* (35 & 36 Vict. c. 62), s. 70.]—What is a reasonable excuse on the part of a parent whose child fails to attend school is a question of fact.

*Semble*—If a working man, who has no wife or elder children, and has to attend to his own work, sees his child start properly prepared for school, and punishes him when informed that he has played truant, he has done all that can reasonably be expected of him.

GILLIES v. QUIGLEY, (1906) 8 F. (J. C. 1)—Ct. [of Justiciary.

17. *Absence from School—Reasonable Excuse—Refusal of Child at Voluntary School—Tender of Child—Breach of Bye-law.*—If a parent of a child ten years of age who attends a voluntary, public and elementary school is informed that, for reasons approved of by the Education Department, the child must cease to attend that particular school, and must attend another school in the district, but such parent continues to send the child to the same school, where the child is refused admission, the parent may be convicted of neglecting to cause his child to attend school.

JONES v. ROWLAND, (1899) 63 J. P. 454; 80 L. T. [630; 19 Cox C. C. 315—Div. Ct.

18. *Employment of Child—"Employment"—What is—Invalid Child allowed to Amuse Himself by Working in Father's Smithy—Elementary Education Act, 1876* (39 & 40 Vict. c. 79), ss. 6, 47.]—A father who on the advice of his doctor allows his son, a boy aged thirteen years and subject to fits, to endeavour to assist him in the way of his trade, by doing light work whenever the boy is so minded, and who makes no gain thereby, does not employ the boy within the meaning of sect. 47 of the Elementary Education Act, 1876, and therefore commits no offence within that section.

REX v. ALSTIN AND OTHERS, (1907) 71 J. P. 29; [96 L. T. 29; 5 L. G. R. 126—Div. Ct.

19. *"Employment" of Child by Parent "for Purposes of Gain"—Domestic Work—Elementary Education Act, 1876* (39 & 40 Vict. c. 79), ss. 5, 6, 47.]—A rather, who keeps his daughter of the age of thirteen years from school in order that she might do the house work at home and so enable his wife to go out and earn money, the daughter not having obtained a certificate under sect. 5 (2) of the Elementary Education Act, 1876, nor coming within the exemptions in the said sub-section or section 9 of the said Act, does not employ such daughter in any labour for the purposes of gain within the meaning of sect. 47 of the said Act, so as to render himself liable to the penalty imposed by sect. 6.

MATHER v. LAWRENCE, [1899] 1 Q. B. 1000; 68 [L. J. Q. B. 714, 63 J. P. 455, 47 W. R. 559, 80 L. T. 600; 15 T. L. R. 347, 19 Cox C. C. 300—Div. Ct.

20. *Neglecting to Cause Attendance of Child at School—Day Exclusively Set Apart for Religious Observance—Ascension Day—Elementary Education Act, 1870* (33 & 34 Vict. c. 75), s. 7 (1), and s. 74 (1), (2).]—The appellant in the first case was summoned for neglecting, without lawful excuse, to cause his child, aged eleven and a half years, to attend school for the whole time required by the bye-laws made by the county council of the West Riding of Yorkshire as the education authority under Part III. of the Education Act, 1902. Bye-law 4 (b) provided that nothing in the bye-laws should require any child to attend school on any day exclusively set apart for religious observance by the religious body to which its parent belongs. Sect. 7 (1) of the Education Act, 1870, contains a similar provision. On May 24th, 1906, being Ascension Day, the child was wholly absent from school in the morning, he attended church in the morning and attended school in the afternoon. The appellant, who belonged to the Church of England, stated in evidence that it was in accordance with his direction that the child attended church in the morning and went to school in the afternoon. The justices came to the conclusion that May 24th, 1906, was not a day exclusively set apart for religious observance by the religious body to which the appellant belonged in the sense contemplated by the bye-law and sect. 7 (1) of the Education Act, 1870, and they convicted the appellant.

In the second case the facts were similar, except that the child was wholly absent from school both in the morning and in the afternoon, and the appellant stated in evidence that he was a member of the Church of England, and that it was by his direction that the child did not attend school that day, but attended church in the morning and stayed at home the rest of the day. The justices were not satisfied that the ap-

**School Attendance and Child Labour—Continued**

pellant was a member of the Church of England, and they came to the same conclusion as in the previous case and convicted the appellant.

**HELD**—that Ascension Day was a day exclusively set apart for religious observance by the Church of England within the meaning of the bye-law and statute, that on the evidence the appellants in both cases were members of the Church of England, and that both convictions were, therefore, wrong and must be quashed.

*Quere*—whether a withdrawal of the child for the whole day would be justified.

**MARSHALL v. GRAHAM, BELL v. GRAHAM, [1907]**  
[2 K. B. 112; 76 L. J. K. B. 690; 71 J. P. 270; 97 L. T. 52; 23 T. L. R. 435; 5 L. G. R. 735—Div. Ct.]

**21. Total or Partial Exemption of Child—Bye-laws—Certificate of Attendance—Elementary Education Acts, 1870 (33 & 34 Vict. c. 75), s. 74; 1880 (43 & 44 Vict. c. 23), s. 4; 1899 (62 & 63 Vict. c. 13), s. 1; 1900 (63 & 64 Vict. c. 53), s. 6—Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), ss. 23, 24, 26—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 68, 71.]**—The respondent, G., was summoned for that he, being the parent of a child not less than five or more than fourteen years of age, unlawfully neglected to cause the child to attend school without reasonable cause for the whole time required by the bye-laws. The child was thirteen years and two months old on May 9th, 1905, when he was absent from school, not having attended since March 20th, 1905. Previous to that date the child had made 350 attendances in not more than two certified efficient schools in each year for five years, and had obtained a certificate to that effect from the principal teacher. He had not received a certificate that he had reached the sixth standard, being in the fourth standard only. Since March 20th, 1905, he had been employed full time, without a labour certificate, at a silk mill.

**HELD**—that as the bye-laws made by the education authority did not provide for a full time exemption on an attendance qualification, the child must satisfy the bye-law as to total exemption by obtaining a certificate that he had reached the sixth standard.

The respondent C. was summoned for allowing his child to be absent from school, she being employed as a half-timer at a silk mill.

**HELD**—that the child being upwards of twelve years of age, and having made the necessary previous due attendance at a certified efficient school, was entitled to a labour certificate to be employed half-time in a factory, provided she attended school in accordance with sect. 68 of the Factory and Workshop Act, 1901.

**STEVENSON v. GOLDSTRAW, STEVENSON v. CRAIG, [1906]** 2 K. B. 298; 75 L. J. K. B. 565; 70 J. P. 340; 95 L. T. 111; 4 L. G. R. 863—Div. Ct.]

**V. TEACHERS AND OFFICERS.****(a) Teachers.**

*And see under* **SECT. II. ENDOWED SCHOOLS ACTS.**

**22. Dismissal—Change of Authority—Notice Determining Contract given before “the appointed day”—Refusal of Local Education Authority to Consent to Dismissal—Education Act, 1902 (2 Edw. 7, c. 42), s. 7 (1) (c).]**—On May 6th, the managers of an elementary school which was to pass from their control to that of the new authority on July 1st, gave the head master of the school written notice that they would not require his services as master after August 9th. On July 15th the first meeting of the new “foundation managers” was held, at which the above notice was confirmed. The “local education authority,” however, refused to consent to the dismissal of the head master under sect. 7 (1) (c), of the Education Act, 1902, which provides, *inter alia*, that the consent of the local education authority shall be required to the dismissal of a teacher.

The head master commenced an action against the foundation managers, and moved to restrain them from preventing him from exercising his duties as master.

**HELD**—that the motion must be dismissed. The notice was good, and, as under that notice the plaintiff’s engagement would terminate on August 9th, the managers appointed under the Act after that notice had been given had not “dismissed” him, and the consent of the local education authority was not required under sect. 7 (1) (c) of the Act.

**JONES v. HUGHES, [1905]** 1 Ch. 180; 74 L. J. [Ch. 57; 69 J. P. 33; 53 W. R. 344; 92 L. T. 218; 21 T. L. R. 59; 3 L. G. R. 1—C A.]

**23. Dismissal—Local Education Authority—Power of Managers to Dismiss Teacher—Consent of Education Authority—Education Act, 1902 (2 Edw. 7, c. 42), ss. 7 (1) (a), (b), (c), (d), (e), (7), 17, Sched. I., A. (6).]**—A county council became the local education authority of their district under the Education Act, 1902, and, acting under the powers conferred by sect. 17 of the Act, appointed an education committee, and delegated their powers to them. The education committee, in exercise of the powers given by clause A. (6) of the First Schedule of the Act, appointed various sub-committees, including a school management sub-committee to deal with the appointment and dismissal of teachers. A section of such sub-committee was appointed to deal with (*inter alia*) matters relating to the dismissal of teachers.

The managers of a “non-provided” school within the district gave notice of dismissal to their head mistress, having first obtained the consent of the aforesaid section of the sub-committee; the consent of the sub-committee itself was not obtained until a few

**Teachers and Officers—Continued.**

days before action brought, and the consent of the education committee was not obtained until after action brought.

In an action by the head mistress against the managers for an injunction to restrain them from dismissing her until the consent of the local education authority had been obtained, and until an opportunity had been given to her to defend herself before the properly constituted authority,

**HELD**—(1) that under the Education Act, 1902, the consent of the education authority is not, as between the managers and a teacher, a condition precedent to the dismissal of the teacher by the managers of a "non-provided" school; and

(2) that the education committee and the sub-committee—but not the section of such last-mentioned committee—had all the powers of a local education authority in regard to the dismissal of teachers, and that the consent of the sub-committee given before action brought referred back to and ratified the action of the managers, if such ratification were necessary.

**YOUNG v. CUTHBERT AND OTHERS**, [1906] 1 Ch. 451; 75 L. J. Ch. 217; 70 J. P. 130; 54 W. R. 296; 94 L. T. 191; 22 T. L. R. 251; 4 L. G. R. 356—Buckley, J.

**24. Powers of—Punishment of Child—Corporal Punishment—Assistant Teacher—Public Elementary School.**—As between a parent and a teacher in a public elementary school, the head teacher's ordinary authority to administer corporal punishment extends to responsible assistant teachers in charge of classes.

The teacher of a class is entitled to use ordinary means of punishment, so long as the punishment inflicted is moderate, is not dictated by a bad motive, and is such as a parent may expect his child to receive.

**MANSELL v. GRIFFIN**, (1907) 98 L. T. 51; 24 [T. L. R. 67—Div. Ct.

**25. Salaries—Deductions for Superannuation Fund—Management of Fund by School Board—Elementary Education Act, 1870** (33 & 34 Vict. c. 75), s. 35.]—For the benefit of the teachers employed by a School Board, a superannuation fund was formed by means of annual deductions of a certain percentage from the salaries of all the teachers employed by the Board; and the fund thus formed remained in the hands of the Board, and was administered by them upon the advice and recommendation of a committee consisting of members of the Board and representatives of the teachers.

**HELD**—that, whether or not this scheme was *ultra vires* of the Board, a teacher could not after resignation of her appointment recover back by an action against the Board money deducted from her salary and paid into the superannuation fund.

Judgment of the Queen's Bench Division ([1898] 1 Q. B. 4; 66 L. J. Q. B. 578; 61 J. P. 758; 77 L. T. 397; 46 W. R. 155; 14 T. L. R. 4) affirmed.

**PHILLIPS v. LONDON SCHOOL BOARD; COCKERTON [v. THE SAME]**, [1898] 2 Q. B. 447; 67 L. J. Q. B. 874; 79 L. T. 50; 14 T. L. R. 501; 46 W. R. 658—C. A.

**26. Salaries—Non-provided School—Whether Contract with Managers or Education Authority—Education Act, 1902** (2 Edw. 7, c. 42), s. 7.]—The plaintiff was in 1899 appointed assistant mistress at a voluntary school, and by the terms of her written agreement with its managers three calendar months' notice on either side was necessary to terminate the engagement. On the Education Act, 1902, coming into operation, the plaintiff continued in her position as assistant mistress in the non-provided school without any express contract with, or proposal for a contract from, the defendants, who were the local education authority under the new Act. The defendants, however, paid the plaintiff's salary directly to her in the amounts and at the times stated in the agreement of 1899. On August 10th, 1903, the defendants confirmed the following resolution of their education committee: "That the marriage of principal or assistant mistresses in provided and non-provided schools shall be equivalent to three months' notice to terminate the engagement." Notice of this resolution was sent to a manager of the non-provided school; but no notice to terminate the engagement was given to the plaintiff, either by the local education authority or the managers, but the terms of the resolution came to the plaintiff's knowledge. On August 9th, 1904, the plaintiff married, and on November 30th, 1904, she received a letter from the defendants telling her that her engagement was determined. The plaintiff continued in her position, and recovered from the defendants in a County Court action arrears of salary from December 1st, 1904, to April 30th, 1905.

**HELD**—that on the proper construction of sect. 7 of the Education Act, 1902, no action lay against the defendants for arrears of salary, as there was no privity of contract between the plaintiff and the defendants.

**CROCKER v. PLYMOUTH CORPORATION**, [1906] 1 [K. B. 494; 75 L. J. K. B. 375; 70 J. P. 204; 54 W. R. 391; 91 L. T. 734; 22 T. L. R. 336; 4 L. G. R. 571—Div. Ct.

**(b) Officers.**

**27. Compensation—Office—Abolition—"In Pursuance or in Consequence of this Act"—Superintendent of Training Ship—Education Act, 1902** (2 Edw. 7, c. 42), s. 25; *Sched. II., cl. 21.*]—The applicant was in 1877 appointed by the London School Board captain superintendent of the training ship *Shaftebury*. By the Education Act, 1902, the powers and duties of the School Board were transferred to the London County Council,

**Teachers and Officers—Continued.**

who determined to discontinue the use of the ship, and they accordingly gave the applicant six months' notice. The applicant applied under cl. 21 of Sched. II. to the Education Act, 1902, for compensation for the abolition of his office.

**HELD**—that the abolition of the applicant's office was not "in pursuance of or in consequence of" the Act, and that therefore he was not entitled to compensation.

**REX v. LONDON COUNTY COUNCIL, Ex PARTE**  
[SCRIVEN, (1907) 23 T. L. R. 493—Div. Ct.]

**28. Compensation — Transfer of Powers from School Board to London County Council—Collection of Rate by Officer in Employment of Third Party—Rate Subsequently Collected by Guardians—Direct Pecuniary Loss to Officer—Local Government Act, 1888 (51 and 52 Vict. c. 41), s. 120—Education Act, 1902 (2 Edw. 7, c. 42), Sched. II., rr. 16, 21]**  
—By the Education Act, 1902, the powers and duties of the school boards were transferred to the County Councils. Previous to the passing of the Act the applicant, a rate collector in the employ of the corporation of the City of London, was employed to collect the education rate levied by the school board. After the passing of the Act the education rate was collected by the guardians as part of the poor rate, and the applicant suffered a pecuniary loss from the loss of fees for collecting the education rate.

**HELD** (by Alverstone, L.C.J., and Ridley, J., Darling, J., *dissentiente*)—that the applicant, not being an officer in the employment of the school board, was not entitled to compensation under sect. 120 of the Local Government Act, 1888, and Sched. II., r. 21, of the Education Act, 1902

**REX v. LONDON COUNTY COUNCIL, Ex PARTE**  
[NORRIS [1906] 1 K. B. 346; 75 L. J. K. B. 241; 70 J. P. 160; 54 W. R. 439; 94 L. T. 218; 22 T. L. R. 235; 4 L. G. R. 305—Div. Ct.]

**EDUCATION ACTS.**

*See* CHARITIES.

**EJECTMENT.**

*See* LANDLORD AND TENANT.

**ELECTION.**

*See* WILLS, Nos. 166—172.

**ELECTIONS.**

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**I. DISQUALIFICATION.**

**1. Bankrupt—Quo warranto—Mandamus—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12, 39, 87—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32.]**—A person, who is an undischarged bankrupt at the time of an election to which sect. 32 of the Bankruptcy Act, 1883, applies, is disqualified by that section both from being elected to, and also from holding the office, and the question of his disqualification for holding the office may be raised by *quo warranto*, though the question of his disqualification for election can only be raised by petition.  
The office being *de facto* full, mandamus will not lie.

**REX v. MAYOR OF EALING; REX v. BEER, Ex PARTE**  
[TYER, [1903] 2 K. B. 693; 72 L. J. K. B. 608; 67 J. P. 326; 89 L. T. 412; 19 T. L. R. 531; 10 Manson, 263; 52 W. R. 221—Div. Ct.]

**2. Interest in Contract—Election of Councillor—Right to Present Petition against Another Candidate—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 77, 88 (1).]**—A person who, at the time of his nomination as a candidate for the office of town councillor, is interested in a contract with the council, is disqualified under sect. 12 of the Municipal Corporations Act, 1882, not only for election, but also for nomination to that office, and this notwithstanding that there may be a possibility of his getting rid of the contract before the date of the election.

Being a "candidate" within sect. 77 of the Act, however, he is entitled under sect. 88, notwithstanding his disqualification, to present a petition against the return of another candidate.

**Monks v. Jackson** ((1876), 1 C. P. D. 683; 46 L. J. C. P. 162; 35 L. T. 95) distinguished.

**HARFORD v. LYNKEY**, [1899] 1 Q. B. 852; 68 [L. J. Q. B. 599; 63 J. P. 263; 80 L. T. 417; 15 T. L. R. 306—Div. Ct.]

**3. Interest in Contract—Election of Town Councillor—Contract with Council—Release by Committee—Ratification by Council—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12, sub-s. 1 (c).]**—The respondent, in answer to an advertisement, sent

**Disqualification—Continued.**

in a tender offering to supply to a city council certain goods as required at specified prices for twelve months ending 31st December, 1900. The Street Committee accepted his tender. The council approved the acceptance of the Street Committee. The respondent supplied goods under the tender. The respondent, being anxious to stand as a candidate at the forthcoming election of councillors in November, applied to the Finance Committee to be relieved from his tender. That committee resolved, subject to the approval by the council, to release him as from 19th October, 1900. On 24th October the respondent was nominated; on 30th October the council confirmed the resolution of the committee; on 1st November the respondent was elected to the office of councillor. A petition was presented against him, alleging that his election was void, on the ground that, at the date of his nomination, he had an interest in a contract with the council.

**Held**—that there was a contract with the council, and as it was uncertain on 24th October whether the act of the Finance Committee would be ratified, the respondent had not then completely got rid of his contract; he was therefore disqualified within sect. 12, sub-sect. 1 (c) of the Municipal Corporations Act, 1882, for having, at the date of his nomination, had a share or interest in a contract with the town council within the meaning of the section.

*Bolton Partners v. Lambert* ([1889] 41 Ch. D. 295; 58 L. J. Ch. 425; 37 W. R. 434; 60 L. T. 687—C. A.) distinguished.

**IN RE GLOUCESTER MUNICIPAL ELECTION PETITION**, [1900] (TUFFLEY WARD); *FORD v. NEWTE*, [1901] 1 Q. B. 683; 70 L. J. K. B. 459; 65 J. P. 391; 49 W. R. 345; 84 L. T. 354; 17 T. L. R. 325—Div. Ct.

**4. Interest in Contract—Disqualification at time of Nomination and of Election—Validity of Nomination—Votes Thrown Away—Election of Opposing Candidate—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12 (1) (c); 56 (2).]**—The petitioner and respondent were duly nominated as candidates for the office of borough councillor. There were no other candidates. The respondent obtained a majority of votes at the election. At the time of the nomination and of the election, the respondent was disqualified under sect. 12 (1) (c) of the Municipal Corporations Act, 1882, by reason of an interest in a contract with the borough council. On a case stated, the petitioner claimed that the nomination of the respondent was invalid, and that, there being only one valid nomination, he should, under sect. 56 (2) of the above-mentioned Act, be deemed to be elected. The respondent admitted that he was disqualified, but contended that the petitioner should not be deemed to be elected.

**Held**—that as the disqualification of the  
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respondent was not apparent on the face of the nomination, and as notice of the respondent's disqualification had not been given to the electorate previous to the election, the votes given for the respondent could not be treated as thrown away. The petitioner could not be deemed to be elected, and as the respondent was disqualified there must be a fresh election.

*HOBBS v. MOREY*, [1904] 1 K. B. 74; 73 [L. J. K. B. 47; 68 J. P. 132; 52 W. R. 348; 89 L. T. 531; 20 T. L. R. 50; 12 L. G. R. 7—Div. Ct.

**5. Non-Payment of Rates—Tender.]**—The actual payment of rates is a condition precedent to the right to be on the Register; mere tender is not sufficient. If a collector wrongfully refuse such a tender he may be liable in damages, or may be indicted should he be actuated by corrupt motives.

*KENNEDY v. BUCHANAN*; *LOUGHREY v. BUCHANAN*, [1903] 2 I. R. 434—C. A.

**6. Non-payment of Rates—Charge for Education Included—Whether part of Poor Rate or Borough Rate — Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9 (2)—Representation of the People Act, 1884 (48 Vict. c. 3).]**—For registration purposes the rate for educational expenditure is an integral part of the poor rate or borough rate; and persons who have not paid the whole of such a rate (including the part levied for educational purposes) have no claim to be registered as voters for parliamentary or municipal purposes.

*ASH v. NICHOLL*; *COX v. MERRIMAN*, [1905] 1 [K. B. 139; 74 L. J. K. B. 74; 53 W. R. 173; 69 J. P. 6; 91 L. T. 803; 21 T. L. R. 62; 3 L. G. R. 11; 1 Smith, 355—Div. Ct.

**7. Peer—University Vote.]**—A peer of Parliament is not entitled to vote at an election of members of the House of Commons for a university.

*Earl Beauchamp v. Madresfield Overseers* ((1873) L. R. 8 C. P. 345; 42 L. J. C. P. 32, 27 L. T. 606; 21 W. R. 124; 2 Hop. & Colt. 41) followed.

*BRISTOL (MARQUESS OF) v. BECK*, (1907) 71 J. P. [99; 96 L. T. 55; 23 T. L. R. 224—Bray, J.

**8. Receipt of "Medical Assistance"—Ordinary Relief—Maintenance of Claimant's Wife as Pauper Lunatic—Question of Fact for Revising Barrister—Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46), s. 2.]**—Where a member of a voter's or claimant's family is attacked with insanity and is in consequence removed to an asylum at the expense of the union, the case is in the first instance one of medical relief. But when the insane person, being a person for whose support the voter or claimant is liable, remains permanently in the asylum, and no payment is made by the voter or claimant, a question of fact arises as to whether the relief has not become ordinary  
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**Disqualification—Continued.**

relief as distinguished from medical. When any payment is made, even although it is not as great as the cost to the union of the maintenance of the lunatic in the asylum, the inference may fairly be drawn that there is no ordinary relief; but this is for the revising barrister. Where the maintenance has continued for a long time without any payment whatever it cannot be said that a revising barrister is wrong in coming to the conclusion that the voter or claimant is in receipt of relief other than medical relief.

The claimant's wife had been maintained for about two years in the county lunatic asylum at the expense of the union, and he had not paid anything towards her maintenance and support. The revising barrister rejected the claim on the ground that the medical assistance (if any) was incidental to the maintenance.

**HELD**—that this was a finding of fact by the barrister, and there was evidence to support it, and it ought not to be disturbed.

**KIRKHOUSE v. BLAKEWAY**, [1902] 1 K. B. 306; 71 [L. J. K. B. 130; 66 J. P. 38; 50 W. R. 206, 86 L. T. 19; 18 T. L. R. 182, 1 Smith Reg. 281—Div. Ct.

**9. Successful Candidate Disqualified—Notice of Disqualification—Right of Unsuccessful Candidate to Claim Seat—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sch. III., Pt. II., r. 16.]**—The successful candidate at a municipal election was disqualified under r. 16 of Pt. II. of Sch. III. of the Municipal Corporations Act, 1882, and his election was declared void.

No notice of his disqualification was given at the time of the election.

**HELD**—that the unsuccessful candidate could not claim the seat.

**Hobbs v. Morey** ([1904] 1 K. B. 74, 73 L. J. K. B. 47; 68 J. P. 132; 52 W. R. 348; 89 L. T. 531; 20 T. L. R. 50—Div. Ct., No. 4, *supra*) followed.

**BOYCE v. WHITE**, 53 W. R. 430; 92 L. T. 240; 21 [T. L. R. 244; 3 L. G. R. 787—Div. Ct.

**II. THE ELECTION.**

**10. Ballot Papers—Marking of—Ballot Act, 1872 (35 & 36 Vict. c. 33.)**—A ballot paper marked with crosses or strokes not in the spaces provided for that purpose but in the margin to the right of such spaces, opposite to the names of a candidate or candidates, so that it is clear for which candidate or candidates the voter intended to vote, is good.

Where there are nine candidates for five vacancies and a voter votes for five candidates in the ordinary way by marking a X in the spaces provided for that purpose and places a sixth mark, being a cross sur-

rounded by a circle, the circumference touching the ends of the cross ⊕ in the space against the name of a sixth candidate, the ballot paper is bad on the ground that six votes have been given.

**PONTARDAWE RURAL DISTRICT COUNCIL ELECTION** [Petition, [1907] 2 K. B. 313; 76 L. J. K. B. 702, 71 J. P. 371; 23 T. L. R. 538; 5 L. G. R. 1060—Div. Ct.

**11. Casting Vote—Guardians—Candidates with Equal Number of Votes—Determination by Deputy Returning Officer, who was not an Elector, by Casting Vote, instead of Drawing Lots—Election Petition—Notice of Intention Not to Oppose Petition—Costs.]**—At an election of guardians in a borough, a deputy returning officer, not having a vote for the ward in which he was acting, gave a casting vote to H., one of two candidates, H. and W., for whom the votes were equal, instead of determining the election by lot in accordance with r. 22 of the Guardians (Outside London) Election Order, 1898. The deputy returning officer thought that the returning officer had instructed him that he had a casting vote. The deputy returning officer declared the result of the poll in accordance with r. 24 (1) of the said Order. The returning officer, on discovering the mistake, urged H. and W. to treat the declaration of the poll as a nullity, and to draw lots for the seat, but H. refused to do this. The returning officer then published the result of the election in the various wards of the parish in accordance with the returns of the various deputy returning officers, and announced H. as the successful candidate for the seat. The returning officer then asked H. to concur in creating a vacancy of his seat, but this also H. refused to do. W. issued an election petition, and joined H., but did not join the returning officer, as a respondent. The respondent did not give notice under sect. 97 of the Municipal Corporations Act, 1882, and rr. 47 and 65 of the general rules of an intention not to oppose the petition. At the hearing the respondent did not oppose the petition, except as to costs.

**HELD**—(1) that the respondent was not duly elected by a majority of lawful votes, and that the election was void.

(2) That the returning officer could not be ordered to pay costs as he had not been joined as a party to the proceedings.

(3) That the respondent must pay the petitioner the costs of and occasioned by the petition (including the costs of the special case) from the time when he might have given notice under the said section and rules of an intention not to oppose the petition.

(4) That the petitioner must pay his own costs up to that date.

**WATTS v. HEMMING**, (1907) 71 J. P. 504—[Div. Ct.

**12. Poll—Hours of—Keeping Poll Open—Supply of Ballot-papers—Deposit of Ballot-**

**The Election—Continued.**

*papers in Ballot-box—Irregularities—Elections (Hours of Poll) Act, 1885 (48 & 49 Vict. c. 10), s. 1.*—An election ought not to be held void by reason of transgressions of the law by a returning officer or his subordinates when the election was, in substance, conducted in accordance with existing election law, and the result, as regards the return of one candidate over the other, was not shown to have been affected by such transgressions; but if the transgressions were such that the election was not fairly conducted, or if it was open to doubt whether it was so conducted and whether the return of a candidate was affected by them, then the election ought to be declared void.

The meaning of sect. 1 of the Elections (Hours of Poll) Act, 1885, is that the officials are to cease to supply ballot-papers to voters at 8 p.m., and if a voter has a ballot-paper before 8 p.m. he is entitled to deposit it in the ballot-box.

Where, if all the votes given after 8 p.m. were given for the successful candidate, there was a majority of five for him,

**HELD**—that the respondents had discharged the onus upon them of proving that the irregularity did not affect the return of the successful candidate.

**MEDHURST v. LOUGH AND GASQUET**, (1901) 17 [T. L. R. 210—El. Pet. Ct.

**N.B.**—In the above case the costs of the election petition were ordered to be borne distributively, and the returning officer was held, in the circumstances, to have been properly made a respondent to the petition, where the acts complained of were the acts of a presiding officer.—17 T. L. R. 230—Div. Ct.

**13. Returning and Deputy Returning Officer—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (2) (v.)—The Guardians (Outside London) Election Order, 1898—The Urban District Councillors Election Order, 1898.**—The clerk to an urban district council is not entitled to act as deputy returning officer for the election of guardians for the parish unless the parish is co-extensive with the urban district or with any ward or wards of such district, or unless the county council has given directions that the polls for the election of guardians and for the election of urban district councillors shall be taken together.

**R. v. CARTER**, (1904) 68 J. P. 466—Div. Ct.

**14. Returning Officer—Duty of—Death of Candidate after Nomination and before Poll—Countermand of Poll—Power of Court to Fix Day of Election—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 58, 70—Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 1.**—Sect. 58 of the Municipal Corporations Act, 1882, incorporates, and applies to municipal and county council elections, the provisions in sect. 1 of the Ballot Act, 1872, as to the

countermand of the poll by the returning officer upon being satisfied of the death of a nominated candidate after the nomination and before the poll; and, consequently, if, in the case of a county council election, the returning officer receive notice of the death of one of the candidates after the day of nomination and before the day fixed for the poll, his duty is to countermand notice of the poll, and in such a case the Court has power, on the application of the returning officer, to fix a day for the election, and to grant a *mandamus* to him to hold the election on the day so appointed by the Court.

**WESTACOTT v. STEWART**, [1898] 1 Q. B. 552; 67 [L. J. Q. B. 421, 78 L. T. 256; 46 W. R. 379; 62 J. P. 229—Div. Ct.

**III. ILLEGAL PRACTICES.**

**15. Application for Relief—When Properly Made—Notices of Application—Municipal Election (Corrupt and Illegal Practices) Act, 1884**—An application for relief under the Municipal Election (Corrupt and Illegal Practices) Act, 1884, sect. 20, may be made before the election is held. Notices of the application need not be posted.

**EX PARTE KYD**, (1897) 14 T. L. R. 64—Div. Ct.

**16. Application for Relief—Rule as to Opponent's Costs—Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 20.**—Where an application for relief is made under sect. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), the rule as to granting costs against the applicant should be this—where the illegal practice was not a serious one the opponents of the application for relief ought not to have their costs, but they should have them when the illegal practice was a serious one.

**IN THE MATTER OF THE MUNICIPAL ELECTION (CORRUPT AND ILLEGAL PRACTICES) ACT, 1884; IN THE MATTER OF LONDON SCHOOL BOARD ELECTION (WESTMINSTER DIV.)**, **EX PARTE KYD**, (1898) 14 T. L. R. 64, 154—Div. Ct.

**17. Illegal Hiring—Application for Relief—Affidavit by Applicants—Corrupt and Illegal Practices Act, 1884 (47 & 48 Vict. c. 70), s. 20.**—On an application by several candidates for relief from an illegal hiring under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, sect. 20, an affidavit of the facts by all the applicants should be filed.

**IN RE ANDREWS AND OTHERS, IN RE STREATHAM [VESTRY ELECTION]**, (1899) 68 L. J. Q. B. 683—Div. Ct.

**18. Issue of "Bill, Placard, or Poster having Reference to a Municipal Election"—Name and Address of Printer and Publisher—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 14.**—In July the name of the respondent who was an alderman on the

**Illegal Practices—Continued.**

borough council, had been informally mentioned, and it was a matter of common knowledge that he was going to stand as a candidate for the office of mayor at the next election in the following November. At the end of August the appellant caused to be printed a circular, headed with the respondent's name and the words, "Shall he be our new mayor?" and sent six copies thereof in sealed envelopes, marked "private," to the respondent, the town clerk, and four councillors of the city. The circulars bore no printer's name or address.

HELD—that the circular was a "bill . . . having reference to a municipal election," within sect. 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and the appellant was rightly convicted for issuing it.

ALCOTT v. EMDEN, (1904) 68 J. P. 434; 20 [T. L. R. 487; 2 L. G. R. 1313—Div. Ct.]

19. *Notice of Motion for Relief—Subsequent Presentation of Election Petition Founded on Same Illegal Act and no Other—Relief Granted—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 20.*—Where there is likely to be an election petition the Court will not as a rule grant relief under sect. 20, but it may do so, even though a petition has been actually presented.

A successful candidate had through ignorance (as the Court were satisfied) used one pair of hired horses to convey voters to the poll. He gave notice of his intention to apply for relief, and subsequently a petition was presented alleging only this particular act of illegality. The petitioner refused to cross-examine the candidate on his affidavit, and the Court determined to grant the relief asked for.

EX PARTE FORSTER, (1903) 67 J. P. 322; 89 [L. T. 18; 19 T. L. R. 525; 1 L. G. R. 632—Div. Ct.]

20. *Payment by Candidate Before Agent Appointed—Payment Honestly Made—Claim for Relief—Finding by Commissioners.*—Where a Parliamentary candidate honestly and in ignorance of law makes a payment to a third person which ought to have been made through the candidate's agent, he is entitled to relief, under sect. 23 of the Illegal and Corrupt Practices Act, 1883.

Further, a report by Election Commissioners exonerating the candidate from complicity in the matter in itself entitles him to relief.

RE WORCESTER ELECTION, (1907) 51 S. J. 14—[Ridley, J.]

21. *Payments by Person Not the Election Agent of the Candidate—Payments which could properly have been made by Agent and were duly vouched for in the Candi-*

*date's Return of Expenses—Relief—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 23.*—Upon application for relief in respect of illegal payments,

HELD—that although the payments were illegal, because made by a person who was not the election agent of the candidate, they were payments which could properly have been made by an agent, and having been made honestly, and in ignorance of the consequences, the applicant was entitled to relief.

RE WORCESTER ELECTION, (1907) 51 S. J. 593—[Bucknill, J.]

22. *Prosecution—Private Prosecutor—Right of Defendant to Costs on Acquittal—Corrupt Practices Prevention Act, 1884 (17 & 18 Vict. c. 102), s. 12—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 53—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 30.*—Where an indictment is preferred by a private prosecutor under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for corrupt practices at a municipal election, the defendant, if acquitted, has the right to recover from the prosecutor the costs sustained by him by reason of such indictment.

REG. v. LAW, [1900] 1 Q. B. 605; 69 L. J. Q. B. [348; 48 W. R. 411; 82 L. T. 145; 16 T. L. R. 199—Bucknill, J.]

23. *Return of Election Expenses—Failure to "Transmit"—Errors in Return—Penalties—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 33, 34.*—The Corrupt and Illegal Practices Prevention Act, 1883, by sect. 33 (1) provides that, "within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate . . . shall transmit to the returning officer a true return" of election expenses; and by sub-sect. 5 a penalty is imposed upon a candidate for each day upon which he sits or votes in the House of Commons after the expiration of the thirty-five days without having transmitted "such return."

A return which is posted to the returning officer within the thirty-five days is "transmitted" within the meaning of the Act, although it does not reach the returning officer until after the expiration of that time.

A return is transmitted within the meaning of sect. 33 (5), although the return which is sent contains errors and omissions.

Decision of Kennedy, J. ((1897) 67 L. J. Q. B. 68; 77 L. T. 657; 14 T. L. R. 90) reversed.

MACKINNON v. CLARK, [1898] 2 Q. B. 251; 67 [L. J. Q. B. 763; 79 L. T. 83; 14 T. L. R. 485; 47 W. R. 19—C. A.]



### Illegal Practices—Continued.

24. *Return of Expenses—No Expenses in fact Incurred—Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 21, sub-secs. 4, 7.*—Every candidate is required, under the Municipal Elections Act, 1884, to send to the town clerk, within twenty-eight days of the election, a return of his expenses with the accompanying statutory declaration.

By sect. 21, sub-sect. 4, if, after the time for making such return, the candidate in default shall, before the date of the allowance of such authorised excuse as is mentioned in the Act, sit or vote in the council, he shall forfeit £50 for every day on which he does so to any person who sues for the same. By sub-sect. 7, if a candidate appeals to the High Court and shows that failure to make such return and declaration has arisen by reason of inadvertence or by any reasonable cause of a like nature, the Court may make such order and declaration as to them seems just, notwithstanding the lapse of the prescribed statutory period for making the return.

P. was returned unopposed at a Municipal election for the county borough of H., and believing that, as he had incurred no expenses of any kind, no return and declaration was required, omitted to return his expenses as "nil" until after the statutory period for making such return and declaration had expired.

HELD—that there was sufficient evidence before the Court that the omission had been under such circumstances as to amount to an authorised excuse under the Act, and that the relief sought ought therefore to be granted.

PENNINGTON, EX PARTE; RE MUNICIPAL ELECTIONS ACT, 1884, (1898) 46 W. R. 415—Div. Ct.

### IV. LODGER VOTERS.

25. *Rateable Value of Houses—Objection—Evidence—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28.*—Where a "lodger claim is made and objected to," the Revising Barrister cannot insist upon the applicant's personal attendance; the applicant may meet the objection by submitting evidence without attending in person.

A Revising Barrister may disallow a "lodger" claim even though *prima facie* proof of the ground of objection has not been given in accordance with sect. 28 (10) of the Act of 1878; when the requirements of this sub-section have not been satisfied, he must weigh the evidence advanced in support of the claim and objection, and decide accordingly. No appeal lies from his decision.

*Semble*, a Revising Barrister may make a personal inspection of the houses in which lodgers, who claim the franchise, reside, and if he is of opinion that they are

not of a sufficient value to support a lodger's claim, may call upon the claimant to give evidence of the annual value of his lodgings, and in default of such evidence may disallow the lodger's claim.

JENKINS v. GROCOTT, [1904] 1 K. B. 374; 73 [L. J. K. B. 215; 68 J. P. 75; 52 W. R. 267; 90 L. T. 90; 20 T. L. R. 148, 1 Smith, 355; 2 L. G. R. 202—Div. Ct.

### V. PETITION.

26. *Agency—Bribery—Expenses—Ward Meetings—Treating—"At Home"—Expense of Distributing Political Almanac—Judges Divided in Opinion—Costs.*—The petition alleged corrupt and illegal practices personally and by agents.

One B. was proved to have given sums of money to voters whom he brought to the poll. He was using for the purpose a cart which had been lent to the respondent. The chairman of the respondent's carriage committee saw B. using the cart in question, but had not authorised or instructed him to do so. Subsequently, on being informed that B. was distributing money, the chairman taxed him with doing so, accepted his denial, and allowed him to continue using the cart to bring up voters.

HELD—by Channell, J., the junior judge, that B. was an "agent" and that the election should be set aside.

HELD—by Grantham, J., that B.'s agency was not established.

A political almanac was ordered in October and sent round at Christmas to electors.

HELD—that, having been ordered before it was known that an election was imminent, it was properly omitted from the respondent's return of election expenses.

It was contended that the expenses of ward and other meetings and smoking concerts ought to be included in the return, though some of them had been held more than a year before the election.

HELD—that the expenses of such political meetings were not incurred "in respect of the conduct and management of the election."

With regard to alleged treating at such ward meetings:

HELD—that there was no proof of agency, and that the drink was distributed to attract an audience and not to corruptly influence votes.

Three months before the election the respondent gave an "at home" in the Town Hall, in honour of the retiring member, who was present; refreshments were provided at the respondent's expense. There were no speeches, political or otherwise.

HELD—that the giving of refreshment was subsidiary to the real object of the entertainment, and that it ought not to be regarded as corrupt treating.

**Petition—Continued.**

The Court being divided upon the main point, the petition was dismissed, but no order was made as to costs.

GREAT YARMOUTH, (1906) 5 O'M. & H. 176—  
[Grantham and Channell, JJ.]

**27. Defence Abandoned—Public Prosecutor Continuing Case—"Admission" by Stranger—Whether Evidence Against a Party—Persons Summoned to Show Cause—Certificate—Costs.**—A petition alleged corrupt practices and general bribery. In the course of the hearing the respondent found himself unable to contest certain charges of bribery by agents, and the seat was declared void.

The Public Prosecutor was then directed to continue calling evidence upon the charges contained in the petition, and the petitioner's solicitor was directed to assist him; audience was given to a solicitor on behalf of persons charged with corrupt practices.

As between petitioner and respondent an admission by a third person that he has been bribed cannot be given in evidence.

A person called, not as a witness, but merely to show cause why he should not be reported, cannot claim a right to make a full admission and receive a certificate; if he denies the offence, he may be cross-examined by counsel for the petitioner.

The petitioner was given his costs right up to the end of the case, though the respondent had in the middle of it given up the contest. The Public Prosecutor received no costs.

WORCESTER, (1906) O'M. & H. 212—Lawrence  
[and Walton, JJ.]

**28. False Statements as to Personal Character and Conduct—"Hounding" a Man to Prison—Corrupt and Illegal Practices Prevention Act, 1854 (58 & 59 Vict. c. 40).**—The petition alleged the publication by the respondent and his agents of false statements of fact in relation to the petitioner's personal character and conduct.

The Court only considered in detail one statement, viz., that petitioner had "hounded" one H. to prison; the petitioner had admittedly taken the lead in pressing certain charges against H.

**HELD**—that the words did not impute that H. was wrongly convicted, or that the petitioner had taken improper steps to secure his conviction, and that there was no false statement within the meaning of the Act.

SHEFFIELD, (1906) 5 O'M. & H. 218—Grantham  
[and Walton, JJ.]

**29. Order for Statement of Special Case—Appeal—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 93, sub-s. 7—Municipal Elections General Rules, rr. 48 and 57—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 36, sub-s. 1.]**—From an order of a judge at

chambers directing a school board election petition to be stated as a special case, an appeal lies by leave to the Court of Appeal.

MONKSWELL (LORD) v. THOMPSON (No. 1), [1898]  
[1 Q. B. 353; 67 L. J. Q. B. 243; 77 L. J. 707; 14 T. L. R. 163—C. A.]

**30. Particulars—Scrutiny and Recount—Claim of Seat—Parliamentary Election Petition Rules, 1868, rr. 6 and 7.]**—In the case of a Parliamentary election petition, in which the petitioner merely claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the delivery of particulars is governed exclusively by rule 7 of the Parliamentary Election Petition Rules, 1868, and, therefore, no order can be obtained under rule 6.

Munro v. Balfour ((1893) 1 Q. B. 113) followed.

FURNESS v. BERESFORD, [1898] 1 Q. B. 495; 67  
[L. J. Q. B. 417; 78 L. T. 137; 14 T. L. R. 249; 46 W. R. 359—C. A.]

**31. Petition—Particulars of Treating—Form of Order.]**—An election petition alleged that the respondents by themselves and their agents had been guilty of the corrupt practice of treating, and also of general treating at Common Law. The respondents applied for particulars of the charges of treating, and the Judge ordered that the petitioners should deliver to the respondents the names of all persons, "if known," alleged in the petition to have been treated, and by whom and the place or places where each act of treating was alleged to have taken place.

**HELD**—that the words "if known" were properly inserted in the order.

RE CHELSEA ELECTION PETITION; WILLES v.  
[HORNIMAN, (1898) 14 T. L. R. 343—C. A.]

**32. Payment of Railway Fare—Commencement of Election—Adoption of Candidate—Inspection of Association's Books—Cross-Examination of Witness called by Public Prosecutor—Witnesses Ordered out of Court—Witness Charged with Bribery—Right to Remain—Costs of Shorthand Transcript.]**—A voter missed a motor-car which was to have taken him home. He was an old man and was accompanied by a child, and they were several miles from home. At 9.30 p.m. an agent of the respondent gave him 1s. 6d. to go by train—his train fare being 1s. 3d.

**HELD**—that the payment could not void the election.

Extent of the right to inspect books of rival political associations discussed.

The fact that a person has been seen in a candidate's committee room and has some of his bills in his hands is not sufficient to constitute him an "agent" of that candidate.

On December 7th, the respondent came before the committee of the local association and was adopted as prospective candidate;

*Petition—Continued.*

on December 14th he addressed a mass meeting; on December 27th he was formally adopted as candidate and appointed his election agent.

**HELD**—that his election expenses began on December 27th.

Where, before judgment given, the Public Prosecutor at the direction of the Court calls as a witness a person alleged to have been bribed, but whom the petitioner has not called, the petitioner is not entitled to cross-examine him.

An intended witness cannot claim to remain in Court, when all witnesses are directed to withdraw, on the ground that a charge of bribery is to be made against him. Costs of transcript of shorthand note not allowed.

**MAIDSTONE ELECTION PETITION, (1906) 5 O'M.**  
[& H. 200—Grantham and Lawrance, JJ.]

**33. School Board—Result of Re-count—Votes Indicated by Crosses—Declaration that Petitioner Duly Elected—Elementary Education Act, 1873 (36 & 37 Vict. c. 86)—Ballot Act, 1872 (35 & 36 Vict. c. 33).**—After an election of members of a school board a re-count was ordered. At the re-count it was discovered that the returning officer had disallowed votes indicated by crosses, and that if these were counted in the petitioner had a majority of votes.

**HELD**—on a special case stating these facts that the election of the respondent was void, and the petitioner was duly elected.

**HELD**—that no costs would be given against the returning officer, as he was not a party to the proceedings.

**RE LONG SUTTON SCHOOL BOARD ELECTION PETITION, (1898) 62 J. P. 565—Div. Ct.**

**34. School Board—Five Members—Petition Against Fifth Member—Re-count of Votes of all Returned Members—No Necessity.**—At the election for members of the School Board there were eight candidates and five seats. W. W. T., the respondent, came out fifth in the poll, and L. M. J. was sixth, and the first five were declared by the returning officer to be duly elected. On a re-count of the votes on a petition presented on behalf of J. it was found that he had a majority over T., the respondent, of five votes. By the petition it was only asked that a re-count should take place of the votes of T. and J.

On the majority being declared in favour of J. he claimed the seat, but it was contended that, in order to unseat the respondent, the petitioners must show that he was not among the first five candidates on the poll, and that, as the re-count had been limited to T. and J. only, the petitioners had not shown that the respondent was not among the first five candidates.

**HELD**—that J. was entitled to the seat, and that T. must be unseated. That, as there

had been no petition against the return of the other members within the twenty-one days, the return of the returning officer must be taken as correct with regard to the number of their votes, and that, therefore, the five candidates, including J., were elected by a majority of lawful votes.

**MONKSWELL (LORD) v. THOMPSON, (No. 2) (1898)**  
[D. C. [1898] 1 Q. B. 479; 62 J. P. 212, 67 L. J. Q. B. 378; 78 L. T. 116, 14 T. L. R. 224; 46 W. R. 382—Div. Ct.]

**35. Security not Found by Petitioners—Costs of Successful Petitioners.**—Even if the money deposited as security for the costs of an election petition has not been found by the petitioners themselves, nevertheless if the petition succeeds, the Court, in its discretion, may allow judgment in their favour with costs.

**YELLOW AND OTHERS v. MEREDITH, (1903) 67**  
[J. P. 111—Div. Ct.]

**36. Taking Petition off File—Appeal—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1—R. S. C., Ord. 59, r. 1 (b).**—An appeal from the refusal of a Judge at Chambers to order an election petition to be taken off the file lies to a Divisional Court.

The Divisional Court has jurisdiction to order a petition against the election of the sheriff of a city to be taken off the file, it being admitted that the remedy is not by way of petition, but by *quo warranto*.

**POPE v. BRUTON, (1901) 17 T. L. R. 182—**  
[Div. Ct.]

**37. Treating—Garden Party—Drinks in Public House—Commencement of Election for Purpose of Return—Charges Withdrawn—Costs.**—The petition alleged corrupt and illegal practices and general treating, and omissions in the respondent's return.

Upon the latter point the Senior Judge, Grantham, J., held that it was not incumbent upon the respondent to include in his return the expenses of meetings held since his adoption as candidate but long before the actual election. Lawrance, J., was of opinion that the return ought to have included them.

The seat was declared void on the ground of treating by the respondent and his election agent, (i.) in public houses, and (ii.) at a garden party given by the respondent's parents at a date when the election was imminent.

The respondent personally was acquitted from blame on account of his inexperience; a certificate was given to his agent.

The petitioner, having abandoned certain charges by permission of the Court, was ordered to pay the extra costs occasioned by charges on which he offered no evidence, but was given the costs of those charges on which the Court differed in opinion.

**BODMIN ELECTION PETITION, (1906) 5 O'M. & H.**  
[225—Grantham and Lawrance, JJ.]

*Petition—Continued.*

38. *Withdrawal of Petition — Costs — Charge of Personation—Scale.*—A petition claimed a recount and scrutiny. It was withdrawn by leave of the Court, the respondent to have costs on the usual scale, with any extra costs occasioned by the charge of personation.

APPLEBY ELECTION PETITION, (1906) 5 O'M. & H. [237—Grantham and Lawrance, JJ.]

## VI. OCCUPATION VOTERS.

39. *Absence on Military Service in South Africa—Electoral Disabilities Removal Act, 1891 (54 & 55 Vict. c. 11), s. 2—Electoral Disabilities (Military Service) Removal Act, 1900 (63 & 64 Vict. c. 8), ss. 1, 3.*—A volunteer was absent on military service during the whole of the twelve months preceding July 15th, 1902. The war ended in May, 1902.

HELD—that he was entitled to be registered; *per* Lord Alverstone, C.J., because his case fell within a liberal construction of the words "absence during the continuance of the present war" in the Electoral Disabilities Removal Act, 1900, s. 3; *per* Wills and Channell, JJ., because his absence after the actual end of the war had not exceeded the four months referred to in sect. 2 of the Electoral Disabilities Removal Act, 1891.

MARSH v. BANTOFT, (1903) 67 J. P. 12; 51 [W. R. 155; 88 L. T. 230; 19 T. L. R. 36; 1 Smith Reg. 239; 1 L. G. R. 106—Div. Ct.]

40. *"As Tenant"—Evidence—Payment of Rent, Rates and Taxes.*—M.'s name was on the occupiers' list (Division I.), and it was objected to on the ground that he had not occupied as owner or tenant. The original agreement of tenancy was between M.'s father, since dead, and the landlord, and the father's name was entered in the rent-book as the tenant. M.'s mother's name remained on the rate-book. M.'s mother had no means. M. maintained the household and paid the rent, rates and taxes.

HELD—upon the above facts, that as the son could not successfully contend that he was not the tenant, there was reasonable ground upon which the Revising Barrister could come to the conclusion that M. was tenant of the qualifying premises.

LOVERIDGE v. GARDOM; MATTHEWS' CASE; [GILLO's CASE, (1899) 15 T. L. R. 232; 1 Smith Reg. 186—Div. Ct.]

41. *Claim by Husband as Sub-Tenant of his Wife.*—A. claimed to have his name inserted in the roll of voters for a county as sub-tenant of a dwelling-house. The house belonged to a railway company, and was occupied by A.'s wife in return for her services as gate-keeper at a level crossing. A. lived in the house with his wife, and the furniture belonged to him. The

manager of the railway company, in a letter to A.'s solicitor, stated that, with a view to enabling men in his client's position to exercise the franchise, there would be no objection "to let the houses occupied by them to their wives, with power to them to sub-let the houses to their husbands, subject to the conditions contained in the missive, one of which would be a condition that, should they cease at any time to be servants of the company, they and their sub-tenants will immediately vacate the houses." No such missive by the railway company to the wife was in fact granted. The wife, by an agreement, let the house to her husband, and he paid rent to her.

HELD—that A. did not occupy the house as sub-tenant to his wife, and was not entitled to have his name inserted in the roll of voters.

MILNE v. MURRAY, [1907] S. C. 396—Ct. of Sess.

42. *College—Religious Educational Community — Bedroom — Dwelling-house.*—Teachers and lay brothers living in a religious college had each a separate bedroom, but no right to any particular room; the occupants might be ordered at any moment to cease sleeping in the allotted rooms; it was against the rules for the occupants to receive guests or to dine in their rooms; the furniture belonged to the college; and the occupants did not pay the servants who attended to the rooms.

HELD—that the bedroom separately occupied by each of the claimants was not his dwelling-house, and that therefore they were not entitled to the franchise.

LADD v. O'TOOLE, [1904] 2 Ir. R. 389—C. A.

43. *Compulsory Absence during Part of the Qualifying Period—Militia Sergeant—Imprisonment—Confinement to Camp for Military Offence—Electoral Disabilities Removal Act, 1891 (54 Vict. c. 11).*—A sergeant in a militia regiment ordinarily resident in Londonderry, while on training at Bun-crana, was sentenced to be a prisoner at large for 48 hours on a charge of drunkenness. The effect of the sentence was that he was not allowed outside the camp lines during the period.

HELD—that he was not thereby disqualified as an inhabitant occupier in respect of his residence in Londonderry.

O'CONNELL v. HOLLAND, [1900] 2 Ir. R. 448—[C. A.]

44. *Convent — Nuns — Service Franchise—"Office, Service, or Employment"—Representation of the People Act, 1884 (48 Vict. c. 3, s. 3).*—The claimants were nuns residing at a convent in the town of E. Each of them occupied a separate bedroom, and was subject to the control of the Lady Superioress, who could at any time change the occupants from one room to another, or arrange to have more than one occupant of a single

## Occupation Voters—Continued.

room. She could refuse to allow a nun to receive a visitor in her room, demand admission to the room, and require the nuns to give up the keys. The nuns took their meals together in the refectory, and occupied in common other general rooms in the convent: they received no remuneration, and were under no contract of employment. The premises were vested in the Roman Catholic Bishop of Clogher, the parish priest, and the senior curate of E., all for the time being, upon trust, for the benefit of the Roman Catholic inhabitants of E. The convent was governed by rules, subject to the supreme authority of the bishop.

**HELD**—that the nuns were not inhabitant occupiers of separate dwellings within the meaning of sect. 3 of the Representation of the People Act, 1884.

*Semble*, the nuns did not occupy their rooms by virtue of any office, service, or employment.

**BANNON v. HAURAHAN**, [1900] 2 Ir. R. 455—C. A.

45. *Declaration as to Misdescription—Amending Qualification—Jurisdiction of Revising Barrister—Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), s. 24.]—A declaration made by virtue of sect. 24 of the Parliamentary and Municipal Registration Act, 1878, gives the revising barrister power to alter the qualification under which an occupier may be entitled to vote for a borough.

**GOODRICH v. GREAT GRIMSBY** (GRANGE T. C.), [1901] 65 J. P. 758; 17 T. L. R. 34; [1902] 1 K. B. 301; 71 L. J. K. B. 99; 50 W. R. 170; 85 L. T. 583; 1 Smith Reg. 273—Div. Ct.

46. *Description of Qualification as "Dwelling-house Joint"—Sufficiency of Description—Representation of the People Act, 1867* (30 & 31 Vict. c. 102), ss. 3, 6, 27—*Representation of the People Act, 1884* (48 & 49 Vict. c. 3), ss. 2, 5.]—Although by reason of the proviso in sect. 3 of the Representation of the People Act, 1867, the description of the qualification in a claim for the Parliamentary franchise as "dwelling-house joint" is bad as a claim in respect of a household qualification, such description is nevertheless sufficient, and under it the claimant may show that in point of fact he is entitled to the £10 occupation franchise if the premises are of the required value.

**BAGLEY v. BUTCHER**, [1898] 1 Q. B. 67; 67 [L. J. Q. B. 326; 77 L. T. 525; 1 Smith's Reg. Cas. 137; 14 T. L. R. 57; 46 W. R. 129—Div. Ct.

47. *Dwelling-house in Fact Inhabited by Servant with Service Franchise.*]—A farm included two houses within the limits of a burgh, and the farmer claimed to be registered in respect of his occupation of such houses as tenant. The houses were occupied

by two servants of the claimant, and the servants had, under sect. 3 of the Representation of the People Act, 1884, the service franchise in respect of their occupation.

**HELD**—that the claimant was not entitled to be registered, since his servants were, for the purposes of the Representation of the People Acts, to be deemed to be the tenants of the houses.

**JACK v. EDIE**, (1906) 8 F. 329—Ct. of Sess.

48. *Husband and Wife—Wife's House—Tenancy—Representation of the People Act, 1867* (30 & 31 Vict. c. 102), s. 3.]—A man who lives with his wife in her house and who pays rates and maintains the household, is not presumed to be his wife's tenant so as to obtain a qualification for the Parliamentary franchise under sect. 3 (2) of the Representation of the People Act, 1867.

**HALL v. MICHELMORE**, (1901) 65 J. P. 759; 17 [T. L. R. 33, 50 W. R. 172; 86 L. T. 17; 1 Smith Reg. 269—Div. Ct.

49. *Husband Tenant of his Wife.*]—There is nothing in the existence of the marital relation to prevent a man (with whom his wife is living) from being a *bonâ fide* tenant of his wife; and accordingly, if a tenancy is shown to exist, he is entitled to have his name inserted in the occupiers' list of voters.

**Hall v. Michelmores** ([1901] 65 J. P. 759; 50 W. R. 172 (Div. Ct., *supra*)), distinguished.

**PEARCE v. MERRIMAN**, [1904] 1 K. B. 80; 73 [L. J. K. B. 183; 68 J. P. 37; 52 W. R. 141; 89 L. T. 745; 20 T. L. R. 48; 1 Smith Reg. 318; 2 L. G. R. 139—Div. Ct.

50. *Inhabitant Occupier of a Dwelling-house—Lodger—Person Occupying One Room—Landlord Residing in House—Representation of the People Act, 1867* (30 & 31 Vict. c. 102), s. 3—*Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), s. 5.]—Where rooms in a house are let out as separate dwelling-houses, the fact that the landlord resides upon the premises does not of itself make the occupiers of the rooms lodgers. The question whether or not they are lodgers depends upon whether the landlord retains a right of control over the rooms let to them.

The landlord of a house occupied and resided in a set of rooms in the house, and let the rest of the rooms to weekly tenants, each tenant having the exclusive use of the room or rooms let to him and a right to such use of the staircases and passages as was necessary for ingress and egress. Each tenant had a key of the front door. There was also let to the tenants the use in common of the courtyard, w.-c., and washhouse. The cleansing of the passages and staircases was shared in common by those using the same. The house was rated as a whole in the name of the landlord, and he was under a covenant with the owner to keep the premises in repair.

## Occupation Voters—Continued.

The revising barrister found that the landlord had no right of control or dominion over the rooms let or over the parts of the house used in common, his use of and right of control over the parts used in common being identical with those of his tenants; and that he did not reserve to himself or exercise any right of general control or dominion or mastership over the premises.

HELD—that, upon the facts found, the tenant of a room in the house was an inhabitant occupier of a dwelling-house, and not a lodger.

*McLaughlin v. Chambers* ([1896] 2 Ir. R. 497) approved.

*KENT v. FITTALL*, [1906] 1 K. B. 60; 75 L. J. [K. B. 310, 69 J. P. 428, 54 W. R. 225; 94 L. T. 76; 22 T. L. R. 63; 4 L. G. R. 36; 1 Smith Reg. 417—C. A.

51. "Inhabitant Occupier"—or "Lodger"—Resident Landlord—Evidence—*Primâ facie* Proof of Ground of Objection—Rebutting Evidence—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), ss. 3, 4—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), ss. 5, 28 ]—An objection having been raised that a claimant for a vote was not an inhabitant occupier of a dwelling-house, but was a lodger, the revising barrister found (1) that the house, part of which was alleged to be separately occupied as a dwelling, was itself of the description popularly known as an ordinary dwelling-house; (2) that the immediate landlord to whom the claimant paid rent resided in the house; (3) that such landlord was rated for the entire house as a separate tenement; and decided that these facts constituted *primâ facie* proof of the ground of objection. The claimant, by way of rebuttal produced a document signed by himself and his landlord containing a statement to the effect that the landlord had no control over the claimant's rooms, but the revising barrister did not accept this statement as a fact, and held that the document was not sufficient to remove the objection.

HELD—(1) that there was evidence sufficient to justify the conclusion of the revising barrister that the objector had made out a *primâ facie* case within sect. 28 of the Parliamentary and Municipal Registration Act, 1878; and (2) that he was not bound to accept the document produced by way of rebuttal as a sufficient answer to the objection.

*Kent v. Fittall* ([1906] 1 K. B. 60; 75 L. J. K. B. 310; 69 J. P. 428; 54 W. R. 225, 94 L. T. 76; 22 T. L. R. 63; 4 L. G. R. 36; 1 Smith Reg. 417—C. A., No 50, *supra*) distinguished.

Decision of Div. Ct. ([1907] 1 K. B. 126; 76 L. J. K. B. 114; 70 J. P. 532; 95 L. T. 877; 23 T. L. R. 49; 5 L. G. R. 109) affirmed.

*DOUGLAS v. SMITH*, [1907] 2 K. B. 568; 76 L. J. [K. B. 969; 71 J. P. 433; 96 L. T. 826; 23 T. L. R. 612; 5 L. G. R. 1004; 2 Smith Reg. 12—C. A.

52. Inhabitant Occupier as Lodger—Objection—*Primâ facie* Proof—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28 (9), (10).]—The facts (a) that a house, part of which is alleged to be occupied as a separate dwelling, is itself a house of the description properly known as an ordinary dwelling-house; (b) that the landlord or landlady to whom an inmate pays rent resides in the house; and (c) that the landlord or landlady is rated and pays the rates for the whole house as a separate tenement, do not necessarily as a matter of law amount to *primâ facie* proof that an objection to the retention of the name of the inmate on the occupiers' list is well founded, the question whether such *primâ facie* proof has been given being entirely a question of fact for the revising barrister.

*Kent v. Fittall* (No. 50, *supra*) distinguished.

*REX v. BELL*, EX PARTE *KENT*, (1907) 71 J. P. [542; 24 T. L. R. 66—Div. Ct.

53. Manse—Objection—Qualifying Premises Acquired during Qualifying Period—"Promotion to an Office"—Appointment of Wesleyan Minister by the Conference of the Connection—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 33 (1).]—The appellant, a Wesleyan minister, was, in August, 1901, appointed by the Wesleyan Conference to the ministry of the Gloucester circuit in succession to a previous Wesleyan minister, and the appellant in August, 1901, entered as such minister into the occupation of the manse, in the City of Gloucester, vacated by the outgoing minister. The manse, which was vested in trustees, was occupied by each successive minister rent free, but the minister in occupation was personally liable for the rates. The appellant's name was entered in Division III. of the occupiers' list of voters of the city of Gloucester in respect of the said manse as a dwelling-house, and was objected to on the ground that the appellant had not in fact occupied the qualifying premises during the whole of the qualifying period. The appellant contended that he had succeeded to the qualifying property by "promotion to an office"—namely, the ministry of the Gloucester circuit, and that the occupancy and rating of the preceding minister were equivalent to the occupancy and rating of himself within sect. 33, sub-sect. 1, of the Municipal Corporations Act, 1882. Save as aforesaid, no evidence was produced at the Revision Court of the terms of the deed of trust under which the qualifying property (the manse) was held. The revising barrister, on the authority of *Foster v. Mulhall*, 10 Ir. C. L. Rep. 532, held that the appointment to the ministry of the Gloucester circuit was not "promotion to an office" within the section, and accordingly allowed the objection and expunged the appellant's name. The appellant duly

*Occupation Voters—Continued.*

appealed, and the revising barrister, in stating a case, appended to the case as an exhibit the deed of trust under which the qualifying property was held, and added a note that this document was not produced in evidence at the Revision Court.

HELD—that the Court could not regard anything which was not in evidence before the revising barrister at the Revision Court; and that upon the evidence before him there was nothing to show that he had come to a wrong conclusion, and consequently that his decision must be affirmed.

WILLIAMS v. BLAKEWAY (1902), 51 W. R. 127, [67 J. P. 11; 88 L. T. 231; 1 Smith Reg. 204—Div. Ct

54. *Misdescription of Qualifying Property—Mistake in Number of House—Revising Barrister—Amendment—Parliamentary and Municipal Registration Act, 1873 (41 & 42 Vict. c. 26), s. 28, sub-ss. 2, 13.]*—Sub-section 13 of the Parliamentary Registration Act, 1878, applies only to the description of the legal character or nature of the qualification (i.e., the third column of the entry in a list or claim)—not to the description of the qualifying property (i.e., the fourth column).

In a claim, the third column (nature of the qualification) was "houses in succession," and the fourth column (description of the qualifying property) was "202, Gordon Road, and 31, Monk Street." The claim having been objected to, it was proved that the claimant had, in fact, occupied in immediate succession during the qualifying period 202, Gordon Road, and 33 (not 31) Monk Street; and that 31, Monk Street (which was, in fact, occupied by another person), had been inserted in the claim by mistake of No. 33. The revising barrister amended the claim by altering "31," Monk Street, to "33," Monk Street, in the fourth column.

HELD—that the revising barrister had power to make the amendment, as he did not thereby "change the description of the qualification" within the meaning of those words in sub-sect. 13 of sect. 28.

KITCHEN v. JOHNSON, [1899] 1 Q. B. 95; 68 [L. J. Q. B. 11; 63 J. P. 20; 47 W. R. 110, 79 L. T. 422; 15 T. L. R. 35; 1 Smith Reg. 171—Div. Ct.

55. *Objection—Notice of—Omission in Body of Notice—Validity—Parliamentary Registration Act, 1885 (48 & 49 Vict. c. 15), s. 18—Registration Order, 1895, Schedule I, Form 5 (a)]*—Notwithstanding the repeal of section 18 of the Parliamentary Registration Act, 1885, an immaterial deviation—even though intentional—from any form prescribed in the Registration Order, 1895, will not itself invalidate a claim or notice of objection, but if a claim or notice of objec-

tion fail in any substantial respect to give the information required to be given to the person who is to receive it, then it is invalid.

A notice of objection sent by post to a person whose name was entered on the register of ownership electors omitted to give (as prescribed in Form 5 (a), Schedule I., of the Registration Order, 1895), in the body of the notice itself, the place of abode as described in the register of the person objected to, but on the back of the notice of objection there was written, for postal purposes, the name of the person objected to, and his place of abode as described in the register. The omission to give in the body of the notice the place of abode of the party objected to was intentional.

HELD (reversing the revising barrister)—that the notice of objection was not invalid on account of such omission.

LINFORTH v. BUTLER, [1899] 1 Q. B. 116; 68 [L. J. Q. B. 3; 47 W. R. 141; 79 L. T. 498, 15 T. L. R. 34, 1 Smith Reg. 162—Div. Ct.

56. *Part of Parish Added to City of London—Except for Rating Premises—Place for which Occupier Entitled to be Registered—Metropolitan Meat and Poultry Market Act, 1860 (23 & 24 Vict. c. xciii), s. 11—Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 6.]*—The parish of St. Sepulchre was by the Redistribution of Seats Act, 1885, included by name in the Parliamentary Borough of Finsbury; in 1860 the City had by its Market Act acquired a small portion of the parish, subject to the proviso that such portion should continue to be rated and assessed as if it had not been severed from the parish of St. Sepulchre. The appellant occupied a store in the market within the limits of the added area.

HELD—that his qualification was in the City, and that he had been rightly struck off the Finsbury register.

PICKARD v. PRESTON, (1903) 67 J. P. 13, 51 [W. R. 156; 19 T. L. R. 35; 1 Smith Reg. 296; 1 L. G. R. 110—Div. Ct.

57. *Objection—Notice of—Place of Abode of Objector—Mistake—Amendment—Revising Barrister—Parliamentary and Municipal Registration Act, 1873 (41 & 42 Vict. c. 26), s. 28, sub-s. 2—Registration Order, 1895, Schedule III, Form 1.]*—In signing a notice of objection to a name being retained on the occupiers' list of voters in a borough, the objector, instead of stating his place of abode, as required by the Registration Order, 1895, gave the address of a shop within the borough, which was his qualifying property. His place of abode was outside the borough, and he thought he ought to give his address within the borough, and not an address outside it. No one was in any way affected by the mistake.

HELD—that the revising barrister had power to amend the mistake,

## Occupation Voters—Continued.

Judgment of the Queen's Bench Division Court ([1899] 1 Q. B. 102; 68 L. J. Q. B. 79, 47 W. 139; 79 L. T. 447; 15 T. L. R. 36) affirmed.

PRESGOTT v. LEE, [1899] 2 Q. B. 273; 68 [L. J. Q. B. 906; 47 W. R. 690; 81 L. T. 43; 15 T. L. R. 467; 1 Smith Reg. 197—C. A.

58. *Objection — Notice of — Registration Order, 1895, Sched. 2, Form I.*—A notice of objection given to the overseers in the Form I., No. 1, of the Parliamentary and Registration Act, 1878 (41 & 42 Vict. c. 26), sched. 2, satisfies the requirements of the note to such form, that it "should specify the list to which the objection refers," by specifying such list with regard to the kind of franchise, e.g., the list of occupiers, and need not specify the particular ward list under which the name objected to occurs on the list.

Mortlock v. Farrer ((1879), 5 C. P. D. 73, 49 L. J. C. P. 160; 41 L. T. 470) followed.

SAGAR v. CLARE, (1900) 82 L. T. 599; 1 Smith [Reg. 243—Div. Ct.

59. *Occupation of Land without a Building.*—The occupation of land by itself without a building qualifies for the burgh occupation franchise as enacted by sect. 5 of the Representation of the People Act, 1884.

BOGIE v. M'GOWAN, [1907] S. C. 391—Ct. of [Sess.

60. *Schoolmaster Permitted to Reside in House.*—A schoolmaster, who, by the terms of his appointment, is permitted but not required to reside in a house, is entitled to have his name placed in Division I. of the list of voters as a full inhabitant occupier, and not in Division II. as a person entitled under the service franchise as Parliamentary elector only.

Marsh v. Estcourt ((1889) 24 Q. B. D. 147; 59 L. J. Q. B. 100; 54 J. P. 294; 38 W. R. 495—(Div. Ct.) followed.

DOVER v. PROSSER, [1904] 1 K. B. 84; 73 [L. J. K. B. 13; 68 J. P. 37; 52 W. R. 140; 89 L. T. 724; 20 T. L. R. 49; 1 Smith Reg. 313; 2 L. G. R. 156—Div. Ct.

61. *£10 Occupation Franchise—Claim by Two Joint Occupiers—Value of Premises only £20—Third Person Already on Overseers' List, Unobjected to—Representation of the People Acts, 1867 (30 & 31 Vict. c. 102), s. 27, and 1884 (48 Vict. c. 3), s. 5.*—K. and W. claimed occupiers' votes in respect of "offices." The premises consisted of a house of the clear yearly value of £20 only. K. and W. were joint tenants, and they used four rooms and a cellar for business purposes. G. and his wife "occupied" the rest of the house, the wife being employed by K. and W. as caretaker. The overseers had entered G.'s name in Division II. of the list of occupation electors, and it had not been objected to.

HELD—that, in the absence of any finding that G.'s occupation was one by virtue of service only, K. and W. could not sustain their claim.

KIRBY AND ANOTHER v. BARBER, (1906) 70 J. P. [20; 54 W. R. 119; 4 L. G. R. 395; 1 Smith Reg. 403—Div. Ct.

62. *Vicar in Receipt of Pew Rents—Whether an "Occupation"—Parliamentary Franchise—Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 24.*—The vicar of a parish or chapelry, constituted under the Church Buildings Act, who is in receipt of pew rents, is not, by reason of such receipt, in "occupation" of the church, and consequently is entitled to be registered as a county voter in respect of his freehold benefice, notwithstanding sect. 24 of the Reform Act, 1832.

Dictum in Beswick v. Alker ((1872) L. R. 8; C. P. 265; 42 L. J. C. P. 26; 21 W. R. 72; 27 L. T. 422) approved.

WOLFE AND OTHERS v. SURREY COUNTY COUNCIL [(CLERK TO) AND OTHERS; REEVE AND OTHERS v. SURREY COUNTY COUNCIL (CLERK TO) AND OTHERS, [1905] 1 K. B. 439; 74 L. J. K. B. 161; 69 J. P. 22; 53 W. R. 264; 92 L. T. 114; 21 T. L. R. 153; 3 L. G. R. 407; 1 Smith Reg. 378—Div. Ct.

## VII. OWNERSHIP VOTERS.

63. *Owning and Occupying Property in Borough—Property Occupied by a Servant—Right of Owner to be on County Register—Representation of the People Acts, 1832 (2 & 3 Will. 4, c. 45), s. 24; and 1884 (48 & 49 Vict. c. 3), s. 3.*—A claimant owned and occupied a house with grounds attached thereto in a Parliamentary borough, in respect of which he was registered as an occupier in the borough. In the grounds there was a cottage which was inhabited by the claimant's gardener by reason of his service, and the gardener was on Division II. (Service) of the borough register.

HELD—that, although the gardener was as a servant entitled to a vote in respect of the cottage, the legal occupation was still in the claimant, and that, therefore, he was debarred by sect. 24 of the Representation of the People Act, 1832, from being on the county register in respect of his ownership of the cottage.

BROOKS v. BAKER AND OTHERS, [1906] 1 K. B. [11; 75 L. J. K. B. 41; 70 J. P. 24; 54 W. R. 195; 94 L. T. 97; 22 T. L. R. 36; 4 L. G. R. 111; 1 Smith Reg. 465—Div. Ct.

64. *Qualification as Owner of Tithe Rent Charge—Power of Revising Barrister to Alter Description of Qualification—Representation of the People Act, 1864 (48 Vict. c. 3), s. 4 (1).*—The description of a property qualification for the ownership list of



**Ownership Voters—Continued.**

voters as "freehold tithes" or "tithe rent-charge" is insufficient if the owner is not the owner of the whole of the tithe rent-charge of a rectory, vicarage, chapelry, or benefice.

READE v. RICHARDS AND GARDOM, (1899) 63 J. P. [759—Div. Ct.]

65. *Vicar's Freehold in Church—Profits from Pew Rents*—8 Hen. 6, c. 7.]—If the pew rents of a church amounting to more than forty shillings per annum are collected by the churchwardens as agents for the vicar, and received by him for his absolute use and benefit, the vicar is entitled to be placed on the list of Parliamentary voters in respect of his freehold in the church.

VICKERS v. SELWYN, (1904) 68 J. P. 9; 52 W. R. [153; 89 L. T. 747; 1 Smith Reg. 325—Div. Ct.]

**VIII. REVISING BARRISTERS.**

66. *Duty—Revision of Separate Lists of Parochial Electors—Separate Lists of Parochial Ownership Claimants—Separate Lists of Parochial Occupation Claimants—Local Government Act, 1894* (56 & 57 Vict. c. 73), ss. 2 (1), 44.]—The Local Government Act, 1894, gives the revising barrister, in the revision of the voters' list for counties, jurisdiction to revise, and imposes upon him the duty of revising—(1) the separate lists of parochial electors, being the lists of persons entitled to vote as parochial electors only in respect of the ownership of property within the particular parish; (2) the lists of ownership claimants claiming to be entitled to have their names entered in the separate parochial electors' lists in respect of the ownership of property in the particular parish; and (3) the parochial electors' lists of claimants who claim to have their names entered in the separate list of parochial electors in respect of the occupation of property within the particular parish.

REG. v. NASH, [1900] 1 Q. B. 103; 69 L. J. Q. B. [77; 48 W. R. 188; 81 L. T. 489; 64 J. P. 104; 16 T. L. R. 17; 1 Smith Reg. 217—Div. Ct.]

67. *Amendment of List—Inserting Christian Name—Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), ss. 24, 28 (1).]—The name of Herbert Green, which appeared on Division I. of the list of voters for a borough, was duly objected to. It was proved that the person's correct name was Herbert Ambrose Green, and the revising barrister was asked to correct the list by inserting "Ambrose" after "Herbert," under sect. 28, sub-sect. 1, of the Parliamentary and Municipal Registration Act, 1878. No declaration of misdescription had been made. The revising barrister held that an omission was not a

"mistake" within that sub-section, and that therefore he was not bound to correct after objection made, and he declined to do so, and struck the name out of the list.

HELD—that this was a "mistake" within sect. 28, sub-sect. 1, of the Act which the revising barrister had power to correct, and that he ought to have made the correction.

GREEN v. WANKLYN, [1906] 1 K. B. 394; 75 [L. J. K. B. 216; 70 J. P. 19; 54 W. R. 197; 93 L. T. 770; 22 T. L. R. 31; 4 L. G. R. 80, 1 Smith Reg. 410—Div. Ct.]

68. *Mandamus to Revising Barrister to state a Case—Statement by Barrister in reply to Order nisi—Affidavit.*]—A statement made by a revising barrister in answer to a rule nisi calling on him to state a case ought as a rule to be embodied in an affidavit.

REX v. NEPEAN, (1904) 52 W. R. 264—Div. Ct.]

**IX. SERVICE FRANCHISE.**

70. "Boots" in a *Hydropathic Establishment—Representation of the People Act, 1884* (48 & 49 Vict. c. 3), s. 3.]—The "boots" in a hydropathic establishment occupied a separate bedroom therein, from which he could exclude other persons and of which he possessed the key. He took his meals, in common with the other servants, in the servants' dining hall. The manager of the establishment had a right to engage and dismiss the servants and had control over them generally, and he and his family occupied rooms in the establishment, which were entered by a door from the main corridor of the building. The whole of the hydropathic establishment was under one roof.

The above Act enacts, that where a man himself inhabits any dwelling-house by virtue of any office, service or employment, and the dwelling-house is not inhabited by any person under whom such man serves in said office, service or employment he shall be deemed for the purposes of the Act and of the Representation of the People Act to be an inhabitant-occupier of such dwelling-house as a tenant.

HELD—that the "boots" inhabited the same dwelling-house as the manager and that he served under him, and was not entitled to be placed on the Register of Voters as an inhabitant-occupier.

COLQUHOUN v. YOUNG, (1898) 25 R. 101; 35 Sc. [L. R. 110—Reg. App. Ct. (Sc)]

71. *Bedroom Occupied by Coachman—Coachman Obligated to take Meals in House—Representation of the People Act, 1884* (48 & 49 Vict. c. 3), s. 3.]—A coachman occupied a room over his master's stable, no part of the building which contained the stable and room being inhabited by the master. As

**Service Franchise—Continued.**

part of the terms of his service the coachman was required to, and did in fact, take his meals with his master's other servants in the house which was inhabited by his master.

**HELD**—that the coachman inhabited the room as a dwelling-house by virtue of his service within sect. 3 of the Representation of the People Act, 1884, so as to entitle him to be on Division 2 of the list of voters.

*Stribling v. Halse* ((1886) 16 Q. B. D. 246; 55 L. J. Q. B. 15; 49 J. P. 727; 54 L. T. 268—Div. Ct.) followed.

*LASKEY v. MICHELMORE*, (1907) 71 J. P. 559; 24 [T. L. R. 61—Div. Ct.

**72. Compulsory Absence on Duty—Representation of the People Act, 1884 (48 & 49 Vict. c. 3), s. 3—Electoral Disabilities Removal Act, 1891 (54 & 55 Vict. c. 11), s. 2.]**—A break of inhabitancy by a person legally compelled to leave home for a period disqualifies for the service franchise, as it would do for the dwelling-house franchise. Therefore, a servant who inhabits a dwelling-house by virtue of his service, but who is compulsorily absent from the house with his master for more than four months during the qualifying period, is not entitled to be on Division 2 of the list of electors, though he is at liberty to leave his wife and family at the house during his absence with his master.

*LARCOMBE v. SIMEY*, [1907] 1 K. B. 139, 76 L. J. [K. B. 107, 71 J. P. 13; 95 L. T. 874; 23 T. L. R. 51; 2 Smith Reg. 1; 5 L. G. R. 17—Div. Ct.

**73. Manager of Public-house—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28 (15).]**—A service occupier is not entitled to the municipal franchise; and, although a servant may occupy as tenant, yet where he is required to occupy in the performance of his contract of service he ought not to be registered in Division 1 of the Occupiers' List as entitled both to the parliamentary and municipal franchise, but can only be registered in Division 2 as entitled to the parliamentary franchise only.

*KENT v. FRASER*, (1898) 61 J. P. 359; 1 Smith's [Reg. Cas. 127; 13 T. L. R. 417—Div. Ct.

**74. Separate Bedroom—Dwelling-house.]**—The claimant was in the employment of a drapery company, being paid a yearly salary, boarded by the company, and having a bedroom so long as he remained in their service, the service being determinable on notice. There was a bolt inside to fasten the door of the bedroom, but the claimant had not the key. The manager could change an employee from one bedroom to another if necessary. There were rules regulating the occupation of bedrooms, e.g., that the claimant could not leave his business in the shop to go there without permission, and that on Saturday the bedrooms were closed up to 2 p.m. for cleaning.

There was no printed rule preventing an assistant being in his bedroom between 11 a.m. and 1 p.m. on Sunday, but there was an understanding to that effect, and if an employee violated this understanding the superintendent would consider it his duty to correct him.

**HELD**—that the claimant was not entitled to the franchise.

*Stribling v. Halse* ((1887) 16 Q. B. D. 246; 55 L. J. Q. B. 15; 49 J. P. 727; 54 L. T. 268—(Div. Ct.)) discussed.

*M'QUADE v. CHARLTON*, [1904] 2 Ir. R. 383—[C. A.

**75. Shop Assistants Living in—Part of House Separately Occupied as a Dwelling.]**—Several claimants were in the employment of P., who carried on an extensive drapery business. Each of them had a yearly salary and board, a room to himself, and the sole control over the room, with a key thereof, and a latchkey for the outside door. They had to reside in the rooms allotted to them, but they would not be changed. P. did not reside on the premises.

**HELD** (Holmes, L.J., dissenting)—that there was evidence to support the finding that the employees were inhabitant-occupiers, and, as such, entitled to the service franchise.

*M'DAID v. BALMER*, [1907] 2 Ir. R. 345—C. A.

**X. MISCELLANEOUS.**

**76. Borough Auditor—Illegal Practices—Relief—Ignorance of Law—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), ss. 5, 20.]**—A candidate for the office of borough auditor, in ignorance of the fact that he was prohibited from incurring any expense in furthering his candidature, sent out postcards soliciting support at the election.

**HELD**—that his application for relief under sect. 20 of Municipal Elections (Corrupt and Illegal Practices) Act, 1884, ought to be granted.

*EX PARTE GALE*, (1905) 69 J. P. 281; 3 L. G. R. [421—Div. Ct.

**77. Borough Auditor—Illegal Practices—Relief—When Granted—Onus of Proof on Applicant—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 62 and Part IV.—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), ss. 5, 7, 20.]**—At an election of elective auditors for a borough, of the three candidates, S. secured 143 votes, T. 130, and W., the unsuccessful candidate, 129. Before the election T. incurred the following expenses: 6s. for the insertion of a notice inviting votes in a local newspaper, 5s. for printing cards for issue to the electors, 2s. 6d. for a copy of the burgh roll, and 8d. for stamps. S. incurred the expense of 3s. 6d. for issuing an address in the form of a bill. It appeared that T. and S. had incurred these

**Miscellaneous—Continued.**

expenses through inadvertence, and, on learning that they had been guilty of illegal practices, took steps to stop the further issue of the cards and bills. They applied for relief.

**HELD**—that T. had not discharged the *onus* that was upon him of showing it was just that he should obtain relief within the meaning of sect. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, as in considering what was “just” regard must be had to the position of the other candidates; it was not clear that T. did not obtain one more vote than W. by the expenditure of some part of the 14s. 2d. Relief was granted to S.

**RE DROITWICH BOROUGH ELECTION OF AUDITORS, [EX PARTE TOLLEY AND ANOTHER, (1907) 71 J. P. 236; 23 T. L. R. 372; 5 L. G. R. 473—Div. Ct.]**

**78. Borough, a County in Itself, Added to Another Borough—Right of Freeholders to Vote—Representation of the People Act, 1832 (2 & 3 Will. 4 c. 45), s. 2, Sched. E.—Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), ss. 2, 7, 11, Schedules I. and V.]**—After the passing of the Reform Act, 1832, and up to the passing of the Redistribution of Seats Act, 1885, the freeholders in the borough of Haverfordwest, a county in itself, were entitled to their vote by virtue of their freehold. Since the last-mentioned Act, Haverfordwest, both for borough purposes and for county purposes, became part, on the one hand, of the borough of Pembroke, and on the other hand of the county of Pembroke, for the purpose of a person having a vote. The right of freeholders to be registered as voters in Haverfordwest has therefore been taken away by the Act of 1885.

**JAMES v. IYEMEY, [1901] 1 Q. B. 193; 70 [L. J. Q. B. 263; 64 J. P. 791; 83 L. T. 587; 17 T. L. R. 70, 1 Smith Reg. 249—Div. Ct.]**

**79. Harbour Commissioners—Aggregation of Rateable Properties.]**—A person who is rated in respect of some premises at £19 and of other premises at £6, both being in his own occupation, is rated as “the occupier of premises . . . on a net annual value . . . of not less than £20.”

**REX v. STEEN, [1905] 2 Ir. R. 574—K. B. D.]**

**80. Mayor—Election of—Disqualified Person Voting—Vote of Outgoing Mayor as Chairman—Contingent Casting Vote of Chairman—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 42, sub-s. 1; s. 61, sub-s. 4; s. 87; sub-s. 1 (d), s. 102—Local Government Board's Provisional Orders Confirmation Act, 1900 (63 & 64 Vict. c. clxxxiii.), Art. LX.]**—At a municipal election the respondent was declared to be elected to the office of mayor of the city of Glou-

cester. Both the petitioner against the return of the respondent and the respondent were candidates for the office. At the time of the election, which took place on the 9th November, 1900, N.'s vote was challenged, and a petition had already been presented against his election as councillor. T., who had been elected mayor on 9th November, 1899, presided as chairman, and voted thereat for the respondent in the first instance, and counted the vote so given as being a good vote for the respondent. There was an equality of valid votes if N.'s vote was bad and had to be struck off, if not, if N.'s vote was good, there was no equality of valid votes. In these circumstances T. gave his casting vote in case there turned out to be an equality of votes. The following questions arose.—(1) Was T., as mayor, entitled to vote in the first instance? (2) Was he, under the circumstances, entitled to give a casting vote? Upon hearing the election petition, N. was held to be disqualified by reason of a contract with the corporation from standing as a candidate for or being elected a member of the town council.

**HELD**—(1) that N. was not able to give a valid vote on the election of mayor, and therefore his vote must be disallowed (*Nell v. Longbottom* ([1894] 1 Q. B. 767; 63 L. J. Q. B. 390; 70 L. T. 499; 10 R. 193—Div. Ct.) followed), (2) that the provisional order of Local Government Board enlarging the area of the city of Gloucester did not deprive T. of his power under the Municipal Corporations Act, 1882, of voting at the election of mayor, the original vote was therefore good; (3) that the contingent casting vote of T. was valid; and (4) that the respondent was duly elected.

By Channell, J., the reasoning upon which *Nell v. Longbottom* [*supra*] proceeded is inconclusive.

**BLAND v. BUCHANAN, [1901] 2 K. B. 75; 70 [L. J. K. B. 466, 65 J. P. 404; 49 W. R. 601, 84 L. T. 390; 17 T. L. R. 348—Div. Ct.]**

**81. Nomination Paper—Finality of Returning Officer's Decision on the Validity of a Nomination Paper.]**—At an election of rural district councillors the nomination paper of one of the candidates was signed by the proposer and seconder, with the name, place of abode, description and qualification of the candidate left in blank, and these particulars the candidate himself subsequently, but before the nomination paper was delivered to the returning officer, filled in.

**HELD**—that the nomination paper was not thereby rendered invalid, and that the returning officer's decision as to the validity of a nomination paper was final under rule 7 (2) of the Rural District Councillors Election, &c., &c.

**COX v. DAVIES, [1898] 2 Q. B. 202; 67 L. J. Q. B. [925; 14 T. L. R. 427—Div. Ct.]**

**Miscellaneous—Continued.**

**82. Registration Appeal—Costs—Clerk to County Council Nominated as Respondent—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) s. 38.]**—Where a revising barrister nominates the clerk to a county council as respondent to a registration appeal, costs may be given against such respondent even if he does not appear.

**LARCOMBE v. SIMEY, [1907] 1 K. B. 139; 95 L. T. [874; 5 L. G. R. 17—Div. Ct.**

**83. Registration—Duplicate Entry—Selection—Revising Barrister—Appeal—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 14.]**—Section 28, sub-section 14, of the Parliamentary and Municipal Registration Act, 1878, enacts that, "where the name of any person appears to be entered more than once as a parliamentary voter on the lists of voters, . . . any such person may, by notice in writing delivered to the revising barrister at the opening of his first revision court, select the entry to be retained for voting."

**HELD**—that this power of selection did not exist where one of two entries was an entry appearing in the overseers' list of voters, and the other was only an entry appearing in the list of claims—even although the claim was in the course of revision—because the duplicate entries must exist in the list of voters at the time when the notice of selection is required to be given, viz., at the opening of the first revision court.

**HELD ALSO**—that no appeal lies from a decision of a revising barrister as to the validity or invalidity of a notice of selection of entry given by a voter.

**Reg. v. The Revising Barrister of Liverpool ([1895], 1 Q. B. 155; 64 L. J. Q. B. 131; 43 W. R. 220; 71 L. T. 636; 1 Fox, 375; 15 R. 123—Div. Ct.)** followed.

**JONES v. MUNRO, [1899] 1 Q. B. 109; 68 L. J. [Q. B. 28; 47 W. R. 220; 79 L. T. 28; 1 Smith Reg. 151—Div. Ct.**

**84. Registration—"Other Building"—"House, Warehouse, Counting House, Shop, other Building"—Ejusdem generis Rule—Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 27—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 31.]**—In construing the words "other building" which occur in connection with the words "house, warehouse, counting-house, shop, or other building" in sect. 27 of the Representation of the People Act, 1832, sect. 31 of the Municipal Corporations Act, 1882, and elsewhere, the *ejusdem generis* rule is to be applied, and the words must be deemed to include only buildings for residential or for commercial (including agricultural) purposes. They do not include a gas-meter house.

**DUNCAN v. JACKSON, (1906) 8 F. 323—Ct. of Sess.**

**85 Town Council—Member for one Ward Elected for Another—Effect.]—A., a coun-**

cillor for X ward, was elected to fill a vacancy as councillor for L ward. He formally accepted office, and at a later date resigned formally his seat as councillor for X ward.

**HELD**—that his election in L ward was valid. *Quære*, whether his old seat became vacant upon his acceptance of office, or only upon his resignation.

**MARWICK v. GIBSON, (1903) 5 F 154—Ct. of Sess.**

## **ELECTRIC LIGHTING, TRACTION, AND POWER.**

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*And see* HIGHWAYS, Nos. 40, 181.

### **I. CONTRACT FOR SUPPLY.**

**1. Condition as to Observing Insurance Company's Rules—Tubes to be Earthed except when not "Desirable"—Construction.]**—A contract for the installation of electric light in a building to be used for the purposes of public baths and washhouses provided (*inter alia*) that: "The whole of the work is to be carried out in accordance with the existing rules as framed by the Phoenix Fire Office." By rule 5: "When a system of metal tubes is employed, the metal tubes should be earthed except in those cases where earthing would not be desirable." A system of metal tubes was employed in the work, and in consequence of such tubes not being earthed a bather received an electric shock which caused his death. The local authority which owned the baths paid damages to his relatives in respect of his death. In arbitration proceedings in which the local authority sought to recover the sums so paid by them from the contractors, the arbitrator found that earthing the tubes would not have been desirable so far as risk of fire was concerned, but would in fact have been desirable so far as risk of accident to bathers was concerned.

**HELD**—that inasmuch as the insurance company's rules were framed for the prevention of fire, and earthing was not desirable for that purpose, there had been no breach of contract, and that, therefore, the contractors were not liable.

**IN RE FULHAM BOROUGH COUNCIL AND NATIONAL [ELECTRIC CONSTRUCTION CO., LD., (1906) 70 J. P. 55; 4 L. G. R. 115—Bigham, J.**

**2. Default in Payment by Consumer—Cutting off Supply—New Occupier—Receiver Appointed by Court—Injunction—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), ss. 19, 21—Electric Lighting Orders Confirmation (No. 2) Act, 1889 (52 & 53 Vict. c. clxxviii.), Sched. (London Electric Supply),**

**Contract for Supply—Continued.**

s. 47.]—Sect. 19 of Electric Lighting Act, 1882, contemplates an arrangement or a contract between the occupier and the undertakers, and the words "entitled to a supply" mean entitled to a supply under and by virtue of a contract made between the occupier and the undertakers.

The plaintiff was the receiver in an action by debenture-holders against a hotel company, and the order appointing him directed the company to deliver up possession of the hotel to him, and he took possession accordingly. Electric current was supplied to the hotel by the defendant corporation under an agreement which provided that the defendants "shall be at liberty to discontinue the supply of energy if and so long as the consumer shall make default in making payment in accordance with the agreement hereinbefore contained." At this time there was due from the company to the corporation a sum of £437 2s. for electric current supplied by them to the hotel. The receiver made no written application for the supply of electric current. The corporation threatened to cut off the supply of current unless the £437 2s. was paid.

**HELD**—that if the occupation by the hotel company had come to an end and the plaintiff was a new occupier, the plaintiff was not entitled to any supply of electric current unless and until he had made a new contract with the defendant corporation; that if the old contract with the hotel company remained in force, and the supply of current was to continue under the old contract, the defendant corporation was entitled to cut off the current because of the default of the hotel company in payment for the past supply under their contract with the defendant corporation; and that in neither view of the case ought the defendants to be restrained from cutting off the supply though their object might be to obtain a collateral advantage. Decision of Kekewich, J., reversed.

**HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION**, [1902] 1 Ch 411; 71 L. J. Ch. 313; 50 W. R. 420; 86 L. T. 166; 18 T. L. R. 296—C. A.

3. *Failure to Supply—Penalty Clause—Action for Damages—Right to Maintain—Loughborough Corporation Act, 1899* (62 & 63 Vict. c. xcvi.), s. 62.]—The defendants were empowered by the Loughborough Corporation Act, 1899, to supply electrical energy. The Act imposed upon the defendants an obligation to supply energy to owners and occupiers of premises within the area of supply upon being required so to do, and sect. 62 provided that "whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy . . . they shall be liable . . . to a penalty . . ." Penalties were recoverable summarily in manner provided by the Summary Jurisdiction Acts.

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Sect 65 of the Act empowered the defendants to make agreements as to the price to be charged for energy. Under the power conferred by that section they entered into an agreement to supply energy to the plaintiffs for a certain period at certain prices. The defendant failed to supply such energy, and the plaintiffs thereupon brought an action in the High Court to recover damages for breach of the agreement.

**HELD**—that the penalty section did not debar the plaintiffs from bringing an action for damages for breach of the agreement.

Decision of Bigham, J. (71 J. P. 10; 5 L. G. R. 269) reversed.

**HERBERT MORRIS AND BASTERT, LD. v. LOUGHBOROUGH CORPORATION**, (1907) 71 J. P. 521—C. A.

4. *Negative Stipulation—Undue Preference—Electric Lighting Act, 1882* (45 & 46 Vict. c. 56), ss. 19, 20.]—An electric lighting company was, under its provisional orders, empowered to supply a district with electric energy. A customer agreed with the company to take a supply of energy for five years, not mentioning the amount. By the agreement the charge was to be 4½d. per Board of Trade unit. The company were at the same time supplying another customer with energy for two years at 4d. per Board of Trade unit. The circumstances of the two cases were not altogether similar.

**HELD**—(1) that the Court would imply a negative stipulation and grant an injunction against the customer taking his energy elsewhere; (2) that the supply mentioned secondly was not an undue preference; (3) that the contract was authorised by sects 19 and 20 of the Electric Lighting Act, 1882.

**METROPOLITAN ELECTRIC SUPPLY CO., LD. v. GINDER**, [1901] 2 Ch. 799; 70 L. J. Ch. 862; 65 J. P. 519; 49 W. R. 508; 84 L. T. 818; 17 T. L. R. 435—Buckley, J.

5. *Option to Purchase after Five Years—Minimum Quarterly Rent—No Current used for one Quarter—Liability to Pay Rent for that Quarter*.]—An agreement was entered into in 1898 between the plaintiffs and the defendant for electric lighting installation. Clause 7 of the agreement provided as follows: "The customer shall until purchase as aforesaid pay quarterly to the Supply Company for the use of the installation, ½d. per Board of Trade unit for every unit of electrical energy supplied to the said premises, and the minimum payment in any year shall be 1s. for each eight-candle power lamp or its equivalent installed." During the quarter from Midsummer to Michaelmas, 1900, the defendant did not use any electricity supplied by the plaintiffs.

**HELD**—that the installation was put in on the terms that the customer should have the right to purchase the installation after five years, and during that five years the cus-

# Contract for Supply—Continued.

tomer should be liable to pay a minimum rent whether the current was *de facto* used or not.

LONDON ELECTRIC SUPPLY CORPORATION, LD., v. [PRIDDIS, (1902) 13 T. L. R. 64—Div. Ct.

## II. GENERALLY.

6. *Electric Wires—Overhead Wires Across Street—Building Contractor bringing Derrick in Contact—Injury to Passenger—Statutory Powers.*—A lighting company was authorised by statute to enter upon and construct under or over the streets and public highways of a town all such pipes, conduits, and other constructions as might be necessary for the purposes of its business, all such work to be performed under the directions of the municipality, provided that the company should be responsible for all damages which it might occasion. The company erected overhead wires which were not insulated or protected by guard wires, and a building contractor, while engaged in building operations, brought a derrick in contact with the overhead wires, with the result that a current of electricity was diverted to the street and killed one of his workmen. In an action by the widow to recover damages owing to the company's negligence, first, in having overhead and underground wires; and secondly, in not having them insulated or guard wires put round them, the jury found for the plaintiff.

HELD—that, as the statute authorised overhead just as much as underground wires, it was not negligence to have them overhead, and that the evidence did not show that insulating the wires or putting guard wires round them would have been an efficient remedy.

DUMPHY v. THE MONTREAL LIGHT, HEAT, AND [POWER Co., [1907] A. C. 454; 76 L. J. P. C 71, 97 L. T. 499; 23 T. L. R. 770—P. C

7. *Electric Inspector—Reasonable Expenses—Electric Lighting Orders Confirmation (No. 15) Act, 1890 (53 & 54 Vict. c. cccxxxix), s. 47.*—By sect. 47 of the Electric Lighting Orders Confirmation (No. 15) Act, 1890, it is enacted that, "Save as otherwise provided by this order or by any regulation under this order, all fees and reasonable expenses of an electric inspector . . . shall, in the absence of any agreement to the contrary between the undertakers and the local authority, be paid by the undertakers. Provided, that where the report of an electric inspector, or the decision of the Board of Trade shows that any consumer was guilty of any default or negligence such fees and expenses shall . . . be paid by such consumer or consumers as the Court or Board having regard to such report or decision shall direct."

HELD—that "reasonable expenses of an electric inspector" here meant expenses

specifically incurred by the electric inspector in making tests and inspections, and did not include the salary appointed to the inspector by the local authority under sect. 36, or the general expenses of his laboratory and staff.

CRAWFORD v. CITY OF LONDON ELECTRIC LIGHTING Co., LD., (1898) 67 L. J. Q. B. 942; 78 L. T. 841; 47 W. R. 45—Div. Ct.

8. *Land Acquired by Local Authority for Generating Station—Use thereof for Refuse Destructor—Ultra vires—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 10—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Sch. cl. 2 and 8—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175.*—Land acquired by a local authority under the Electric Lighting Acts for the purpose of electric lighting cannot be used by them for any other purpose in the absence of leave specially given by some Act of Parliament.

Attorney-General v. Hanwell Urban District Council ([1900] 2 Ch. 377; 69 L. J. Ch. 626; 48 W. R. 690; 82 L. T. 778—C. A., *see* LOCAL GOVERNMENT, 83), and Attorney-General v. Teddington Urban District Council ([1898] 1 Ch. 66; 67 L. J. Ch. 23; 61 J. P. 825; 46 W. R. 88; 77 L. T. 426—Romer, J., *see* SEWERS, 37) applied.

Decision of Farwell, J. ([1905] 2 Ch. 441; 74 L. J. Ch. 716; 69 J. P. 459; 54 W. R. 61; 21 T. L. R. 770; 3 L. G. R. 1,259) affirmed.

ATTORNEY-GENERAL v. PONTYPRIDD URBAN [DISTRICT COUNCIL, [1906] 2 Ch. 257; 75 L. J. Ch. 578; 70 J. P. 394; 95 L. T. 224; 22 T. L. R. 576; 4 L. G. R. 791—C. A.

9. *Laying Electric Light Near Gas Mains—Arbitration—Award of Compensation—Summary Proceedings for Penalty—Limitation of Time—Conviction—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Sch. s. 18.*—By the Electric Lighting (Clauses) Act, 1899, Sch. s. 18, an obligation is imposed on the undertakers who lay new electric lines (other than service lines) near the mains of any gas company to conform with the reasonable requirements of the gas company for protecting their mains from injury and for securing access thereto, and repair and damage done thereto. Any question or difference arising under the section is to be determined by arbitration. If any default is made by the undertakers in complying with any requirements of the section, they shall make full compensation to the gas company for any loss or damage incurred by reason thereof, and in addition thereto they shall be liable for each default to a penalty not exceeding £10 and to a daily penalty not exceeding £5. By sect. 1 the expression "daily penalty" means a penalty for each day on which any offence continued after conviction therefor.

In October, 1903, the respondents, after addressed to the appellants, who were in the streets of a town electric lines other than service lines, complained that such

**Gener. lly—Continued.**

lines were being laid in a manner injurious to the respondents' gas mains, and required the lines to be laid at a greater distance from such mains. In further correspondence the respondents specified the requirements they considered necessary for the protection of their gas mains, but the appellants disputed the reasonableness of the respondents' requirements, and did not at any time comply with them.

Shortly after November 2nd, 1903, the differences which had arisen between the parties were referred to arbitration, and on February 12th, 1904, the arbitrator found that the appellants had not complied with the requirements of the respondents, and awarded to the latter a sum as full compensation for the loss and injury they had thereby sustained. On April 29th, 1904, the respondents wrote to the appellants, pointing out that the appellants had taken no steps to comply with the requirements of the respondents, and threatening to take proceedings unless an undertaking was given to comply with such requirements. On May 31st, 1904, a complaint was laid on behalf of the respondents, alleging that on and since October 2nd, 1903, the appellants had made default in complying with certain requirements of sect. 18; that they had laid their electric lines too near the respondents' mains, and they did not and had not conformed with the respondents' requirements for the protection from injury of the respondents' mains, and for securing access thereto. The justices convicted the appellants, and adjudged that they should forfeit and pay the sum of £1, and a further sum of £1 for every day during default.

**HELD**—(1) that the complaint sufficiently alleged an offence within the limit of the six months provided by sect. 11 of the Summary Jurisdiction Act, 1848, and that the facts did not show a completed offence before the period of limitation began to run.

(2) that the conviction so far as it imposed the daily penalties was bad, but that such part of the conviction was separable from the other part, which remained good.

(3) that the award of the arbitrator was no bar to the proceedings.

**CHEPSTOW ELECTRIC LIGHT CO., LD. v. CHEPSTOW GAS CO., LD.**, [1905] 1 K. B. 198; 74 L. J. K. B. 28; 69 J. P. 72; 92 L. T. 27; 21 T. L. R. 35; 3 L. G. R. 49—Div. Ct.

10. *Leakage — Explosion — Damages to Premises—Liability of Undertakers—Electric Lighting Orders Confirmation (No. 11) Act, 1890 (53 & 54 Vict. c. cxcvii.), s. 70.*—The defendants were, under a provisional order confirmed by statute, made the undertakers for the supply of electric energy for lighting purposes in the City of Manchester, and, as such, were empowered to lay down electric mains under the streets, and were bound to give a supply to persons requiring it. Clause 70 of the provisional order provided that "nothing in this order shall exonerate the

undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." A leakage of electricity occurred in one of the mains which fused the wire, and the fusing of the wire caused the bitumen in which the mains were laid to be volatilized, and large quantities of inflammable gas to be generated, which caused an explosion and set fire to the plaintiffs' premises.

**HELD**—that, apart from any question of negligence, this was a nuisance for which the defendants were liable to the plaintiffs, in consequence of Clause 70 of their order.

**MIDWOOD & CO., LD. v. MANCHESTER CORPORATION** [1905] 2 K. B. 597; 74 L. J. K. B. 884; 69 J. P. 348; 54 W. R. 37; 93 L. T. 525; 21 T. L. R. 667; 3 L. G. R. 1136—C. A.

11. *Limited Company—Statutory Authority to Supply Electrical Energy—Statutory Area—Limit of Powers—Metropolitan Electric Lighting Act, 1889 (52 & 53 Vict. c. cxvii.), ss. 3, 5—Metropolitan Electric Supply Company Act, 1898 (61 & 62 Vict. c. ccxxxv.), ss. 2, 16.*—A limited liability company was authorised by statute to supply electrical energy within certain areas only, and also by a later statute to erect a station for generating electric current or electrical energy at a place outside those areas for the purpose of transmitting such current or energy therefrom to certain distributing stations within those areas, and for the purpose of supplying such current or energy within the same areas.

**HELD**—that the company, though incorporated under the Companies Acts with unrestricted powers of producing and supplying electricity, was restricted by the special Acts to the supply of electricity within the special areas.

**Decision of Farwell, J.**, [1905] 1 Ch. 24; 74 L. J. Ch. 145; 69 J. P. 95; 53 W. R. 198; 91 L. T. 768; 21 T. L. R. 10; 3 L. G. R. 77—affirmed.

**ATTORNEY-GENERAL v. METROPOLITAN ELECTRIC SUPPLY CO., LD.** [1905] 1 Ch. 757; 74 L. J. Ch. 384; 69 J. P. 169; 53 W. R. 418; 92 L. T. 544; 21 T. L. R. 355; 3 L. G. R. 625—C. A.

12. *Provisional Order—Agreement with Company—No Consent of Board of Trade—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 11.*—A corporation obtained a provisional order from the Board of Trade authorising them to supply electricity within their district. They subsequently entered into an agreement with a company to carry out all the necessary works for, and to supply electricity to carry on the business, and to indemnify the corporation against all expenses, but the agreement provided that nothing in the agreement was to be deemed to transfer to the company any powers which the corporation were forbidden, by sect. 11 of the Act of 1882, to transfer without the consent of the Board of Trade. Such consent

**Generally—Continued.**

was not obtained. The company failed to carry out the contract, and an action for damages was brought against them for the breach of it.

HELD—that upon its true construction the agreement was one prohibited by the Act as being a transfer of the corporation's duties and liabilities, and could not be enforced.

SUDBURY CORPORATION *v.* EMPIRE ELECTRIC LIGHT [AND POWER Co., LD., [1905] 2 Ch. 104; 74 L. J. Ch. 442; 69 J. P. 321; 53 W. R. 684; 3 L. G. R. 822; 93 L. T. 630—Warrington, J.

13 *Provisional Order—Transfer of Powers—Approval by Board of Trade—Collateral Agreement as to Dust Destructor—Ultra vires—Lambeth Electric Lighting Order, 1892, s. 62*—A local authority having power under an Electric Lighting Order to transfer their powers under the order and their undertaking constructed thereunder, subject to the approval by the Board of Trade of the terms of the transfer, and being minded to exercise their power of transfer, sought to embody in the deed of transfer certain terms relating to the erection by the transferees of a dust destructor and the disposal by them of the refuse in the district of the local authority. The Board of Trade declined to allow these terms to be inserted in the deed of transfer, and they were accordingly struck out and the deed approved without them. Thereupon the local authority and the transferees, with the knowledge of the Board of Trade, entered into a collateral agreement (of even date with the deed of transfer) embodying these terms, and the execution of this agreement was made a condition of the transfer.

HELD—that the collateral agreement was not *ultra vires* on the ground that it had not received the approval of the Board of Trade.

Decision of Bigham, J. (70 J. P. 27; 22 T. L. R. 78; 4 L. G. R. 457) reversed.

LAMBETH BOROUGH COUNCIL *v.* SOUTH LONDON [ELECTRIC SUPPLY CORPORATION, LD., (1907) 71 J. P. 233; 96 L. T. 440, 23 T. L. R. 347; 5 L. G. R. 526—C. A.

14. *Provisional Order—Transfer of Powers—Agreement by Transferees to Perform Obligations—Neglect—Specific Performance*—The plaintiff Council obtained a Provisional Order for supplying electrical energy within their district, with liberty to transfer their powers, duties and liabilities thereunder. The Provisional Order specified remedies for non-compliance with the provisions thereof. The powers, duties and liabilities were transferred to the defendants by an agreement by which the defendants undertook to perform all the obligations imposed upon them by the said agreement.

The defendants neglected to supply electrical power within the said district, or to execute any works under the said Provisional Order.

HELD—that the plaintiffs were entitled to specific performance of the obligations imposed upon the defendants under the agreement, and were not confined to the remedies specified in the Provisional Order.

AUDENSHAW URBAN DISTRICT COUNCIL *v.* MANCHESTER CORPORATION, (1907) 71 J. P. 343—Lancaster Chancery Court.

15. *Purchase of Undertaking by Local Authority—Statutes—Construction—Annuity*—The defendant company were authorised to carry on an electric undertaking in Sheffield by a Provisional Order under the Electric Lighting Acts confirmed by the Electric Lighting Orders Confirmation Act, 1892, which received the Royal Assent on June 27th, 1892. The order gave the corporation the option of purchasing the undertaking within forty-two years "upon the terms of issuing or transferring to the undertakers such an amount of Sheffield Corporation stock as will produce by the interest or dividends thereon an annuity of 5 per cent. per annum upon the sum properly expended by the undertakers upon the undertaking, and chargeable to the capital account." An additional sum was to be paid if the option was exercised within ten years. Under the Sheffield Corporation Acts, 1883 and 1888, the corporation had power to issue irredeemable or redeemable stock, but by a Provisional Order under the Public Health Act, confirmed by an Act which received the Royal Assent on June 27th, 1892, the power to issue irredeemable stock was taken away. On the corporation giving notice to purchase, the company refused to sell unless irredeemable stock could be issued. The corporation sued for specific performance.

HELD—that the annuity mentioned in the option was a perpetual annuity, and that the corporation had no power to issue irredeemable stock.

SHEFFIELD CORPORATION *v.* SHEFFIELD ELECTRIC [LIGHT Co., [1898] 1 Ch. 203; 62 J. P. 87; 67 L. J. Ch. 113, 77 L. T. 616; 46 W. R. 485—North, J.

**EMBEZZLEMENT.**

See CRIMINAL LAW AND PROCEDURE.

**EMBLEMENTS.**

See LANDLORD AND TENANT; REAL PROPERTY.

**EMIGRATION.**

See SHIPPING AND NAVIGATION.



**EMPLOYER'S LIABILITY.***See* MASTER AND SERVANT.**ENDOWMENT.***See* CHARITIES.**EQUITABLE ASSIGNMENT.***See* CHOSER IN ACTION; MORTGAGES.**EQUITY.**

- I. UNCONSCIONABLE BARGAINS . . . 1161  
 II. UNDUE INFLUENCE . . . 1162

**I. UNCONSCIONABLE BARGAINS.***And see* MONEY AND MONEYLENDERS.

1. *Expectant Heir—Reversionary Interest—Reversioner of Full Age—Unfair Dealing—Sales of Reversions Act, 1867* (31 & 32 Vict. c. 4).—The plaintiff brought an action to set aside an indenture on the ground that it was an unconscionable bargain. He was an expectant heir, aged thirty, and was entitled, on the death of his mother, aged seventy-two, to the share of an estate whose value was a good £3,000. He got £300. He could redeem in two months for £600. If he did not redeem, £1,000 was to be paid to the defendant at the plaintiff's mother's death.

**HELD**—that the transaction was unfair, and did not come within the Sales of Reversions Act, 1867, and must be set aside; and that the plaintiff must repay the £300 with interest at 5 per cent.

Decision of Farwell, J. ((1899) 82 L. T. 143), affirmed.

**BRENCHEY v. HIGGINS**, (1901) 70 L. J. Ch. 788; [83 L. T. 751—C. A.]

2. *Expectant Heir—Onus on Plaintiff to Show that Transaction was Just, Fair, and Reasonable.*—The plaintiff induced the defendant, who was 28 years of age and in embarrassed circumstances, with small present income, but entitled under the will of his late father to a sum of not less than £30,000 on attaining the age of 30, to sign a note in consideration of a cheque for £300, from which commission was deducted. £200 interest was to be paid for this loan for a year.

**HELD**—that this was a case of an advance not secured by any charge on the expectancy, but of an advance on the credit of the expectancy; that the plaintiff had failed to show that there were circumstances which

made such a transaction just, fair, and reasonable; that the plaintiff was only entitled to recover the sum advanced with interest at 5 per cent; and that as more than that had already been paid him, the defendant was entitled to be repaid any sum beyond this paid by him, with interest at the same rate

**SAMUEL v. NICHOL**, (1902) 18 T. L. R. 513—[Wright, J.]

**II. UNDUE INFLUENCE.***And see* CONTRACTS.

3. *Beneficiaries under a Settlement—Pressure by Relatives—Beneficiaries just of Age—Transaction set aside.*—Beneficiaries under a settlement, who were only just of age and had no proper legal advice, were induced by relatives, by whom they had been brought up, to sign promissory notes given by the relatives to a creditor, and, under pressure of legal proceedings, to assign their interest in settled lands of which the relatives were in possession, so as to enable the latter to mortgage the lands to the creditor.

**HELD**—that the assignment and mortgage must be set aside as procured by undue influence.

**O'CONNOR v. FOLEY**, [1905] 1 Ir. R. 1—M. R.

4. *Medical Man and Patient—Large Pecuniary Gift by Patient to her Medical Man—No Independent Advice—Order to Repay.*—A substantial gift made by a person in a relationship to the donee where he is likely to be under influence, unless the donor acts under independent advice, or the gift is confirmed after the relationship has ceased, cannot stand. The relationship to which this doctrine applies includes those of master and servant, guardian and ward, lawyer and client, and doctor and patient.

A medical man, a constant attendant on a lady of great age, illiberal education, and living with one servant only, received gifts from her of sums amounting to £800 during the six months previous to her death.

**HELD**—that it was incumbent on the medical man to see that the lady obtained independent advice, and as he had failed to do so he must be ordered to pay the £800 to her executors.

**RADCLIFFE v. PRICE**, (1902) 18 T. L. R. 466—[Eady, J.]

5. *Mother and Daughter—Attainment of Age by Latter—Dealing with Daughter's Property—Absence of Professional Advice.*—M. died intestate, being possessed of real estate and personalty, including leaseholds, leaving a widow and one daughter under age. The widow took out letters of administration, and deposited the lease of the leaseholds with a bank as security for an overdraft and for money advanced on bills. The bank had full knowledge of the insolvent condition of the widow's affairs and of the daughter's age and circumstances. A few days before the

**Undue Influence—Continued.**

daughter came of age the bank, deeming the security insufficient, applied peremptorily to the mother for payment. At an interview with the managing director, shortly after the daughter came of age, the mother offered to secure payment of the overdraft by a joint promissory note of herself and her daughter. The daughter, who was present, being asked to join, expressed her willingness by saying "Yes." Some time afterwards the bank again pressed the mother for payment, but consented to allow a short extension of the time for payment if the mother and daughter signed a joint promissory note, payable on demand, for the entire debt. Two promissory notes for the amount were prepared by the bank and signed by the mother and daughter. The local manager stated in evidence that on the occasion of the signing of the notes he explained to the daughter that she would be liable for the whole amount, and that, in the event of the failure to pay the debt on the part of her mother the bank would look to her; and that the daughter replied that she understood all that. She had not, on this or any other occasion, independent advice.

**HELD**—that a judgment which the bank obtained against the daughter could not stand.

*M'MACKIN v. HIBERNIAN BANK*, [1905] 1 Ir. R. [296—Barton, J]

**ESTATE AGENT.**

See AGENCY; AUCTIONS AND AUCTIONEERS; SALE OF LAND; VALUERS AND APPRAISERS.

**ESTATE DUTY.**

See DEATH DUTIES.

**ESTATE TAIL.**

See REAL PROPERTY.

**ESTOPPEL.**

See also ARBITRATION, 11; BANKERS AND BANKING, 22; BANKRUPTCY AND INSOLVENCY; BILLS OF EXCHANGE, 19; BILLS OF SALE, 5; EXECUTORS, 103; FRAUDULENT CONVEYANCES; INSURANCE, 11, 15, INTOXICATING LIQUORS, 45; MASTER AND SERVANT, 294; PATENTS, 155; TRADE MARKS, 217.

1. *Certiorari to quash Order of Inferior Court—Application Refused—Grounds of Decision Different—Mistake of Law.*—Prior to

December, 1889, the plaintiff was entitled to receive from the defendant a tithe rent-charge of £4 1s. 5d., out of the lands of B., in the county of Limerick. In December, 1889, the defendant applied to the chairman and justices of the county to vary this tithe rent-charge, and, by order of Quarter Sessions, dated the 30th December, 1889, it was reduced to £1 19s. 1d. The plaintiff then obtained from the Queen's Bench Division a Conditional Order for a writ of *certiorari* to quash the order of Quarter Sessions; but on the 15th May, 1890, on cause shown, the Conditional Order was discharged. From May, 1890, until the decision of the Court of Appeal in *Regina (Metge) v. Meath Justices* ([1898] 2 I. R. 592) on the 28th January, 1898, the defendant paid to the plaintiff, and the plaintiff accepted from him, tithe rent-charge at the rate of £1 19s. 1d. It was admitted that the *Dublin Gazette* did not from 1887 to 1889 contain any publication of the average prices of corn, but the absence of such publication was not the ground upon which the order reducing the tithe rent-charge had been impeached. After the decision of *Metge's Case* the plaintiff sued the defendant to recover the difference between £4 1s. 5d. and £1 19s. 1d. for the years from 1890 to 1898. On a case stated,

**HELD**—(affirming the decision of the Queen's Bench Division)—(1) that the plaintiff was not estopped by the order of the Queen's Bench Division of the 15th May, 1890, from alleging that the order of the 30th December, 1889, was bad; and (2) that the plaintiff was entitled to recover six years of the arrears which had accrued prior to the commencement of the suit.

*O'GRADY v. SYNAN*, [1900] 2 Ir. R. 602—[Q. B. Div.]

2. *Conviction—Civil Action*—Since estoppel must be mutual, a conviction is no estoppel in civil proceedings.

*CAINE v. PALACE STEAM SHIPPING CO., LD.*, [1907] 1 K. B. 670; 23 T. L. R. 203—C. A.

3. *Conviction—Negligence—False Evidence—Witness in Criminal Proceedings—Conviction for Forgery—Conviction Unreversed—Cause of Action.*—As long as a conviction stands no one against whom it is producible is permitted to aver against it. Therefore, if owing to the negligence, misfeasance, and breach of duty of the Bank of England in keeping their records a person is wrongfully convicted of forgery, and through their officer giving false evidence he was wrongfully convicted, such convicted person has no right of action against either the bank or their officer.

*BYNOE v. BANK OF ENGLAND*, [1902] 1 K. B. 467, [71 L. J. K. B. 208; 50 W. R. 359, 86 L. T. 1140; 18 T. L. R. 276—C. A.]

4. *Final Judgment—Meaning of*—Per Cozens-Hardy, L.J. For the purposes of the

**Estoppel—Continued.**

doctrine of estoppel a judgment between the parties other than an interlocutory one is none the less "final," although it may be reversed on appeal.

HUNTLY (MARCHIONESS) v. GASKELL, [1905] 2 Ch. [656; 75 L. J. Ch. 66; 93 L. T. 785; 22 T. L. R. 20—C. A.]

5. *Lloyd's Bond—Deposited by Holder as Security—Wrongfully Transferred for Value by Pledgee—Right of Transferee to Sue on Bond.*—The defendants gave to D., in respect of work done by him, a "Lloyd's Bond," which he deposited together with a signed transfer in blank with C. & Co., who had accepted some bills for him. It was expressly agreed that C. & Co. should not transfer the bond, unless D failed to meet any of the bills. D. in fact made no default, but C. & Co. wrongfully transferred the bond for value to the present plaintiffs, who now sued upon it.

HELD—that the plaintiffs could not recover, for the defendants were not estopped from denying C. & Co.'s authority to transfer the bond.

*France v. Clark* ((1884) 26 Ch. D. 257; 53 L. J. Ch. 585; 32 W. R. 466; 50 L. T. 1—C. A.) followed.

SAMUEL MONTAGUE & Co. AND ANOTHER v [WESTON, CLEVEDON AND PORTISHEAD LIGHT RAILWAYS Co., (1903) 19 T. L. R. 272—Bigham, J.]

6. *Married Woman—Restraint on Anticipation—Admission as to Occurrence of Event Defeating Life Interest.*—A married woman was entitled, under a deed dated 1867, to the surplus rents and profits of certain estates for her life for her separate use without power of anticipation, but subject to a proviso that, if she should succeed to an income for life of a certain amount, her life interest in the estates should absolutely cease and determine, and the property should be held upon trust for her husband.

In 1890 the married woman executed a deed-poll, admitting, in good faith but contrary to the fact, that her interest in the estates had determined under the proviso, on the ground of which deed a creditor of her husband's altered his position. Having subsequently discovered that she had executed the deed-poll under a misapprehension, she claimed to receive the surplus rents and profits of the estates notwithstanding her admission.

HELD—that a married woman could not by any device, even by fraud, deprive herself of the protection afforded by the restraint upon anticipation; and that, therefore, in the present case she was not estopped from contradicting the admission made by her, and was entitled to the surplus rents and profits.

Decision of Kekewich, J. ([1897] 2 Ch. 223; 664 J. Ch. 721; 77 L. T. 71; 13 T. L. R. 470; 46 W. R. 151) affirmed.

BATEMAN (LADY) v. FABER, [1898] 1 Ch. 144; 67 [L. J. Ch. 130; 77 L. T. 576; 14 T. L. R. 81; 46 W. R. 215—C. A.]

7. *Mortgage Prior to 1881—Lease by Mortgagor—Affirmance by Mortgagee—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).*—Leasehold premises were mortgaged by subdemise to N. in 1881 for the residue of a long term less three days. In 1892 the mortgagor purported to underlet the premises to G. & Co. for twenty-one years, with a covenant against subletting; this sublease was not binding on N., as the mortgage to him was prior to the Conveyancing Act of 1881.

In 1895 N. foreclosed, but did not get in the last three days of the term; thenceforward G. & Co. paid their rent to N. In 1899 N. died, and G. & Co. sublet the premises to S. under a licence from N.'s executors, who therein described themselves as reversioners on the under-lease of 1892.

The plaintiff, who claimed under N.'s executors, now claimed to eject G. & Co. and S. on the ground that the underlease of 1892 did not bind them.

HELD—that the plaintiff, as successor of N.'s executors, was estopped from denying that he was the reversioner on the under-lease of 1892, or from setting up an over-riding title inconsistent with the licence given by the executors as reversioners; and that the action failed.

KEITH v. GANZIA & Co., LD., AND OTHERS, [1904] [1 Ch. 774; 73 L. J. Ch. 411; 52 W. R. 532; 90 L. T. 395; 20 T. L. R. 330—Joyce, J., and C. A.]

8. *Mortgagor's Signature Obtained by his Solicitor's Fraud—Receipt in Body of Deed—Solicitor's Authority to Receive Mortgage Money.*—K., who was not a man of much education, employed E., a solicitor. K. signed a deed which E. advised him was necessary. The deed was a mortgage. E. applied the mortgage money to his own uses, paid interest on the mortgage to the mortgagees for some time, and then absconded. K. brought an action to obtain a declaration that the mortgage was void.

HELD—that K. was estopped from saying that it was not his solicitor who produced the deed and received the mortgage money.

*Dictum* of North, J., in *Day v. Woolwich Equitable Building Society*, ((1888) 40 Ch. D. 491; 58 L. J. Ch. 280; 37 W. R. 471; 60 L. T. 752—North, J.) questioned.

KING v. SMITH, [1900] 2 Ch. 425; 69 L. J. Ch. [598; 83 L. T. 815; 16 T. L. R. 410—Farwell, J.]

9. *Res Judicata—Action—Money Paid into Court Without Denial—Accepted and Taken Out—Mistake in Amount of Claim—Second Action.*—The plaintiff in an action of detinue in a County Court by mistake

**Estoppel—Continued.**

claimed too small a sum. The defendant paid the amount claimed into Court, not denying liability. The plaintiff took the amount out of Court and, having discovered the mistake, amended his particulars by claiming a larger sum. The judge held that the plaintiff was not entitled to amend, and gave judgment for the defendant. The plaintiff then began a new action for the larger amount, giving the defendant credit for the amount previously paid into Court.

HELD—that the matter was *res judicata*, and the action was not maintainable.

*Dewar v. Winder* ((1896) 12 T. L. R. 54—Wright, J.) doubted.

*SANDERS v. HAMILTON*, (1907) 96 L. T. 679; 23 T. L. R. 389—Div. Ct.

10. *Res Judicata—Affiliation Proceedings—Final Order of Quarter Sessions—Action for Seduction by Mother—Paternity of Child—Estoppel.*—In an action for seduction of the plaintiff's daughter, affiliation proceedings taken by the daughter against the defendant, in which the Quarter Sessions had made a final order dismissing those proceedings, do not estop the plaintiff from saying that the defendant was the father of her daughter's child. Such an order is not a judgment *in rem*, and is final and conclusive between the parties to the affiliation proceedings—that is, between the girl and the man only.

*ANDERSON v. COLLINSON*, [1901] 2 K. B. 107, [70 L. J. K. B. 620; 49 W. R. 623; 84 L. T. 465, 17 T. L. R. 465—Div. Ct.

11. *Res Judicata—First Summons Defective—Second Summons—Public Health (Buildings in Streets) Act, 1888* (51 & 52 Vict. c. 52), s. 3.—A summons was issued against the appellant at the instance of an urban district council, charging him with an offence under sect. 3 of the Public Health (Buildings in Streets) Act, 1888. The summons was dismissed upon the ground that it was defective in that no offence to which a penalty was attached by the statute was set out. The urban authority then served a written notice on the appellant, and took out another summons in proper form. The appellant, who was convicted, appealed.

HELD—that, as the matter was not decided one way or the other on the first summons, it could not be regarded as *res judicata*.

*JENKINS v. MERTHYR TYDVIL URBAN DISTRICT COUNCIL*, (1899) 80 L. T. 600—Div. Ct.

12. *Res Judicata—Foreclosure Order nisi in Respect of Five Charges—Sixth Charge Overlooked at the Moment—New Proceedings in Respect of the Six Charges*—The defendant charged a reversionary interest with repayment of £100 to the plaintiff, her solicitor. She gave him four further charges in respect of further loans, and then gave him a sixth to secure yet another loan and his professional charges.

The plaintiff took foreclosure proceedings by originating summons in respect of the first five charges and obtained a foreclosure order *nisi*. He had omitted the sixth charge from his claim, because he had mislaid the memorandum. Shortly afterwards he found it.

HELD—that he could commence fresh proceedings in respect of all six charges, there being no estoppel; and that the two proceedings should be consolidated.

*BAKE v. FRENCH*, [1907] 1 Ch. 428; 76 L. J. Ch. [299; 96 L. T. 496; 97 L. T. 131—Warrington, J.

13. *Res Judicata—Validity of Will—Intestacy—Probate Action—Citation of Person as Next of Kin and Heir-at-Law—Ejectment by Heir-at-law—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 63.—In an action for establishing a will in the Probate Division to which the heir-at-law of the deceased is a party as one of the next of kin, it is not necessary also to cite him in his character of heir-at-law in order that he should be bound as to the real estate of the deceased by the decision of the Court.

HELD—therefore, that an heir-at-law who had been a party to a probate suit as one of the next of kin only, was bound by the decision of the Court establishing the will, and was estopped from afterwards bringing an action of ejectment founded upon the alleged intestacy of the deceased.

*BEARDSLEY v. BEARDSLEY*, [1899] 1 Q. B. 746; [68 L. J. Q. B. 270, 47 W. R. 284, 80 L. T. 51, 15 T. L. R. 173—Div. Ct.

14. *Solicitor and Client—Solicitor Approving Title—Part of Property previously Built on by Solicitor—Whether Solicitor subsequently Estopped from Setting up his Possessory Title.*—For neglect to give rise to an estoppel, it must be neglect of some duty owed, and must be in the transaction itself, and also the proximate cause of the other party's mistake.

The plaintiff, having bought a house and land, employed a solicitor, the owner of the next house, to investigate the title and carry out the purchase. The solicitor approved the title in ignorance of the fact that he had himself encroached upon the purchased property when building his conservatory thirteen years before. The plaintiff five years later discovered the encroachment, but took no steps until after the solicitor's death. In his evidence he admitted that he believed the conservatory to belong to the solicitor, and never thought that he was buying it, and that he was not induced to purchase by any representation of the solicitor as to the boundaries.

HELD—that, even if there was a representation by reason of negligence on the solicitor's part, it was not the proximate cause of the plaintiff's loss, and that the solicitor's representatives were not estopped from relying on their possessory title.

**Estoppel—Continued.**

*Dictum of Blackburn, J., in Swan v. North British Australasian Co.* (1863) 32 L. J. Ex. 273; 2 H. & C. 182 (Ex. Ch.) 10 W. R. 841, approved.

Decision of Buckley, J. (88 L. T. 605), reversed.

BELL v. MARSH, [1903] 1 Ch. 528, 72 L. J. Ch. [360, 51 W. R. 325, 88 L. T. 605—C. A.]

15 *Summary Conviction—Assault on Constable—Action against such Constable for Previous Assault by him.*—A. was summarily convicted of assaulting a constable. He then sued the constable in respect of an assault upon himself committed just before the one for which he was convicted.

HELD—that the action was maintainable.

WILSON v. BENNET, (1904) 6 F. 269—Ct. of Sess

16. *Voluntary Trust—Intended Transfer of Property—Representations Influencing Conduct.*—N., a promoter of, and vendor to, an unsuccessful mining company, publicly and in good faith promised to create a trust, under which the company and its shareholders would have benefited, but died before the trust was created.

HELD—that a person who heard of the contemplated trust could not, in virtue of the fact that he bought or held shares of the company in confidence of N.'s promise being carried out, establish a case of contract as against N., and, in the absence of any fraud or special representation, neither N. nor his executors would be estopped from denying liability, notwithstanding that N. himself might have benefited by the promise having been made.

COLEMAN v. NORTH, (1898) 47 W. R. 57—  
[Romer, J.]

17. *Will of Woman under Incapacity—Entry of Tenant for Life—Possessory Title—Rights of Remaindermen.*—A., a woman, was owner in fee of property at L., and entitled to the reversion in fee of property at W., subject to a life interest of M. She married in 1871, and settled the L. property on such persons as she should appoint, and in default of appointment on herself for life, after her death on her brother E. for life, and after his death to such persons as she herself should by will appoint.

She died in 1883, having by a will of 1871 appointed the L. property to her husband for life, and after his death on trusts for E., F., and Y. By a codicil in 1873, after M.'s death, she devised the W. property to her husband for life, and after his death on trusts for E., F., and Y., and their issue; this codicil was in fact inoperative, since A. was married before 1883.

On A.'s death her husband took undisputed possession of both properties, and held them till his death in 1903.

HELD—that those claiming under the husband were not estopped by his entry on W.

under the codicil from saying as against the issue of E., F., and Y. (all dead), that the testamentary disposition of W. by A. was invalid.

*Paine v. Jones* (1874) L. R. 18 Eq. 320; 43 L. J. Ch. 787; 22 W. R. 837; 30 L. T. 779 followed.

*Dalton v. Fitzgerald* ([1897] 2 Ch. 86; 45 W. R. 685; 76 L. T. 700—C. A.) distinguished.

IN RE ANDERSON; *PEGLER v. GILLIATT*, [1905] 2 [Ch. 70; 74 L. J. Ch. 433; 53 W. R. 510; 92 L. T. 725—Buckley, J.]

**EVIDENCE.****I. IN GENERAL**

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**I. IN GENERAL.****(a) Admissibility.**

1. *Bill of Exchange—Contemporaneous Oral Agreement to Renew—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), ss. 21 and 29.]—In an action on a bill of exchange evidence of a contemporaneous oral agreement to renew is inadmissible.

NEW LONDON CREDIT SYNDICATE, LD. v. NEALE, [1898] 2 Q. B. 487, 67 L. J. Q. B. 825; 79 L. T. 323—C. A.

2. *Cheque—Condition Attaching to Delivery—Proof by Parol—Negotiation—Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), ss. 29, 38, 73, 100.]—The defender drew a cheque for £500 upon the Commercial Bank of Scotland in favour of C. W. S., and indorsed it to the pursuer. The defender agreed to grant this cheque only on condition that he should receive a cheque by R. on the same afternoon, and if he did not, then he would countermand payment of the cheque.

*In General—Continued.*

HELD—that the condition in question was one which it was competent to prove by parol, both under sect. 100 of the Bills of Exchange Act and at Common Law, and was effectual against an indorsee who was not a holder in due course.

SEMPLE v. KYLE, (1902) 4 F. 421—

[Ct. of Sess. 1st Division.]

*3. Deed—Parol Evidence of Consideration.]*

—Where a deed states a consideration, any other consideration may be proved by parol, if it does not contradict the deed, and mere proof of a consideration larger than that stated is not a contradiction.

FRITH v. FRITH, [1906] A. C. 254; 75 L. J. P. C. 50; 54 W. R. 618, 94 L. T. 383, 22 T. L. R. 388—P. C.

*4. Hearsay—Statement by Deceased Person—Statement by Medical Man to Patient as to Nature of Illness—Duty.]*—Upon the trial of a petition by a husband for dissolution of marriage, the wife made counter-charges against him of cruelty and adultery. Evidence was tendered by the wife of a statement made to her by a doctor whom she consulted, but who died before the trial, as to the nature of her illness.

HELD—that the evidence was not admissible as a statement made in the course of duty.

DAWSON v. DAWSON AND ANOTHER, (1905) 22 [T. L. R. 52—Deane, J.]

*5. Covenant to Pay Rent in Advance—Antecedent Agreement to Pay by Bill—Admissibility.]*—The plaintiff by deed granted a lease of certain premises to the defendant for a term of years, the defendant “yielding and paying therefor during the said term the yearly rent of £2,500,” to be paid quarterly in advance; and the defendant covenanted to “pay the said yearly rent hereby reserved at the times and in manner hereinbefore appointed.” Before the execution of the lease there was a parol agreement between the parties that the rent should be paid each quarter by a bill at three months.

HELD—that the parol agreement was not admissible in evidence, as it would contradict the covenant in the lease, which meant payment in cash.

HENDERSON v. ARTHUR, [1907] 1 K. B. 10; 76 [L. J. K. B. 22; 95 L. T. 772; 23 T. L. R. 60—C. A.]

*6. Insurance Policy—Parol Representation by Agent—Collateral Contract—Varying Terms of Policy.]*—The plaintiff effected a semi-tontine life policy for £5,000 with the defendants, through their agent, who represented to him in writing that the cash value at the end of fifteen years would be £7,390. A clause in the policy stated that the contract between the parties was completely set forth in the application and policy, and

could not be modified except by agreement signed by an officer other than the agent. At the end of the fifteen years the plaintiff claimed £7,390, which the defendants refused to pay, upon the ground that under the policy only £6,106 5s. was due.

HELD—that, assuming that the agent had authority to make the representation, it was not a collateral agreement, as it was inconsistent with the terms of the policy, and was not admissible in evidence against the defendants.

Decision of Walton, J. (22 T. L. R. 534), affirmed.

HOENCASTLE v. THE EQUITABLE LIFE ASSURANCE [SOCIETY OF THE UNITED STATES, (1906) 22 T. L. R. 735—C. A.]

*7. Interpretation of Written Contract—Admissibility of Extrinsic Parol Evidence to Explain Meaning—“Total Cost of Works.”]*—Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about.

When there is a contract for the sale of a specific subject-matter, oral evidence may be received for the purpose of showing what that subject-matter was of every fact within the knowledge of the parties before and at the time of the contract.

If the words in question have a fixed meaning not susceptible of explanation, parol evidence is not admissible to show that the parties meant something different from what they have said.

Where the respondent, an engineer employed by the appellants to superintend the construction of a railway, stipulated that he should be allowed another 1½ per cent. on the estimate of £35,000, in the event of his being able to reduce “the total cost of the works” below £30,000,

HELD—that “the total cost of the works” might mean the cost to the owner of the completed railway, and the words were so ambiguous that extrinsic evidence was admissible to explain the meaning given to them by the parties.

BANK OF NEW ZEALAND v. SIMPSON, [1900] A. C. 182; 69 L. J. P. C. 22, 48 W. R. 591; 82 L. T. 102; 16 T. L. R. 211—P. C.]

*8. Parcels—Grant of Land by Crown—Acts of User before Grant—Evidence to Identify Subject-Matter of Grant.]*—An Act of Parliament authorised the grant by the Crown of tracts of land in Van Diemen’s Land to a company which had already been formed under a charter for the purpose of cultivating waste lands in the colony. A grant of lands by the Crown to the company was subsequently made, both the Act and the grant reciting that the company had taken possession of the lands intended to be granted, and had incurred expense in the improvement thereof.

**In General—Continued.**

At the trial of an action by the company claiming a piece of land as included in the lands granted, the grant neither expressly including nor expressly excluding the piece of land in question, evidence was tendered and rejected of acts of user by the company over the piece of land in question antecedent to the grant.

HELD—that the acts of user were evidence to identify the land intended to be included in the grant, and the evidence was therefore admissible.

HELD ALSO—that a lease by the company of a jetty over the land in dispute was evidence of seisin, and not merely of an easement.

THE VAN DIEMEN'S LAND CO. v. THE MARINE [BOARD OF TABLE CAPE, [1906] A. C. 92; 75 L. J. P. C. 28; 54 W. R. 498; 93 L. T. 709; 22 T. L. R. 114—P. C.]

And see Sect. II. DOCUMENTS (a), Col. 1175.

**(b) Affidavits.**

And see JURIES, No. 1.

9. *Form—American Affidavit in Third Person—R. S. C., Ord. 37, r. 2.*—On the hearing of a partition action evidence was by agreement taken by affidavit. An affidavit sworn in the United States was produced, which was not entitled in any cause or matter as required by Ord. 37, r. 2. It was in the third person and not in the first as required by r. 7 of that order. The parties desired that it should be admitted, in order to save expense.

HELD—upon the authority of *Salvidge v. Tutton* (1869) 20 L. T. 300 that the affidavit might be admitted.

BLAMEY v. BLAMEY, [1902] W. N. 138; 113 [L. T. Jo. 262; 37 L. J. N. C. 364—Farwell, J.]

10. *Foreign Country.*—An affidavit made by a person resident in Germany and sworn before a notary was allowed to be used, the notary's signature having been attested by the seal of the British Consul, though the certificate did not state that he was by German law qualified to administer oaths. It was not denied that in fact he was so qualified.

IN RE LONDON ASPHALTE COMPANY, (1907) 23 [T. L. R. 406—Eady, J.]

11. *Information and Belief—Interlocutory Motion—Irremediable Injury—R. S. C. 1883, Ord. 38, r. 3.*—The rules of evidence are the same in all branches of the High Court, and on the trial of an action what is inadmissible in one branch is inadmissible in another. For the purpose, however, of interlocutory applications, an exception to the strictness of those rules has been introduced in order to make such applications, especially motions for injunctions to restrain

injury, effectual. In order to prevent irremediable injury, keep matters *in statu quo*, and do justice on an interlocutory application, the Court will act on information and belief. An affidavit as to information and belief of statements by another person who declines to make an affidavit in support of his statements, and who might have been and is not subpoenaed, not admitted, there being no irremediable injury to restrain.

IN RE ANTHONY BIRRELL, PEARCE & Co.; DOIG [v. ANTHONY BIRRELL, PEARCE & Co., [1899] 2 Ch. 50; 68 L. J. Ch. 444; 80 L. T. 688—Kekewich, J.]

12. *Information Acquired from Solicitor.*—Petition of right by a claimant to a fund which had been paid to the Crown in default of next of kin of an intestate. The claimant's case depended on the proof of a pedigree, and in support of the pedigree an affidavit was made by a person who deposed to a portion of it by reference to documents and from information "acquired by him from his solicitor." A certificate was based on this affidavit, and a summons was now taken out to vary the certificate.

HELD—that the fact that the deponent's solicitor had told him something could not possibly be made evidence. The certificate must be discharged, and the master directed to continue the inquiry without regard to this particular affidavit.

PALMES, IN RE; PALMES v. R., [1901] W. N. [146; 111 L. T. Jo. 275—Kekewich, J.]

13. *"Information and Belief"—Irregularity—Inadmissibility—Costs—R. S. C., 1883, Ord. 38, r. 3.*—Affidavits on "information and belief" without saying what the source of the information and belief, are worthless, and unless the deponent's statements are corroborated by some one who speaks from his own knowledge they are worthless and ought not to be received in evidence in any shape whatever, whether on interlocutory applications or on final ones. The persons responsible for such affidavits should pay the costs of them.

IN RE J. L. YOUNG MANUFACTURING CO., LD.; [YOUNG v. J. L. YOUNG MANUFACTURING CO., LD., [1900] 2 Ch. 753; 69 L. J. Ch. 868; 49 W. R. 115; 83 L. T. 418—C. A.]

13A. *Office Copies—Proper Method of Preparing—Rules of the Supreme Court, Ord. 38, r. 15.*—The proper method of preparing office copies within the meaning of Or. 38, r. 15, is as follows: Where an affidavit exceeds four folios in length, one writer reads it out to another writer who is paired with him, and the second writer compares it with and corrects the copy. Then both of them put their initials on the copy, so that they may be responsible for its accuracy.

COLEMAN v. COLEMAN, [1905] W. N. 160; 40 [L. J. N. C. 789, 120 L. T. Jo. 63; 50 Sol. J. 43—Buckley, J.]

## II. DOCUMENTS.

## (a) In General.

14. *Ancient Document—Compromise of Legal Proceedings—Proper Custody—Exercise of Ownership—Admissibility.*—Ancient documents coming out of proper custody and purporting on the face of them to show exercise of ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession. An action was brought by B. and another to determine the title to land. The plaintiffs tendered in evidence an ancient document, which was found in the muniment-room of plaintiff B., and which related to the settlement of legal proceedings for trespass by a predecessor in title of plaintiff B., in respect of part of the land in question.

HELD—that the document was an ancient document coming from the proper custody, and was evidence of an act of ownership, and was admissible in evidence.

*Papendick v. Bridgwater* ((1855) 5 E. & B 166; 24 L. J. Q. B. 289, 1 Jur. (N.S.) 657) distinguished.

The rule laid down by Willes, J., in *Malcomson v. O'Dea* ((1863) 10 H. L. C. 593, 9 Jur. (N.S.) 1135, 12 W. R. 178; 9 L. T. (N.S.) 93), applied.

Decision of Byrne, J., reversed.

*BLANDY-JENKINS v. EARL OF DUNRAVEN*, [1899] 2 Ch. 121; 68 L. J. Ch. 589, 81 L. T. 209—C. A.

15. *Colonial Statute—Proof of.*—Colonial law, like foreign law, must be proved in an English Court by evidence.

*REX v. BRIXTON PRISON GOVERNOR*, (1907) 71 [J. P. 148—Div. Ct.]

16. *Maps and Plans—Evidence of Reputation*—On a question of highway or no highway ordnance plans and deposited plans of a proposed light railway are admissible as evidence of reputation.

*ATTORNEY-GENERAL v. ANTROBUS*, [1905] 2 Ch. [188, 69 J. P. 141; 92 L. T. 790, 21 T. L. R. 471, 3 L. G. R. 1071—Farwell, J.]

17. *Privilege—Communications Addressed to Inland Revenue Authorities.*—In an action of damages against a party for statements alleged to have been made by him to the Inland Revenue authorities respecting duties due by the pursuer, a diligence to recover documents was obtained by the pursuer. The solicitor of Inland Revenue refused to produce letters addressed to his office by the defender, on the ground that to do so would be prejudicial to the public service, and it was held that he was entitled to refuse production.

*BROWN'S TRUSTEES v. INLAND REVENUE*, (1897) 35 [Sc. L. R. 340—Ct. of Sess.]

18. *Privilege—Secondary Evidence.*—After judgment had been delivered in favour of the plaintiffs in an action, the defendant became aware of certain documents used in the defence of a previous action, dealing with the same subject matter, and defended at the cost of the plaintiff's predecessor in title. The defendant, having appealed, asked for an order that these documents should be produced, and, on the plaintiffs objecting that they were privileged, asked that he might give secondary evidence of those of which he had copies.

HELD—that the documents were protected by privilege; but that, having regard to the decision in *Lloyd v. Mostyn* (10 M. & W. 478), the appellant was not precluded from giving secondary evidence of the contents of the documents.

*CALCRAFT v. GUEST*, [1898] 1 Q. B. 759, 67 [L. J. Q. B. 505; 78 L. T. 283, 46 W. R. 420—C. A.]

## (b) Certificates.

19. *Birth—Age—Plea of Infancy—Evidence as to Identity*—HELD—that in support of a plea of infancy it was sufficient to produce a certificate of the defendant's birth, and to call a relative to give evidence of identity.

*WILTON & Co. v. PHILLIPS*, (1903) 19 T. L. R. [390—Phillimore, J.]

20. *Birth—Effect of Entry in Register—Births and Deaths Registration Act, 1836* (6 & 7 Will. 4, c. 86)—A certified copy of an entry in a register of births, made pursuant to the Act of 1836, is evidence of the actual date of birth, not merely of the fact of birth at some date prior to the date of the entry.

*In re Wintle* ((1870) L. R. 9 Eq. 373—Lord Romilly, M.R.), disapproved.

*IN RE GOODRICH; PAYNE v. BENNETT*, [1904] P. [138; 73 L. J. P. 33, 90 L. T. 170, 20 T. L. R. 203—Jeune, P.]

21. *Marriage—Pedigree—Evidence of Marriage of Parents of Intestate—Certificate of Marriage in Scotland of Brother of Intestate.*—The plaintiff claimed, as a cousin-german and one of the next of kin of the intestate, a grant of letters of administration in the deceased's estate. No official record of the marriage of the parents of the intestate or of the birth of the intestate existed.

HELD—that the certificate of the marriage in Scotland in 1868 of the brother of the intestate, which contained the "name, surname, and rank or profession of father," was sufficient *prima facie* evidence of the marriage of the parents of the intestate.

*WIGLEY v. SOLICITOR TO THE TREASURY*, [1902] [P. 233; 71 L. J. P. 115; 87 L. T. 745—Jeune, P.]

22. *Marriage—Christians in British India—Indian Act XV. of 1872 (Indian Christian Marriage Act, 1872).*—A certificate of a



**Documents—Continued.**

marriage produced from the India Office is satisfactory proof of that marriage according to the forms of the Church of England in St. Paul's Cathedral at Calcutta in 1874

*WESTMACOTT v. WESTMACOTT*, [1899] P. 183; 68 [L. J. P. 63; 80 L. T. 632—Barnes, J

**(c) Entries in Books, Reports, &c.**

**23. Bankers' Books—Books "Used in the Ordinary Business of the Bank"—Successors of Bank—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), ss 3, 4, 7, 9]**—The Bankers' Books Evidence Act, 1879, applies to books which are in the custody or control of the successors to the bank by whom the entries in the books were originally made.

A book is "used in the ordinary business of the bank" within the meaning of sect 9 of the Act, though it may not be in daily use, if it is kept by the bank, so that they may have it in case it is desired to refer to it.

*THE ASYLUM FOR IDIOTS v. HANDYSIDES AND [OTHERS]*, (1906) 22 T. L. R. 573—C. A.

And see *BANKERS AND BANKING* NO. 28

**24 Field Book Entries by a Deceased Surveyor—Records Necessary for Performance of a Duty.]**—Where the record by a deceased person of a duty performed is admissible in evidence, records of facts necessary, and made by him, for the performance of such duty, are also admissible.

*Doe d. Patteshall v. Turford* ((1832) 3 B. & Ad. 890—Ld. Tenterden) followed

In 1864 a local authority employed a surveyor to survey ground for the purpose of a drainage scheme. In the course of his work he made entries as to levels, &c., in his note-book.

**HELD**—that in an action as to private rights such entries were admissible in evidence (the surveyor being dead) to show the high tide mark in 1864.

*Decision of Eady, J.* ([1904] 2 Ch. 525, 73 L. J. Ch. 757, 52 W. R. 665, 91 L. T. 317, 20 T. L. R. 695), reversed

*MELLOR v. WALMESLEY*, [1905] 2 Ch. 164, 74 [L. J. Ch. 475, 53 W. R. 581; 93 L. T. 574, 21 T. L. R. 591—C. A.

**25. Records made by a Deceased Official]**—Records made by a deceased official held not to be admissible under the doctrine of *Price v. Earl of Torrington* ((1703) 1 Salk. 285), there being nothing to show that they were made by him whilst doing something which it was his official duty to record, and there being no evidence as to the instructions upon which he was acting, nor as to the source from which he derived the information recorded.

*MERCER v. DENNE*, [1905] 2 Ch. 538; 74 L. J. Ch. 723, 93 L. T. 412; 70 J. P. 65, 54 W. R. 303, 3 L. G. R. 1293—C. A.

And see No. 29, *infra*.

**26. Reports by Experts—Facts not within Living Memory—Admissibility of Reports.]**—A question having arisen in a *quia timet* action as to the nature of the soil through which the Thames Tunnel was driven, the Court accepted as evidence the reports of the engineer and constructor (now dead) which have been since accepted as correct by the profession; it was admittedly impossible to now verify such reports by investigations.

*EAST LONDON Ry. Co. v. CONSERVATORS OF THE [RIVER THAMES]*, (1904) 90 L. T. 347—Farwell, J.

**27 Report from Medical Referee—Whether Conclusive—Workmen's Compensation Rules, 1898, No. 2]**—*Semble*, when an arbitrator finds the medical evidence conflicting or insufficient, and he obtains a report from a "medical referee," he should consider such report along with the other evidence before him, and not accept it as final and conclusive.

*DOWDS v. JOHN BENNIE & SON*, (1903) 5 F. 268 [—Ct. of Sess.

**28 Solicitor's Books—Presumption of his Death—Seven Years' Absence—Absconding Solicitor.]**—The books of a deceased solicitor are admissible in evidence if he therein charges himself with receipts on his client's behalf, even if such entries were not made in the ordinary course of his business as a solicitor; and his death will be presumed for this purpose after seven years, although he absconded, and would therefore be likely to conceal his whereabouts,

*WELLS v. PALMER*, (1905) 53 W. R. 169—[Kekewich, J.

**(d) Public Documents.**

**29 Reports to Government Departments—Depositions—Charts]**—To be admissible as evidence as a "public document" a document must have been made for the purpose of the public having access to and using it. Reports and maps made for the use only of a Government Department are not admissible as public documents. Charts prepared by the Admiralty for the use of sailors are admissible; but a chart prepared by a private person is not admissible, merely because it comes from the custody of the Admiralty.

Ancient surveys, &c., produced from the Record Office, but which do not affect the King's property or revenues, are not admissible as public documents or as evidence of reputation.

Depositions, made in an action as to public rights, are admissible against strangers, whenever evidence of reputation is admissible, so long as they speak only as to the reputation and not as to particular facts

*Sturla v. Freccia* ((1879) 5 App. Cas. 623; 50 L. J. Ch. 86; 44 J. P. 812; 29 W. R. 217; 43 L. T. 209—H. L.) distinguished.

**Documents—Continued.**

Decision of Farwell, J. ([1904] 2 Ch. 534, 68 J. P. 479), affirmed.

MERCER v. DENNE, [1905] 2 Ch. 538; 74 [L. J. Ch. 723, 93 L. T. 412; 21 T. L. R. 760; 70 J. P. 65; 54 W. R. 303; 3 L. G. R. 1293—C. A.

*And see* No. 25, *supra*.

30. *Report to Government Department—Refusal to Produce—Possible Prejudice to Public Service*—In an action to restrain the use of a small-pox hospital, as being a source of danger to health, a Local Government Board of Inspector, who was subpoenaed, stated that the President of the Local Government Board had ordered him not to produce a report that he had made on the hospital, on the ground that it might be prejudicial to the public service. The inspector was not examined, but the Court respectfully protested against the action of the Local Government Board.

ATTORNEY-GENERAL v. NOTTINGHAM CORPORATION, (1904) 68 J. P. 125, 2 L. G. R. 698—Farwell, J.

31. *Statistical Returns of the Meteorological Office*—The statistical returns of the Meteorological Office, which are based upon information supplied by volunteer observers in different parts of the country, are not to be treated as public records to be accepted as evidence of the particular event recorded, unless the individual who made the observations recorded is called.

BURROWS AND ANOTHER v. BEDFORD SCHOOL [BOARD AND ANOTHER, (1902) 18 T. L. R. 292 Bruce, J., Bedford Assizes

**III PERPETUATING TESTIMONY.**

32 *Action to Perpetuate Testimony—Discretion of Court as to Making Order—Alternative Procedure Available—R. S. C., Ord. 37, r. 35—Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93)*—If the Court is of opinion that a plaintiff can at once bring the point, which he desires to establish, for judicial determination in another way, *e.g.*, under the Legitimacy Declaration Act, 1858, it will, as a general rule, in its discretion refuse to make an order for the perpetuation of testimony under Ord. 37, r. 35.

Per Stirling, L.J.—The rules are rules of procedure, and are not intended to form a code. Rule 35 does not oblige the Court to make an order in every action that may fall within the terms of the rule.

The plaintiff, who claims to be entitled upon the death of the present peer to a peerage and the family estates, but who is alleged by other members of the family to be illegitimate, asked to have certain witnesses in Spain and France examined under Ord. 35, r. 7, on the ground that their evidence would

tend to establish his legitimacy. Three years previously the present defendants (members of the family) had commenced an action against him to perpetuate testimony upon the point, but he alleged that further materials had come to light since that date.

HELD—that, as the real point in issue, viz., the plaintiff's legitimacy, could be tried at any time that he wished under the Legitimacy Declaration Act, 1858, the Court ought not to make any order.

Decision of Kekewich, J. (19 T. L. R. 450), reversed.

WEST v. SACKVILLE, (1903) 72 L. J. Ch. 649; [51 W. R. 625; 88 L. T. 814; 19 T. L. R. 541—C. A.

33. *Deposition to Perpetuate Testimony—Commonable Rights—Reputation—Crown Survey—Public Document—34 Geo. 3, c. 75, s. 8 (An Act for the better Management of the Land Revenue of the Crown, &c.)*—In certain Chancery proceedings an issue was directed whether a piece of land was "common land or subject to any commonable rights either of the commoners of the parish of Cantref or of the commoners of the parish of Llanfrynach."

HELD—that a question of such general interest in the locality let in evidence of reputation.

A deposition of a person was taken on behalf of G., who was a predecessor in title of the urban district council, in a suit to perpetuate testimony. There was no evidence that G. ever adopted the deposition, or made it his own in any way.

HELD—that the deposition could not be treated as an admission by G.

A survey of Crown lands was made by one C. in 1816 in performance of a duty cast upon him by 34 Geo. 3, c. 75, s. 8, on the occasion of a sale of them.

HELD—that it was a public document produced out of the proper custody, and was admissible as such.

EVANS v. MERTHYR TYDFIL URBAN DISTRICT [COUNCIL, [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578—C. A.

**IV. PRESUMPTION.**

*And see* ARBITRATION, 19, BASTARDY, 11, 14; BOUNDARIES, 1, 2, HIGHWAYS.

**(a) Of Death.**

*And see* No. 28, *supra*, and title EXECUTORS, 77—84.

34. *Commorientes—Brothers on Board same Vessel—Total Loss—Leave to Swear Death—Declaration of Non-Survivorship*—Two brothers sailed in the same vessel in 1896, but nothing had been heard of them, or any one else on board, from that time.

The Court, in giving leave to swear that both the brothers died on or about the 14th

**Presumption—Continued.**

May, 1896, added a declaration, and permitted the same to be included in the oath in each case, to the effect that there was no reason to suppose that either died before the other.

IN THE GOODS OF JOHNSON BROTHERS, (1898) 78 [L. T. 85—Jeune, P.

**35. Death Without Issue.]**—Although a man's death will in a proper case be presumed, there is no presumption that he died without issue. Some evidence must be given to justify a finding that he in fact left no issue.

IN RE JACKSON; JACKSON v. WARD, [1907] 2 Ch. [354; 76 L. J. Ch. 553—Kekewich, J.

**36. Disappearance for Three Years.]**—The Court presumed the death of a person who disappeared only three years before from his place of abode, and who had not since been traced.

IN RE GOODS OF MATTHEWS, [1898] P. 17; 67 [L. J. P. 11; 77 L. T. 630—Jeune, P.

**37. Onus probandi—Time of Death—Continuance of Life.]**—A., who died in 1890, gave life interests in her residuary estate to the children of her deceased niece.

J., one of the children, was last heard of on March 31st, 1895, and an order was made that his death was to be presumed at the end of seven years from that date.

Upon a summons as to how his share of income should be dealt with,

HELD—that the *onus* was on his representatives to prove that he lived to a later date than March 31st, 1895; and that, in the absence of evidence, his share of income must be dealt with on the footing that he died on that day.

IN RE PHENÉ'S TRUSTS ((1870) L. R. 5 Ch. 139; 39 L. J. Ch. 316; 18 W. R. 303; 22 L. T. 111) discussed.

IN RE ALDERSLEY; GIBSON v. HALL, [1905] 2 [Ch. 181; 74 L. J. Ch. 548; 92 L. T. 826—Kekewich, J.

**38. Practice—Affidavit of Applicant.]**—It is essential in motions for leave to presume the death of a person that in the affidavit filed in support thereof the applicant should dispose to his or her personal belief that the death occurred on or since the alleged date.

IN RE GOODS OF HURLSTON, [1898] P. 27; 67 [L. J. P. 69—Barnes, J.

**(b) Generally.**

**39. Capacity of Child-bearing—Widow aged over 56 who has had only One Child.]**—Where there has been a long lapse of time since the birth of a child—e.g., twenty-four years—the presumption is that the capacity of child-bearing has ceased. The principle applies alike to spinsters and to widows who have had children.

A widow who had lived with her husband for 24 years and is 56 years and 3 months old, and who has had only one child who is 34 years old, is to be taken to be past the age of child-bearing.

IN RE WHITE; WHITE v. EDMOND, [1901] 1 Ch. [570; 70 L. J. Ch. 300; 49 W. R. 429; 84 L. T. 199—Buckley, J.

**40. Money Lent—Proof of Payment—Onus.]**—In an action for money lent there was produced on behalf of the plaintiff an order on a savings bank drawn by him and bearing a receipt by the defendant. The plaintiff was not present to give evidence as to the loan.

HELD—that, in the absence of any explanation by the defendant as to how or why the payment was made to him, the presumption was that he borrowed the money.

GILL v. GILL, (1907) S. C. 532—Ct. of Sess.

**41. Judicial Cognizance—Status and Boundaries of Foreign Tribes—Application to Secretary of State for Foreign Affairs.]**—The Court is bound to take judicial cognizance whether foreign tribes are independent or not—that is to say, whether they are an independent state, and if its personal knowledge is insufficient to instruct it on the point, then the proper course is to apply to the Secretary of State for Foreign Affairs for information, and his answer (which is in effect the answer which the Crown condescends to give the judges of the High Court when they ask such a question) is conclusive on the parties.

Whether a tract of foreign land is the territory of certain tribes or of a certain sovereign is a matter which must necessarily be within the cognizance of Her Majesty, because for the protection of her lieges in the ordinary way she would know whether redress should be applied for to the sovereign or to the head of the tribe. Sound policy requires that the Court should act in unison with the Government on such a point as that. Application should therefore be made by the Court to the Foreign Office for information as above.

FOSTER v. GLOBE VENTURE SYNDICATE, LD., [1900] [1 Ch. 811; 69 L. J. Ch. 375, 82 L. T. 253—Farwell, J.

**EXCISE.**

See INTOXICATING LIQUORS, 27, 28, 53, 132—135, 189—192, 207.

**EXECUTION.**

See also BANKRUPTCY AND INSOLVENCY; COUNTY COURTS; INTERPLEADER; LUNATICS, 32; PRACTICE AND PROCEDURE, 143—152.

**1. Completion of Execution—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 45, 125.]**—

**Execution—Continued**

Section 45 of the Bankruptcy Act, 1883, which disentitles an execution creditor to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he completes the execution before the date of the receiving order, is not applicable to an administration of the estate of a deceased debtor under sect. 125, such administration not being equivalent to a receiving order, or a petition in bankruptcy, or an act of bankruptcy.

Judgment of Wright, J. ([1898] 2 Q. B. 28, 67 L. J. Q. B. 627, 5 Manson, 113), affirmed.

HASLUCK v. CLARK, [1899] 1 Q. B. 699; 68 [L. J. Q. B. 486; 47 W. R. 471; 80 L. T. 454, 15 T. L. R. 277; 6 Manson 146—C. A.

**2. Execution on Goods of Third Person—Substantial Grievance—Damages against High Bailiff.]**—The goods of a third party cannot be taken in execution, even when on the premises.

The owner of goods wrongfully seized by way of execution by the high bailiff of a county court may recover damages against the high bailiff on an interpleader issue where the claimant has suffered a substantial grievance.

LONDON, CHATHAM & DOVER RAILWAY Co. v. CAELE, (1899) 80 L. T. 119—Div. Ct.

**3. Garnishee Order—Attaching Debt due from a Company in Voluntary Liquidation—Jurisdiction to issue Execution.]**—Judgment having been recovered against the defendant, the plaintiff obtained a garnishee order attaching all debts owing or accruing due from a company in voluntary liquidation to the defendant, who was a creditor of the company, execution not to issue without further order. Subsequently the liquidator of the company had in his hands a dividend in the winding-up due to the defendant. On an application by the plaintiff for leave to issue execution on the garnishee order the company appealed.

HELD—that leave should be given to issue execution against the company unless the liquidator paid the dividend to the plaintiff within fourteen days.

KLAUBER v. WEIL, (1901) 17 T. L. R. 44—C. A.

**4. Garnishee Order—Garnishee Order Absolute—Debenture issued Subsequently—Priority.]**—A garnishee order creates no charge on the assets of the person upon whom it is made.

On February 2 a garnishee order absolute was made upon a company. On February 3 the claimant, with knowledge of the order, advanced money to the company and took as security a debenture charging all its assets present and future. The debenture provided that the sum secured should become payable if any process were issued against the company,

The garnishor having issued execution against the company,

HELD—that the debenture-holder was entitled to priority.

GEISSE v. TAYLOR AND ANOTHER, [1905] 2 K. B. [658; 74 L. J. K. B. 912; 93 L. T. 534; 54 W. R. 215; 12 Manson, 400—Div. Ct.

And see COUNTY COURTS, No. 67.

**5 Goods Seized by Sheriff—Payment of Money to Sheriff to Avoid Sale—Right to Money.]**—A limited company issued debentures which gave the debenture-holders a floating charge over the property of the company. Subsequently the goods of the company were seized in execution of a judgment, and the company, in order to avoid a sale, agreed with the sheriff, with the assent of the judgment creditor, that in consideration of his not selling the goods they would pay the sheriff a certain sum per day. A receiver, who was subsequently appointed in a debenture-holder's action, claimed the moneys in the hands of the sheriff.

HELD—that the judgment creditor was entitled to the moneys.

ROBINSON v. BURNELL'S VIENNA BAKERY Co. [AND ANOTHER, [1904] 2 K. B. 624; 73 L. J. K. B. 911; 52 W. R. 526, 91 L. T. 375; 20 T. L. R. 284—Channell, J.

**6. Privileged Goods—"Tools and Implements of Trade"—Non-intervention of Official Receiver—The Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 8—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44 (2), 45 (1), 54 (1)—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11.]**—Where the goods of a debtor are seized in execution, and bankruptcy supervenes, unless the official receiver requires the sheriff to hand over the goods seized before sale, the bankrupt will only be entitled to retain the tools of his trade, &c., to the value of £5, as provided by the Small Debts Act, 1845, s. 8, instead of to the value of £20, as provided by the Bankruptcy Act, 1883, s. 44 (2).

IN RE DAWSON; EX PARTE DAWSON v. THE [SHERIFF OF MIDDLESEX, [1899] 2 Q. B. 54; 68 L. J. Q. B. 668; 47 W. R. 524; 80 L. T. 498; 6 Manson, 200—Wright, J.

**7 Property in Goods Seized.]**—Subject to the security of the execution creditor, the property in goods seized under a *fi. fa.* remains in the debtor till sale.

RE CLARKE, [1898] 1 Ch. 336; 67 L. J. Ch. 234; [78 L. T. 275; 14 T. L. R. 274; 46 W. R. 337—C. A.

**8. Sale—Retention of Proceeds—Administration Order—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 46, 125—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (?).]**—A judgment creditor levied execution upon the goods of a judgment debtor. The sheriff seized and sold the goods, retaining the pro-

**Execution—Continued.**

ceeds for fourteen days as required by section 11 (2) of the Bankruptcy Act, 1890. Within the fourteen days the sheriff had notice of a petition in bankruptcy against the debtor, and therefore continued to hold the money after the fourteen days had expired. Soon after that date the debtor died, and the petition, of which the sheriff had had notice, was dismissed, but a petition was presented by a different creditor for administration under section 125 of the Bankruptcy Act, 1883, upon which an administration order was made.

The trustee in the administration and the execution creditor both claimed the money in the hands of the sheriff.

**HELD**—that the execution creditor was entitled to the money, because it had become his property prior to the making of the administration order, and at that date no longer formed part of the property of the debtor.

**WATKINS v. BARNARD**, [1897] 2 Q. B. 521; 66 [L. J. Q. B. 771; 4 Manson, 221; 46 W. R. 156—Williams, J.

**9. Sale—Money Retained by Sheriff—Notice of Bankruptcy Petition—Service of Notice—Time—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 2—Bankruptcy Rules, r. 90.]**—Notice of a bankruptcy petition presented by or against the debtor is well served on the sheriff, in accordance with sect. 11 (2) of the Bankruptcy Act, 1890, if it is served at any time before midnight on the last of the fourteen days during which the sheriff is, by that section, bound to retain the proceeds of an execution levied on the goods of the debtor.

**LOLE v. BETTERIDGE**, [1898] 1 Q. B. 256; 67 [L. J. Q. B. 215; 77 L. T. 548; 5 Manson 1; 14 T. L. R. 147; 46 W. R. 161—C. A.

**10. Sale by Sheriff—Proceeds of Sale—Notice of Bankruptcy—Notice of Rent in Arrear—Priority—"Goods of a Debtor"—The Landlord and Tenant Act, 1709 (8 Anne c. 18), s. 1—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 2.]**—The bankruptcy of a tenant does not prevent a distress by a landlord. Bankruptcy does not place the tenant's goods in *custodia legis* so as to protect them from distress. A tenant's goods, seized by a sheriff under a writ of execution, cannot be distrained for rent. They are said to be in *custodia legis* and protected from seizure by the landlord. 8 Anne, c. 18, prohibits the removal of the goods seized by the sheriff until the landlord's rent in arrear (not exceeding one year's rent) has been paid by the execution creditor, provided the sheriff has notice that rent is due to the landlord. Goods which belong to a judgment debtor and are seized by the sheriff, but which are impounded by the statute of Anne until the landlord is paid, are not "goods of a debtor" which have to be handed over by the sheriff to the trustee in bankruptcy

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under sect. 11 of the Bankruptcy Act, 1890. Nor are the proceeds of sale of such goods to be handed over free from the rights of the landlord or of the sheriff for his own indemnity.

**In re M'Carthy**, (1881) 7 L. R. (Ir.) 473 followed. Decision of Divisional Court reversed.

**IN RE MACKENZIE, EX PARTE SHERIFF OF HERT-FORDSHIRE**, [1899] 2 Q. B. 566; 68 L. J. Q. B. 1003; 81 L. T. 214; 15 T. L. R. 526; 6 Manson, 413—C. A.

**11. Seizure of Goods—Abandonment of Possession—Title of Purchaser from Execution Debtor.]**—If a sheriff goes out of possession of goods which he has seized under a writ of execution, it is a question of fact to be decided in each particular case whether the sheriff has or has not abandoned possession of such goods, so as to enable the judgment debtor effectually to dispose of the goods to a purchaser.

**BAGSHAW'S, LD. v. DEACON**, [1898] 2 Q. B. 173; [67 L. J. Q. B. 658; 78 L. T. 776; 46 W. R. 618—C. A.

**12. Seizure of Goods by Sheriff—Liability of Sheriff to pay Rates—Local Act (35 Geo. 3, c. 73), s. 195.]**—By sect. 195 of a local Act applicable to the parish of St. Marylebone (35 Geo. 3, c. 73), it is enacted that when the goods of any person liable to pay any rate by virtue of the Act "shall be taken in execution" by the sheriff before the rate has been paid, then the sheriff, on demand being made by the rate-collector, shall, in the first place, pay such rate.

**HELD**—that, first, the sheriff must have taken in execution the goods of a person liable to pay a rate; secondly, the sheriff must have been served with a demand for the payment of the rate. If those two conditions were fulfilled, it was clearly the duty of the sheriff under the statute to pay the rate. In ordinary language the sheriff was said to have taken goods in execution when he had seized them.

**ST. MARYLEBONE VESTRY v. THE SHERIFF OF [LONDON]**, [1900] 1 Q. B. 111; 69 L. J. Q. B. 69; 16 T. L. R. 50—Bigham, J.

**13. Seizure of Goods—Money Subsequently Placed by Debtor in Article Seized—Possession—Death of Debtor—Administration of Insolvent Estate—Right to Money—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12.]**—The goods of a judgment debtor were seized by the sheriff under a writ of *f. fa.* in execution of a judgment. While the sheriff remained in possession of the goods the debtor placed some bank notes in the drawer of a piece of furniture which had been seized by and which was then in the possession of the sheriff. The sheriff was not aware that the debtor had done so. The debtor died insolvent, and while the sheriff was still in possession an order was made for the administration of his estate under sect. 125

**Execution—Continued.**

of the Bankruptcy Act, 1883. The Official Receiver, as trustee of the estate, claimed the bank notes placed in the drawer.

**HELD**—(1) that there had been no seizure of the notes in the debtor's lifetime; (2) that money, notes and other documents mentioned in sect. 12 of the Judgments Act, 1838, cannot be seized after the debtor's death; and (3) that therefore the trustee was entitled to the money.

Decision of Lawrance, J. ([1907] 2 K. B. 437; 76 L. J. K. B. 904; 97 L. T. 516; 23 T. L. R. 579; 14 Manson, 191), reversed.

**JOHNSON v. PICKERING; NORTON CLAIMANT,**  
[1907] 24 T. L. R. 1—C. A.

**14. Seizure of Stranger's Goods—No Claim by Owner before Sale—Sale by Sheriff—Purchaser Acquires no Title—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 154.]**—When goods, not in fact the debtor's property, are seized in execution by a County Court bailiff, and sold by him in the absence of any notice of claim from the true owner, the purchaser gets no title thereto as against the owner.

The plaintiffs had lent a piano to W. on a hire-purchase agreement. Without their knowledge a judgment was recovered against W., and the County Court bailiff seized and sold this piano together with certain of W.'s goods.

**HELD**—that the plaintiffs were entitled to recover the piano from the purchaser, although he had bought it in good faith.

**Goodlock v. Cousins** ([1897] 1 Q. B. 348 558; 66 L. J. Q. B. 360; 45 W. R. 367; 76 L. T. 313—C. A.) distinguished.

**CRANE AND SONS v. ORMEROD**, [1903] 2 K. B. 37; 72 L. J. K. B. 507; 52 W. R. 11; 89 L. T. 45—Div. Ct.

**15. Sheriff's Possession for Fifteen Months—Act of Bankruptcy, when Committed—Possession Money—Consent of Execution Creditor and Execution Debtor—"Costs of Execution"—Order of 31st August, 1888, under Sheriffs Act, 1887 (50 & 51 Vict. c. 55)—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), ss. 1, 11 (2).]**—Where the sheriff seizes goods and remains in possession for a period greatly exceeding twenty-one days (e.g., fifteen months), there is, under sect. 1 of the Bankruptcy Act, 1890, one act of bankruptcy, which is committed at the expiration of twenty-one days, but not a continuing act of bankruptcy or a succession of such acts. In such a case, therefore, if such execution creditor and execution debtor assented to the sheriff retaining possession, he will be entitled, under sect. 11 of the Bankruptcy Act, 1890, to possession money for the whole time he remained in possession, notwithstanding that the debtor has been made a bankrupt on a petition presented more than three months after the expiration of the twenty-one days. The only cases in which

the sheriff would not be so entitled are cases coming within the provisions of the Bankruptcy Act, 1883, as to reputed ownership and the relation back of the trustee's title, and cases to which the Act 13 Eliz. c. 5 applies.

**In re Hurley** ((1893), 41 W. R. 653; 10 Morrell, 120) approved.

**IN RE J. S. BEESTON, EX PARTE THE BOARD OF TRADE**, [1899] 1 Q. B. 626; 68 L. J. Q. B. 344; 47 W. R. 475; 80 L. T. 66, 6 Manson, 27—C. A.

**16. Sheriff's Right to Poundage—Goods Seized but not Sold—Sale Stopped by Official Receiver—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1—Order as to Fees (31st August, 1888) under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20, sub-s. 2.]**—A sheriff who has seized goods under a judgment, but has, by notice of a receiving order and a request (under sect. 11, sub-sect. 1, of the Bankruptcy Act, 1890) to deliver the goods to the Official Receiver, been prevented from selling, is not entitled to poundage.

**Trustee of Woolford's Estate v. Levy** ([1892] 1 Q. B. 772; 61 L. J. Q. B. 546; 56 J. P. 694; 40 W. R. 483; 66 L. T. 812—C. A.) applied.

Decision of Div. Ct. ([1898] 1 Q. B. 66; 68 L. J. Q. B. 247; 79 L. T. 356) affirmed.

**IN RE H. P. THOMAS, EX PARTE THE SHERIFF OF MIDDLESEX**, [1899] 1 Q. B. 460; 68 L. J. Q. B. 245; 47 W. R. 259; 80 L. T. 62; 6 Manson, 1—C. A.

## EXECUTORS AND ADMINISTRATORS.

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## I. EXECUTORS GENERALLY.

1. *Action Against Personal Representatives—Negligence of Deceased as a Solicitor—Survival of Cause of Action—Actio personalis moritur cum persona.*—An action for negligence against a solicitor is not founded (at any rate not exclusively) on tort; it arises out of the contract of employment, of which it is an implied term that the solicitor will use due skill and diligence.

Therefore an action will lie in respect of the negligence of a deceased solicitor against his personal representatives after his death.

*Finlay v. Chirney* ((1888) 20 Q. B. D. 494, 57 L. J. Q. B. 247; 52 J. P. 324; 36 W. R. 534; 58 L. T. 664—C. A.) discussed

*Wilson v. Tucker* ((1825) 3 Starkie N. P. 154; D. & R. (N. P. C.) 30) followed.

*DAVIES v. HOOD AND OTHERS*, (1903) 88 L. T. [19; 19 T. L. R. 158—Ridley, J.

2. *Corporate Body and Individuals—Grant to*—Probate cannot be granted to a body corporate (e.g., the Law Guarantee and Trust Society) and an individual, who have both been named as executors in a will.

*IN THE GOODS OF MARTIN*, (1904) 90 L. T. 264; [20 T. L. R. 257—Jeune, P.

3. *Executor de Son Tort—Chattels Real—Acquiring Possessory Title—Next of Kin and Administrator.*—A person who has gone into possession of chattels real of a deceased, as executor *de son tort*, and remained in possession for twelve years, may, in the absence of circumstances raising an inference of an express trust, rely on the Statute of Limitations in answer to an action for the recovery of the lands brought by a person taking out administration to the deceased.

*DOYLE v. FOLEY* (No. 1), [1903] 2 Ir. R. 95—[K. B. D.

See *also* title DEATH DUTIES.

4. *Gift to Executor—Presumption—Gift of Residue.*—Where a legacy to an executor is one of residue the ordinary presumption that it is *primâ facie* given to him in that character for his trouble does not arise.

*Griffiths v. Pruen* (11 Sim. 202) followed.

*IN RE MAXWELL; EIVERS v. CURBY*, [1906] 1 [Ir. R. 386—C. A.

5. *Implied Trust—Residue given to Executors—Implied Trust for Next of Kin—Secret Trust—Parol Evidence.*—A testator, whose next of kin were his brother T. and the ten children of his deceased brother C., appointed A. and B. executors of his will, and gave them small legacies in return for their trouble; he gave all his residuary estate to his executors "to apply the same as they shall think fit." After the execution of the will, the testator, in reply to a question by one of the executors as to how he wished the residue to be applied, said that he would like the six younger children of C. to have it, and did not wish the four elder children or T. to get any

Held—that the executors took not beneficially but with an implied trust for the next of kin; that the trust could not be varied by evidence of a conversation after the execution of the will, and that the doctrine of secret trusts had no application to the facts of the case.

*BALFE v. HALFPENNY*, [1904] 1 Ir. R. 486 [Barton, J.

6. *Intermeddling before Probate—Renunciation—Wilful Default—Delay—Loss of Interest.*—A testator died in 1882, having by his will appointed S. and E. and another executors. The will was not proved until 1889, when it was proved by S. alone. The testator's estate was got in and administered by S. and E. before and after probate, but E., who was a solicitor, alleged that he had only acted as solicitor and agent for S.

In April, 1894 an action was commenced by one of the residuary legatees under the will for administration of the testator's estate, and an account, on the footing of wilful default, against S. and E.

The statement of claim was delivered on the 28th May, 1894, and on the following day E. renounced probate. The action was pressed against him on the ground that he had intermeddled with the assets, and could not afterwards renounce.

Part of the testator's estate consisted of a policy of insurance on his life, which was deposited with his bankers as security for an overdraft. In July, 1883, a letter was written to the insurance company signed by the three executors named in the will, directing them to pay the amount of the policy to the bankers. It appeared that this letter was written by arrangement with the bankers. The insurance company refused to pay until probate. The money was finally paid on the 18th Nov., 1889, with interest at 1 per cent. for the interval. Meanwhile

**Executors Generally—Continued.**

the testator's estate had been charged with interest by the bankers at the rate of 5 per cent. The delay in getting in the policy moneys was relied on by the plaintiff as an act of wilful default.

**HELD**—that there being no proof that the executors did wrong in not paying off the bankers, and so reducing the policy and getting in the asset which it represented, a case of wilful default could not be established; that payment of debts even in a wrong order was not a wrong entitling a legatee to relief, nor did such payment amount to wilful default; and that, if no sufficient proof or even *prima facie* evidence of a breach of duty was given, it was not right to insert in the judgment any declaration of liability, or even an inquiry as to liability based upon such supposed breach of duty.

Decision of North, J. [1897], 1 Ch. 422; 66 L. J. Ch. 155; 76 L. T. 18; 45 W. R. 284; affirmed.

**IN RE STEVENS; COOKE v. STEVENS**, [1898] 1 Ch. 162; 67 L. J. Ch. 118; 77 L. T. 508; 14 T. L. R. 111; 46 W. R. 177—C. A.

**7. Intermeddling before Probate—Executor compelled to take up Probate**—If an executor have intermeddled with an estate, he may be compelled on the application of a legatee to take up probate, though from his conduct he appears an undesirable person to fill the office of executor

**IN THE GOODS OF COATES**, (1898) 78 L. T. 820—[Jeune, P.]

**8 Misappropriation — Bankruptcy — Injunction — Receiver — Jurisdiction.**—The Court has jurisdiction to restrain a person from acting as an executor, without appointing a receiver of the property.

**BOWEN v. PHILLIPS**, [1897] 1 Ch. 174; 66 [L. J. Ch. 165; 75 L. T. 628; 4 Manson, 370; 45 W. R. 286—Kekewich, J.]

**9. Renunciation—Retraction—Court of Probate Act, 1857 (20 & 21 Vict., c. 77), s. 79**—The Court of Probate Act, 1857, s. 79, does not abrogate the former practice of the Ecclesiastical Courts, which allowed an executor, who had renounced, to retract his renunciation, on good cause shown, for the purpose of taking probate.

One of two executors took probate of a will and absconded.

The other executor, who had previously renounced, was allowed to retract his renunciation for the purpose of taking probate.

**IN THE GOODS OF STILES**, [1898] P. 12; 67 L. J. P. 23; 78 L. T. 82; 14 T. L. R. 61; 46 W. R. 444—Jeune, P.

**10. Residue Undisposed of—Next-of-Kin—Equal Legacies to All Executors—Rights of Executors to Residue.**—A testator by his

will appointed three executors and gave them each a legacy of £1,000, and in addition he gave to one executor his foreign decorations, to another his diamond ring and his gold watch. The residuary personal estate was not disposed of by the will, and the testator died without leaving any next-of-kin.

**HELD**—that the specific bequests to two of the three executors did not prevent the application of the rule that, where pecuniary legacies of equal amount are given to the executors, the presumption is that they are not intended to take the residue beneficially; and that therefore the Crown was entitled.

**IN RE GLUKMAN; ATTORNEY-GENERAL v. JEFFERYS**, [1907] 1 Ch. 171; 76 L. J. Ch. 82; 96 L. T. 225; 23 T. L. R. 212—Eady, J.

**11. Sole Executor — Trust—Reversioner—Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), s. 1, sub-ss. 2 and 4—Judicial Trustee Rules, 1897, rules 2, 4, and 5.**—By the express terms of the Judicial Trustee Act, 1896, it is entirely in the discretion of the Court whether a judicial trustee shall be appointed or not; in the absence of misconduct on the part of a sole executrix the Court refused to appoint a judicial trustee on the application of the residuary legatee against the wish of the tenant for life and sole executrix, but remitted the summons to chambers to appoint an ordinary trustee under the Trustee Act, 1893, to act with the executrix, such trustee to be nominated by her.

**IN RE RATCLIFF**, [1898] 2 Ch. 352; 67 L. J. Ch. 562; 78 L. T. 834—Kekewich, J.

## II. GRANT OF LETTERS OF ADMINISTRATION.

### (a) Administration Bond.

**12. Dispensing with Sureties—Trustee in Bankruptcy.**—The Court can grant letters of administration to a trustee in bankruptcy without requiring any further security than his personal bond, as he has already been made responsible in the bankruptcy, and no further precaution is necessary.

*In the Goods of Cope* ((1890), 15 P. D. 107; 59 L. J. P. 94; 38 W. R. 688; 62 L. T. 500—Hannen, P.) followed.

**IN THE GOODS OF ASTBURY**, (1899), 80 L. T. 296 [—Jeune, P.]

**13. Dispensing with Sureties—Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81.**—The applicants were the trustees of a testator's will who died in 1861, and, subject to a life interest to his widow, gave his residuary estate to his two sons. One of these sons died in 1880 and the other in 1890, both intestate and bachelors. The widow died in 1901, and probate of her will was granted to the executors therein named, the applicants, who applied for grants of letters of administration to the sons' estates. All debts and funeral expenses of the sons had long since been paid.



**Letters of Administration—Continued.**

**HELD**—that on applying for the grants of letters of administration, the bond of the applicants alone should be accepted as a sufficient compliance with sect. 81 of the Probate Act, 1857.

IN THE GOODS OF PATON, [1901] P. 188, 70 [L. J. P. 49; 84 L. T. 570; 17 T. L. R. 434—Jeune, P.

**14. Next of Kin a Lunatic—Dispensing with Sureties—Official Solicitor Committee of Lunatic's Estate—Grant to him as such Committee.]**—In 1899 Mrs. C. took out letters of administration to her mother's estate, and a large portion of such estate was still unadministered. In 1902 Mrs. C. was found by inquisition to be a lunatic, and the official solicitor was appointed committee of her estate. He had completed his security, and now applied for a grant of administration of the mother's estate during the lunacy of Mrs. C.

The grant was made on the solicitor's own bond without sureties.

IN THE GOODS OF UNWIN, (1903) 87 L. T. 749, [19 T. L. R. 91—Barnes, J.

**15. Dispensing with Sureties—Nominee of a Public Department.]**—Where a nominee of the Board of Education, the residuary legatees under a will, obtained a grant with the will annexed, the Court dispensed with sureties to the administration bond.

IN THE ESTATE OF BRYAN, BOARD OF EDUCATION [v. REUBELL, [1905] P. 88; 74 L. J. P. 41; 92 L. T. 426; 21 T. L. R. 107—Jeune, P.

**16. Dispensing with Sureties—Trustee in Bankruptcy—Security—Bankruptcy Rules, 1886, r. 342.]**—The husband of a lady who died intestate was adjudicated bankrupt without having taken out letters of administration to his wife. The Official Receiver was appointed trustee in his bankruptcy, and he gave general security to the amount of £5,000 under rule 342 of the Bankruptcy Rules, 1886. The Official Receiver having taken out letters of administration to the bankrupt's wife, the Court gave leave to dispense with his giving security in the administration.

IN THE GOODS OF CAUSTON, [1906] P. 124; 75 [L. J. P. 42; 94 L. T. 613; 22 T. L. R. 124—Barnes, P.

**17. One Surety Executing Bond—Refusal of Co-Surety to Execute Bond—Execution by Another Substituted Co-Surety—Cancellation of Bond—Recall of Grant.]**—A surety to an administration bond executed it on the assurance that the other person named therein as a co-surety would execute it. Subsequently the latter refused to execute it, and the name of another surety was substi-

tuted, and he executed the bond. The first surety, who had not assented to the alteration, moved to cancel the bond.

**HELD**—that the bond was void and must be cancelled; that the grant must be recalled so far as the first surety was concerned, and that the administratrix must pay the costs of the application.

IN THE GOODS OF COWARDIN, (1902) 86 L. T. [261, 18 T. L. R. 220—Barnes, J.

**18. Personal Bond without Sureties—Funds in Court—Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 82, 83.]**—Grants of letters of administration of several estates were obtained by the applicant. All the grants were under the nominal sum of £100. The grants to two of the estates were increased. These two estates consisted of funds standing to the credit of an action in the Chancery Division. The applicant applied for a reduction of the penalties on the bonds. The applicant's own share was nominal.

**HELD**—that the proper order to make was that as to the amounts that would be paid to other persons directly under the order in the Chancery action the applicant should enter into a personal bond without sureties, and as to so much as was coming to himself he should give a bond with sureties.

IN THE GOODS OF LEACH, (1899) 80 L. T. 170—[Barnes, J.

**19. Premium Paid to Insurance Company—Allowance Out of Estate.]**—Where a person who is entitled as of right to a grant of administration, but is otherwise unable to give justifying security, procures a surety bond from an insurance company, and pays a premium thereon, it is within the discretion of the Court to allow the amount of such premium out of the general personal estate, where the circumstances of the case show that reliable security could not otherwise be obtained, and that the course adopted was reasonable and proper, and for the interest of all parties entitled to the assets.

IN RE LUCAS, PARR v. BLAIR, [1900] 1 Ir. R. [292—V. C.

**(b) As on an Intestacy.**

**20. Document Purporting to be a Will—Compromise.]**—The deceased died without issue or parent. He executed, in the presence of two witnesses, a document purporting to be his will, whereby he bequeathed everything he possessed to his nurse, under whose care he had been for some years before his death, and appointed her sole executrix. An agreement of compromise was entered into between the executrix and members of the deceased's family.

Upon the understanding that the applicant would swear that he was the next of kin when obtaining the grant, the Court

**Letters of Administration—Continued**

granted to the applicant letters of administration as upon an intestacy.

*Crosby v. Noton* ((1867) 36 L. J. P. & M. 55; 15 W. R. 775; 16 L. T. 153) followed.

IN THE GOODS OF GEORGE DENNIS, [1899] P. 191; 68 L. J. P. 67—Jeune, P.

21. *Non-appearance of Legatees—Grant to Next of Kin as on an Intestacy*.—G. Q. brought an action to have an alleged will of J. Q. pronounced against and for a grant of administration. The defendants A. J. Q. and others entered a caveat against administration to G. Q. The legatees under the alleged will, which had been made at New York at a time it was contended that the testator was insane, did not appear.

HELD—that A. J. Q. was entitled to a grant of administration as on an intestacy on proof that he was next of kin of the deceased.

*Morton v. Thorpe* ((1863) 3 Sw. & Tr. 179; 32 L. J. P. 174—Sir C. Cresswell) followed.

IN THE GOODS OF QUICK; *QUICK v. QUICK*, [1899] P. 187; 68 L. J. P. 64; 80 L. T. 808—Jeune, P.

22. *Revocation of only Will—Form of Grant—Wills Act, 1837* (1 Vict. c. 26), s. 20.]—Where a testatrix in accordance with sect. 20 of the Wills Act, 1837, duly revoked her will and made no other,

HELD—that there should be a grant as upon intestacy, but not annexing the paper of revocation, but with a note that the grant was made in consequence thereof.

*TOOMER v. SOBINSKA*, [1907] P. 106; 76 L. J. P. 19; 96 L. T. 475—Deane, J.

23. *Will not Forthcoming—Citation of Parties Interested—Non-appearance*.—Where parties interested under an alleged testamentary paper had been cited to appear and propound it and had not done so, the Court granted administration as to an intestate.

*Morton v. Thorpe* ((1863) 3 Sw. & Tr. 179; 32 L. J. P. 174; 7 L. T. (N.S.) 194) followed.

IN THE GOODS OF BOOTLE; *HEATON v. WHALLEY* [AND OTHERS, (1901) 84 L. T. 570; 17 T. L. R. 476—Jeune, P.

## (c) Citation.

24. *Father—Disappearance of Father—Grant to Sole Surviving Brother*.—A. W. H. died in England, a lunatic, bachelor, and intestate. His mother, sisters, and brothers (except the applicant for administration, A. C. H.) had predeceased him. His father had not been heard of for over thirty years.

HELD—that the father of the intestate should be cited.

IN THE GOODS OF HARPER, [1899] P. 59; 68 [L. J. P. 48; 80 L. T. 294—Barnes, J.

25. *Heir-at-Law—Land Transfer Act, 1897* (60 & 61 Vict. c. 65)—(20 & 21 Vict. c. 77), s. 73—Sect. 2, sub-s. 4, of the Land Transfer Act has not the effect of extending the Powers of the Court under sect. 73 of 20 & 21 Vict. c. 77 to realty.]—Where a wife dies after January 1, 1898, intestate as to real estate, but having made a will bequeathing her personalty to her husband and appointing him executor, and the husband survived her but died intestate without having proved the will, a grant of letters of administration cannot be made to the husband's administrator without citing the wife's heir-at-law.

Under certain circumstances a grant *ad colligenda bona* may in such a case be made and framed so as to apply to the realty.

IN THE GOODS OF ROBERTS, [1898] P. 149; 67 [L. J. P. 71; 78 L. T. 390—Jeune, P.

26. *Heir-at-Law Abroad and his Address Unknown—Court of Probate Act, 1837* (20 & 21 Vict. c. 77), s. 73—*Land Transfer Act, 1897* (60 & 61 Vict. c. 65), s. 2, sub-s. 4.]—Notwithstanding the provisions of sect. 2, sub-sect. 4 of the Land Transfer Act, 1897, and the fact that the heir-at-law of an intestate had not been cited, the Court granted administration under sect. 73 of the Court of Probate Act, 1837, to one of the next-of-kin, the heir-at-law being abroad and his address being unknown.

IN THE GOODS OF BLENKINSOP, (1901) 49 W. R. 336—Barnes, J.

27. *Husband—Deed of Separation—Property to go as if Husband had predeceased Wife*.—The deceased had separated from her husband, and by the deed of separation which was alleged to be in operation at her death, on her death in his lifetime all her property was to go as it would have gone if her husband had died in her lifetime. The husband was alleged to have become a bankrupt and indebted to the estate of the deceased for payments due under the deed amounting to £841. Her estate was small.

The Court granted letters of administration conditionally on the husband being cited by advertisement, as he might dispute the validity of the deed.

IN THE GOODS OF MEGSON, (1899) 80 L. T. 295—[Jeune, P.

28. *Next-of-Kin—Grant of Letters of Administration to Heir-at-law—Land Transfer Act, 1897* (60 & 61 Vict. c. 65).—Where a person has died intestate after the 1st Jan., 1898, possessed of real estate, but not possessed of personalty, letters of administration may be granted to the heir-at-law without citing the next-of-kin.

IN THE GOODS OF BARNETT, [1898] P. 145; 67 [L. J. P. 85; 78 L. T. 391—Barnes, J.

29. *Next-of-Kin—Previous Death of Husband Intestate and without Issue—Intestate's Estate less than £500—Death of Widow In-*

**Letters of Administration—Continued.**

*testate—Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 1—Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 78.]*—A husband died intestate without issue, leaving a widow. His estate did not exceed £500. Subsequently his widow died intestate without having taken out letters of administration to her husband. Letters of administration to the widow's estate were granted to her sister, who thereupon applied for letters of administration to the husband's estate.

**HELD**—that as the widow was entitled to the whole of her husband's estate, letters of administration would be granted without citing the next-of-kin.

**IN THE GOODS OF GREEN, (1901) 84 L. T. 61; 17 [T. L. R. 242—Barnes, J.]**

**(d) Creditors**

**30. Creditor's Right to Letters of Administration—Right of Retainer—Assets in the Jurisdiction.]**—A creditor will not be granted letters of administration to defeat the right of retainer of the next of kin unless he can show the existence of assets in the jurisdiction.

A general allegation of information and belief as to the existence of assets is useless.  
**IN THE GOODS OF FOY, (1898) 78 L. T. 49—[Barnes, J.]**

**31. Grant to Creditor.]**—The deceased in 1871 charged a reversionary interest in personalty in favour of a creditor. He died intestate in 1878, leaving his father his next of kin. His father died in 1888 having appointed A. his executrix. A. died in 1896 having appointed L. her executrix. No letters of administration had been taken out to the estate of the deceased. The reversionary interest fell into possession in 1897. The charge had been assigned to the applicants and the sum due on it exceeded the property charged. L. consented to the application.

**HELD**—that a grant ought to be made to the applicants.

**IN THE GOODS OF LOW, (1898) 78 L. T. 566—[Barnes, J.]**

**32. Grant to Creditor—Mortgagee by Sub-demise—Outstanding Day—Limited Grant.]**—The deceased was tenant for a term of fourteen years. He sub-demised the premises to W. S. by way of mortgage for the unexpired residue of the term, less the last day of the term of which the mortgagor covenanted to stand possessed in trust for W. S., or as he should direct. In default of payment of principal and interest W. S. entered into possession of the premises. The deceased was at the time of his death insolvent and possessed no real or personal property. He left surviving him three children. W. S. assigned to the applicant under the power of sale in the mortgage the sub-lease and the beneficial interest in the last day free from all equity of redemption.

The applicant asked for a grant of letters of administration limited to the outstanding day. The children had been cited.

**HELD**—that letters of administration limited to the outstanding day of the term might be granted to the applicant.

**IN THE GOODS OF KINGWELL, (1899), 81 L. T. 461 [—Barnes, J.]**

**33. Notice to Next of Kin—Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.]**—The deceased at the time of his death was an inmate of a county lunatic asylum, and was indebted to the guardians of the union in the sum of £52 for maintenance. The only next of kin was the deceased's daughter, also an inmate in the same asylum, and who was also indebted to the same guardians. The clerk to the guardians moved for a grant of letters of administration under sect. 73 of the Court of Probate Act, 1857.

**HELD**—that notice must be given to the next of kin.

**IN THE GOODS OF DEUCE, (1899), 68 L. J. P. 120; [81 L. T. 458—Barnes, J.]**

**(e) Crown's Rights.**

**34. Bastard—Real and Personal Estate—Nominee of Crown—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.]**—Where a person dies a widow (or bachelor) without issue, a bastard and intestate, entitled to real and personal estate, the grant of administration to the nominee of the Crown will be of the personal estate only, as before the Land Transfer Act, 1897. The Crown is not bound by that Act.

**IN THE GOODS OF HARTLEY, [1899] P. 40; 68 [L. J. P. 16; 47 W. R. 237—Jeune, P.]**

**35. Death of Sovereign—Death of Intestate without Next-of-Kin—Right of Sovereign's Executors to Nominate Solicitor to take Grant.]**—Grants of letters of administration of the personal estate and effects of a deceased, who had died domiciled in the County Palatine of Lancaster intestate and without kin, had been made by the Court to the then solicitor for the Duchy of Lancaster for the use of her late Majesty Queen Victoria. The then solicitor died without having completed administration.

**HELD**—that the Court would allow the executors of her late Majesty to nominate the solicitor to the Duchy to take grants for their use in all cases where their beneficial use was undisputed. The solicitor, however, must give the usual administration bond (from which he would be exempted by statute if he took for the use of the Sovereign), but sureties would be dispensed with.

**IN THE GOODS OF BEST AND OTHERS, [1901] P. [333; 17 T. L. R. 720; 71 L. J. P. 9; 85 L. T. 640—Jeune, P.]**

## Letters of Administration—Continued.

## (f) Cum testamento annexo.

36. *Relation Back of Administrator's Title—No Executor Named—Universal Devisee and Legatee—Administration or Probate—Land Transfer Act, 1897* (60 & 61 Vict. c. 65), ss. 1, 24.]—The Land Transfer Act has not altered the practice whereby a universal legatee and devisee (no executor being named) is entitled only to administration *cum test. annexo*, and not to probate according to the tenor.

*Semble*, the title of an administrator dates back to the date of death in respect of real as well as of personal estate. In any case the devisee is in no worse a position as administrator than as executor, for the Court would aid by appointing a receiver if necessary to protect his interests.

IN THE GOODS OF PRYSE, [1904] P. 301; 73 [L. J. P. 84; 90 L. T. 747—C. A.]

37. *Special Circumstances—Grant to Stranger in Blood—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—On account of litigation, which it was desired by all parties interested in the estate to put an end to, and also on account of the position of the applicant in relation to the estate, a stranger in blood who had been employed by the deceased in auditing his accounts, administration with will annexed was granted to the applicant under the 73rd section of the Probate Act, 1857, subject to consents of the widow and all the parties interested, and an affidavit of fitness of the proposed administrator being filed.

IN THE GOODS OF POTTER; POTTER v. POTTER, [1899] P. 265; 68 L. J. P. 97; 81 L. T. 234—Barnes, J.

38. *Special Circumstances—Disappearance of Executor—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—A testatrix died leaving personalty of the value of £2,000. She appointed two executors. One of the executors did practically nothing except draw £25 from the assets on account of expenses, and shortly afterwards sailed with his family for New York, leaving no address. The other executor renounced probate. All parties interested under the will consented to the grant of administration with the will annexed to one of the sons and a residuary legatee.

*Held*—that under sect. 73 of the Court of Probate Act, 1857, the grant might be made.

IN THE GOODS OF MASSEY, [1899] P. 270; 68 [L. J. P. 127; 81 L. T. 493—Barnes, J.]

39. *Special Circumstances—Foreign Domicil of Testatrix—No Executors—Next of Kin out of Jurisdiction—Estate and some Beneficiaries in England—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—The testatrix died domiciled in the Republic of Hayti, having made a holograph will in

accordance with the forms required by the laws and constitutions of the Republic, but not in accordance with the Wills Act. She appointed no executor or residuary legatee, but the will contained (*inter alia*) the following words: "M. E. Bordu of Port-au-Prince and Mr. J. B. Wallace of Liverpool shall carry out my last wishes." The sole next-of-kin, the sister of the testatrix, who was entitled to half the estate, was in Hayti. The persons entitled to the remaining half were in England, and consented to the appointment of Mr. J. B. Wallace as administrator with the will annexed. The only estate consisted of a sum of £1,260 7s. 11d. in the hands of Mr. J. B. Wallace's firm in Liverpool.

The Court made a grant to Mr. J. B. Wallace under sect. 73 of the Court of Probate Act, 1857, of administration with a certified copy of the will annexed.

IN THE GOODS OF MOFFATT, [1900] P. 152; 69 [L. J. P. 98—Jeune, P.]

40. *Special Circumstances—Testatrix Deserted by her Husband—Grant to Daughter—Husband not Cited—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—The Court granted administration with the will annexed under sect. 73 of the Court of Probate Act, 1857, to the daughter of the testatrix's husband, who had deserted her twenty-five years prior to her death, and had not been heard of since, the daughter swearing that she believed herself to be the sole next-of-kin, and the husband not being cited.

IN THE GOODS OF BYRNE, (1901) 84 L. T. 570; [17 T. L. R. 452—Jeune, P.]

41. *Special Circumstances—Charitable Bequest—Gift to Roman Catholic Bishop for the Library of a Diocesan Seminary—Death of Bishop and two of his Successors—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—Canon Lalor died on March 20th, 1901, leaving a will dated August 16th, 1880, under which he left his books to the Right Rev. James Danell, Roman Catholic Bishop of Southwark, for the library of the Diocesan Seminary of Southwark, and also two bonds of £100 each on the Government of Queensland, the interest of the said bonds to be applied to the binding, maintenance, &c., of the aforesaid books in the first place, and then to the purchase of new ones. After giving a number of small legacies, the testator appointed Dr. Danell his residuary legatee, and directed that if there should be any surplus it should be applied to increasing one specific legacy, and the remainder, if any, to go to increase the legacy for the Seminary library aforesaid. Dr. Danell died in 1881, and was succeeded in the Bishopric by three bishops, the last of whom was still alive, and in whom the library was vested *ex-officio*.

*Held*—that there must be a grant of administration with the will annexed to the

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present Bishop of Southwark, under the 73rd Section of the Probate Act, 1857, as a *prima facie* case had been made out, but that this grant was not to prejudice the next-of-kin's rights to any proceedings he might desire to take in Chancery or elsewhere.

IN THE GOODS OF LALOR, [1902] 71 L. J. P. 17, [85 L. T. 643; 18 T. L. R. 15—Barnes, J.

42. *Special Circumstances—Sole Executrix Incapable of Acting—Joint Grant to her Nominees—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—Where a sole executrix and universal legatee was, owing to ill-health, incapable of taking probate, the Court made a joint grant with the will annexed to her nominees.

IN THE GOODS OF DAVIS, [1906] P. 330; 75 [L. J. P. 94—Deane, J.

**(g) De Bonis Non.**

43. *Fresh Grant to One of the Next-of-Kin—Disappearance of Former Administratrix—Revocation of Grant.*—If the Court has, in certain circumstances, made a grant of administration in the belief and hope that the person appointed will properly and fully administer the estate, and if it turns out that the person so appointed will not or cannot administer, the Court may revoke the inoperative grant, and make a fresh grant.

An intestate died, leaving his widow and six children by a former marriage, all *sui juris*, him surviving. Administration was granted to the widow in 1885. By an order made in the Chancery Division in 1899, a sum of money was payable to the legal personal representative of the intestate. The administratrix, though every effort had been made to trace her, could not be found. The six children desired that a grant *de bonis non* should be made to J. L., one of their number.

HELD—that the grant formerly made to the widow of the intestate should be revoked, and a fresh grant issued in favour of J. L. in respect of the personal estate and effects of the intestate left unadministered.

IN THE GOODS OF LOVEDAY, [1900] P. 154; 69 [L. J. P. 48; 83 L. T. 692—Jeune, P.

44. *Partner of Deceased Nominee of all Parties—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—A grant of administration with the will annexed was made to a stranger in blood, who had been employed by the deceased in auditing his accounts, as the nominee of all parties. When he died a grant *de bonis non* was made to his partner with the consent of all parties.

IN THE GOODS OF POTTER; POTTER v. POTTER, [(1900) 69 L. J. P. 53—Jeune, P.

45. *Previous Grant to Attorney of a Next-of-Kin—Persons Entitled—Application for*

*Fresh Grant—Notice.*—The deceased left a son and daughter, his next-of-kin, both resident out of jurisdiction. The son appointed an attorney, who took out letters of administration in this country, and died, leaving part of the estate of the deceased unadministered. The daughter afterwards appointed an attorney, who applied for a grant *de bonis non*, for the use and benefit of the daughter, limited until such time as she should come to this country and duly apply for and obtain administration.

The Registrar refused the application, but, on further application,

The Court made the order for a grant as prayed.

Whether in such cases notice must be given to a person equally entitled with the applicant, *quære*.

IN THE GOODS OF BARTON, [1898] P. 11; 67 [L. J. P. 10; 77 L. T. 629; 78 L. T. 81—Jeune, P.

46. *Renunciation — Retracting — Joint Grant to Wife and Children.*—A. H. T. became bankrupt, and died on September 1st, 1896, intestate. He left five children by his first wife and one by his second wife, who survived him.

In 1897 letters of administration to his estate were granted to the Official Receiver of the Lincoln County Court, on renunciation duly signed by or on behalf of the widow and children, as well as letters of administration *de bonis non* of the estate of the first wife.

The Official Receiver paid all the debts, and had a substantial sum in hand for distribution, and desired to be released. The widow and two of the six children moved to revoke the grant to the Official Receiver, and asked leave to retract the renunciations, and applied for a joint grant.

HELD—that the joint grant should go; that it would be sufficient to revoke the grants, and make a fresh grant to A. H. T.'s estate only. As his representatives, the applicants would be entitled, as a matter of course, to represent the first wife's estate.

IN THE GOODS OF TRACER, [1900] P. 15; 69 [L. J. P. 1; 81 L. T. 790—Barnes, J.

47. *Limited Grant to Trustee—Shares in French Railways—Legal Estate in Intestate — Bankrupt Beneficial Owner.*—A., a British subject, domiciled in England, died intestate, a bachelor, without any known next-of-kin. Administration was granted to J. T., a creditor, who died some years later. Certain shares in two French railways which A. formerly possessed had, prior to his death, passed, together with the right of receiving the dividends, into C.'s hands, but no formal transfer or registration had been made. C. was subsequently adjudicated bankrupt.

HELD—that administration *de bonis non* in the estate of A. might be granted to C.'s

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trustee in bankruptcy, limited to the shares in the French railways, the legal estate in which was vested in A. at the time of his death.

IN THE GOODS OF AGNESE, [1900] P. 60; 69 [L. J. P. 27; 82 L. T. 204—Jeune, P.

48. *Surviving Executor absent from England—No Intention to Return, or to Continue to Act—Grant de bonis non to Nominee of Assignee of Residuary Legatee.*—Where a surviving executor, after proving the will and codicil left England not intending to return or continue to act, the Court, on motion, granted administration *de bonis non*, with the will and codicil annexed, to the nominee of the assignee of the residuary legatee without requiring citation or any formal notice to be served upon the executor.

IN THE GOODS OF CAMPION, [1900] P. 13; 69 [L. J. P. 19; 48 W. R. 288; 81 L. T. 790—Barnes, J.

**(h) Foreigners.**

49. *Colonial Grant—Resealing—Intestacy.*—A testator died leaving a will, probate of which was granted in England to the executors therein named. Under this will the personal representatives of the testator's brother were entitled to a legacy of £250. The brother had died intestate in the Colony of Victoria, where he was domiciled, and had left no estate in England. Letters of administration to his estate were granted in Victoria to his widow.

HELD—that the Colonial grant could be resealed in England.

IN THE GOODS OF SANDERS, [1900] P. 292; 69 [L. J. P. 121; 83 L. T. 716—Barnes, J.

50. *Colonial Grant—Resealing in England—Colonial Probates Act, 1892 (55 & 56 Vict. c. 6.).*—A colonial grant of administration, though limited to specific property, may be resealed in the United Kingdom, upon complying with the requirements of the Colonial Probates Act, 1892.

W., who died in St. Vincent, resident and domiciled there, was administrator of the estate of G., and at W.'s death certain sums, in England and St. Vincent, belonging to G.'s estate were standing in his name. A grant, limited to these particular sums, was made to G.'s widow in St. Vincent with the consent of W.'s next of kin, to whom a grant was made as to the rest of W.'s estate.

HELD — that G.'s widow could have her grant resealed in England, in order to obtain payment of such of the moneys which were deposited in English banks.

IN THE GOODS OF SMITH, [1904] P. 114; 73 [L. J. P. 28; 90 L. T. 169; 20 T. L. R. 119—Bucknill, J.

51. *Egyptian Law — Attorney of an Attorney.*—Where a power is given by an

hair-at-law to an attorney to appoint another attorney for the purpose of administration of the estate of a deceased foreigner, and such power is allowable by the law of the deceased's domicile, letters of administration will be granted to the attorney duly appointed by the first attorney.

*Quebec and Richmond Railway v. Quinn* (12 Moo. P. C. C. 232) affirmed and followed.

*Semble*, where a power of attorney expressly authorises the appointment of an attorney by an attorney, the maxim *Delegatus non potest delegare* does not apply.

IN THE GOODS OF ABDUL HAMID BEY, (1898) 67 [L. J. P. 59; 78 L. T. 202—Jeune, P.

52. *Foreign and English Wills—English Will Appointing Executors—Foreign Domicil—Foreign Will—Grant to Foreign Administrators—Executors passed over.*—Our Courts cannot follow the foreign law so far as to grant administration to a person by our law disqualified from taking the grant; but, otherwise, they will follow the law of the foreign domicile.

The deceased, who died domiciled in Belgium, left a Belgian will, and also an English will and codicil appointing executors and dealing with his English property. The Belgian Court having appointed administrators of his estate in Belgium, the English Court passed over the executors, and made a grant of administration, with all three documents annexed, to the foreign administrators.

IN THE GOODS OF MEATYARD, [1903] P. 125, 72 [L. J. P. 25, 89 L. T. 70—Jeune, P.

53. *Foreign Grant of Letters of Administration with Will annexed—Similar Grant in this Country—Foreign Official Collecting Money in this Country.*—C. S. died in Tasmania, domiciled there, and leaving a will disposing of his property without qualification as to its locality, and appointed G. B. executor, who renounced probate. The Supreme Court of Tasmania appointed a curator of the deceased's estates in Tasmania, subject to such orders as might from time to time be made by the Court. The attorney of the curator applied for a grant of letters of administration to C.S.'s estate with will annexed.

The Court granted the application on the ground that a grant had been made by the foreign Court, and by virtue of that grant the applicant was entitled to a grant in this country, notwithstanding that a foreign official would be entitled to collect money here.

IN THE GOODS OF SCARR, (1899) 80 L. T. 296—[Jeune, P.

54. *Foreign Will—Property in England—Extracts from Will.*—Where the will of a foreigner resident abroad was proved by the executor in the foreign Court, and the testatrix died possessed of property in Eng-

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land, the Court refused to make a grant to the executor of administration with extracts from the will annexed, such extracts relating to the English property and being furnished by the foreign Court, to enable the application to be made.

IN THE GOODS OF BARONESS VON FABER, (1904)  
[20 T. L. R. 640—Jeune, P.]

55. *Lunacy of Administratrix—Appointment of foreign Administrateur Provisoire.*—Where the wife of a domiciled foreigner obtained letters of administration with the will annexed to his assets in England and became insane abroad, the Court granted letters of administration to an *Administrateur Provisoire* appointed by a foreign Court for the use and benefit of the lunatic so long as the applicant remained *Administrateur Provisoire*.

IN THE GOODS OF GOLDSCHMIDT, (1898) 78 L. T.  
[763—Jeune, P.]

56. *Will in Custody of Foreign Government—Grant ad colligenda till Original or Exemplification brought in.*—The testator and his wife made a mutual will in Cape Colony before a notary public, and left the will in his custody. The notary died, and according to the law of Cape Colony the Government of Cape Colony took possession of all documents—including the will—left in his possession for safe custody. The testator died in England after having made there a second will confirming his previous will, and appointed his wife sole executrix as to all his property in Great Britain. It was necessary that someone should be appointed to superintend the business of the testator.

The Court made a grant to the widow *ad colligenda* till the original will or an exemplification could be brought in.

IN THE GOODS OF BROWN, (1899) 80 L. T. 360—  
[Jeune, P.]

57. *Will of Frenchwoman — Subsequent Marriage in England to French Fugitive Criminal — Revocation — Domicil — Animus Revertendi—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 18.*—The validity of a pre-nuptial will, so far as it affects movable property, depends not only on the law of the domicile of the testator at the time of his death, but also on the law of his domicile at the time of his making his will, and at the time of his subsequent marriage; but the domicile of the testator on each of these occasions must be determined by the English Court of Probate in the English sense—i.e., according to those legal principles which are recognised in this country and are part of its law.

To acquire an English domicile in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period.

According to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends *primâ facie* on the domicile of the husband in the English sense at the time of the marriage; and, ever assuming that it is possible for the parties to accept in this respect by express agreement (e.g., by marriage settlement) a matrimonial *régime* different from that of the country of the husband's domicile at the time of the marriage, yet no such intention ought to be circumstantially inferred in the absence of such express agreement.

*Per* Vaughan Williams, L.J.—The rule that a pre-nuptial will is revoked by the subsequent marriage of the testator is part of the matrimonial *régime* of England.

A Frenchwoman, in 1870, made a will in England in the French language, which was a holograph will valid by the law of France, whether she was domiciled in England or France. She was in service in England, and this by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was in England, and, according to French law, she was domiciled (in the French sense) in England. In May, 1874, she married a French refugee, known by the name of Martin, and continued to live in England till her death in 1895. According to French law and in the French sense, her husband was domiciled in England when he married. He dared not go back to France for many years, but he could safely do so at the end of twenty years from the time he fled from his own country. He went back in 1890, a few years after it was safe to do so, and remained there, living with his own relatives. One of his reasons for returning was the state of his health; another, probably, the unsatisfactory state of his relations with his wife.

HELD, by Rigby, L.J., and Vaughan Williams, L.J. (Lindley, M.R., dissenting)—that (in the English sense) the domicile of the testatrix at the time of her marriage was English, and her marriage revoked her will, and that the grant of letters of administration with the will annexed must be revoked.

Decision of Jeune, P. (68 L. J. P. 106; 81 L. T. 459), reversed.

IN RE MARTIN; LOUSTALAN v. LOUSTALAN, [1900]  
[P. 211; 69 L. J. P. 75; 43 W. R. 509; 82 L. T. 807; 16 T. L. E. 354—C. A.]

58. *Will of Married Woman Domiciled Abroad—Administration with Will Annexed—Limited or General Grant.*—The sole executor applied for probate in the registry of the will of a married woman who had died domiciled abroad. The husband, a colonel in the Italian army and an Italian subject, who, with the exception of a small legacy, was the universal legatee named in the will, concurred in the application.

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**HELD**—that the applicant could not take the grant as executor; that he was, however, entitled to a full grant of administration with the will annexed.

*In the goods of Hallyburton* ((1866) L. R. 1 P. & M. 90; 12 Jur. (n.s.) 416; 35 L. J. P. 122; 14 L. T. (n.s.) 136—Sir J. P. Wilde) and *In the Goods of Tréfond* ([1899] P. 247; 68 L. J. P. 82, 81 L. T. 56—Jeune, P., No 59, *infra*) explained.

*IN THE GOODS OF VANNINI*, [1901] P. 330; 71 [L. J. P. 7—Jeune, P.

**(i) Limited Grants.**

**59. Appointee — Testatrix a Married Woman—Domicil—Will Executing Power of Appointment—Invalid as Will, Good as Executing Power—Consent of Husband.**—A married woman lived in England apart from her husband, who was a domiciled Frenchman. She made a will in English form, purporting to execute a power of appointment under her marriage settlement. The applicant for a general grant of administration with the will of the deceased annexed applied as the appointee in trust under the marriage settlement of the deceased (which it seemed included all her property), as the will had not been executed in accordance with the law of the deceased's domicil—namely, in France.

**HELD**—that in the absence of a consent by the husband, a general grant must be refused; but that a grant would be made to the applicant as appointee, limited to such property as the deceased had power to dispose of, and did dispose of by her will; but if the consent of the husband could be obtained the applicant might take a full grant, either under the 73rd section of the Court of Probate Act, 1857, or otherwise.

*IN THE GOODS OF TRÉFOND*, [1899] P. 247; 68 [L. J. P. 82; 81 L. T. 56—Jeune, P.

**60. Assignee of Estate—Grant, with Will Annexed.**—Upon application by the assignee of the freehold and pure personal estate of a testator for a grant of administration, limited to certain leaseholds held by the testator upon trust for the said assignee,

**HELD**—that it was safer in such cases that the will should be annexed to the grant.

*IN THE GOODS OF BUTLER*, [1898] P. 9; 67 [L. J. P. 15; 77 L. T. 376; 46 W. R. 445—Jeune, P.

**61. Durante Absentia—Absence out of the Jurisdiction of Administrator—Guardian of Next-of-Kin—Probate (Ireland) Act, 1857 (20 & 21 Vict. c. 79), s. 79.**—Under the 75th section of the Probate Act, 1857, the guardian of the person and fortune of a minor next-of-kin is entitled to apply for a grant of

administration during the absence out of the jurisdiction of the administrator of the deceased, who had left Ireland without administering the assets.

*IN THE GOODS OF LEE*, [1898] 2 Ir. R. 81—[Andrews, J.

**62. Grant ad colligendum—No Relations in England—Immediate Necessity for Sale of Business.**—A small shopkeeper left an estate worth about £265. He was believed to be a bachelor and to have died intestate. He had no relations in England. Before his death the deceased had asked the applicant to manage his affairs. The applicant was a creditor for about £20. If the shop were closed once the business would be worthless, but if sold immediately it would fetch £100.

**HELD**—that a grant *ad colligendum* might be made to the applicant in the form adopted in.

*In the Goods of Schwerdtfeger*, ((1876) 1 P. D. 424; 45 L. J. P. 46, 24 W. R. 298; 34 L. T. (n.s.) 72.

*IN THE GOODS OF BOLTON*, [1899] P. 186; 68 [L. J. P. 63; 80 L. T. 631—Barnes, J.

**63. Husband—Limited Grant—Wife's Property not for her Separate Use—Probate Rules 15 and 18 of March, 1887.**—Under certain circumstances a grant of letters of administration limited to such property as the wife could not dispose of by will may still be made to a husband though the wife has made a will.

In 1875 the deceased, a married woman domiciled in New Zealand, the law of which colony in respect of married women's property was at that time identical with English law before the passing of the Married Women's Property Acts, made a will purporting to dispose of all her property, and after her death in 1875 the will was proved in New Zealand. She had been at the time of her marriage entitled to certain sums under English settlements. These were not limited to her separate use and had never been reduced into possession during her lifetime.

**HELD**—that letters of administration to these sums might be granted to the husband.

*IN THE GOODS OF DONOVAN*, (1898) 78 L. T. 567—[Barnes, J.

**64. Husband—Limited Grant—Wife's Property not for her Separate Use—Probate Rules 15 & 18 March, 1887.**—The deceased was at the time of her marriage in 1872 entitled to a mortgage debt not settled for her separate use. This debt was never reduced into possession. The deceased made a will purporting to dispose of the whole of her property, under which the husband was appointed executor.

The Court gave the husband a grant of administration limited to such property as the wife could not dispose of by will.

*IN THE GOODS OF LEMAN*, [1898] P. 215; 67 [L. J. P. 100; 78 L. T. 764—Jeune, P.



*Letters of Administration—Continued*

65 *Next-of-Kin Declining to Assist Specific Legatee or take a Grant—Legatee in Poor Circumstances—Limited Grant, without Citing Next-of-Kin.*—A niece, by a will appointing no executor, left to her aunt certain specified shares previously transferred into her name by the aunt. Her brothers refused to help their aunt by executing a power of attorney, so that she might obtain a grant. She was in impoverished circumstances and much in need of the shares, and, under the circumstances, the Court, without requiring the next-of-kin to be cited, made a grant to the aunt limited to her specific legacy.

IN THE GOODS OF BALDWIN, [1903] P. 61; 72 [L. J. P. 23; 88 L. T. 565—Barnes, J.]

66 *Pendente lite—Administrator and Receiver—Real Estate—Notice to Heir-at-Law.*—In a probate action where the estate of the deceased comprised both real and personal property, and the heir-at-law was an infant, an application was made for an administrator and receiver *pendente lite*.

HELD—that an order might be made for the appointment of an administrator and receiver, but notice must be given to the heir-at-law, and he must be made a party to the application.

WIGGINS v. HUDSON, (1899) 80 L. T. 296—[Jeune, P.]

67. *Pendente lite — Concurrent Suits in Chancery and Probate Divisions—Creditors—Sureties.*—A probate suit was in progress relating to a deceased person's will. Creditors who were not parties thereto, brought an administration action in the Chancery Division, making defendants in that action the plaintiffs and defendants in the Probate suit.

Upon the application of such creditors the Probate Division appointed as administrators *pendente lite* the same persons who had been appointed in the Chancery Division, and with the same surety.

IN THE ESTATE OF CLEAVER, [1905] P. 319; 74 [L. J. P. 164; 94 L. T. 99—Barnes, P.]

68. *Power of Appointment—Will made in Execution of Power—Foreign Domicil.*—By marriage settlement, made in 1853, real estate in Ireland and certain moneys were vested in trustees by the intended husband upon trust to sell the real estate, and to hold the proceeds of sale and the moneys upon trust (in the events, which happened, of there being no child of the marriage, and of the husband dying in the lifetime of his wife), for such person or persons, for such estates and interests, and in such manner as he should by deed, or by his last will and testament, in writing appoint.

The husband died in 1865, having made his will in Scotland in 1862, by which he gave all the rest of his property to his wife for life, and appointed her residuary legatee.

In 1866 probate of the will, in common form, was granted to A., who had been appointed executor and trustee. In 1897, the wife died, having made a will appointing B. executor and residuary legatee.

The husband was a domiciled Scotchman. His will was duly executed according to the Wills Act, 1837, but invalid according to Scotch law. The real estate remained unsold.

An action having been brought to revoke the probate of the will of the husband, the Court.—

HELD—(1) that the real estate was, notwithstanding the trust for conversion, to be regarded as land; and that, the will being valid according to the law of England, the residuary gift was a good appointment of the beneficial interest in the lands to the wife, (2) that the residuary gift was also a good appointment of the trust moneys, inasmuch as the intention of the settlement was that the trust funds were to be disposed of by a will made according to the law of England; (3) that the probate in common form should be revoked, and liberty given to B. to apply for a grant limited to real estate and trust moneys, the subject-matter of the power of appointment.

MURRAY v. CHAMPERNOWNE, [1901] 2 Ir. R. 232—[Andrews, J.]

69. *Trust—Limited Grant to Cestui que trust—Consent of Trustee's Personal Representatives.*—E. R. R. was trustee for M. R. of a sum of India three-and-a-half per cent. stock which stood in the books of the Bank of England in his name at the date of the application. The applicant M. R. applied for administration limited to the trust fund. Probate of E. R. R.'s will was granted to his wife. Probate of the wife's will was granted to E. H. Letters of administration to E. H.'s estate were granted to the personal representatives of E. R. R. the deceased, and they consented to the application.

HELD — that the application might be granted, limited as prayed.

Pegg v. Chamberlain (1860), 1 Sw. & Tr. 527; 8 W. R. 273, 2 L. T. (N.S.) 25).

IN THE GOODS OF RATCLIFFE, [1899] P. 110; 68 [L. J. P. 47; 80 L. T. 170—Barnes, J.]

70. *Trust—Death of Surviving Trustee—Grant Limited to Trust Property.*—B. was the last surviving trustee of a deed, by which a rentcharge on real estate was put in settlement. B. died and his own estate was administered. His administrator having died, the Court granted letters of administration *de bonis non* to his goods the grant being limited to the appointment of a new trustee of the settlement and to vesting the rentcharge in the new trustee.

IN THE GOODS OF DERRY, [1907] 2 Ir. R. 209—[Andrews, J.]

## Letters of Administration—Continued

## (k) Passing Over.

71. *Executor — Disappearance of Sole Executor—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—The sole executor appointed by the testator had before the testator's death disappeared, and a warrant had been issued for his arrest on a charge of embezzling trust funds. Since then nothing had been heard of him.

HELD—that the evidence was not enough to warrant the inference that the executor was resident abroad; but that sect. 73 of the Court of Probate Act, 1857, extended to the case, and that there were "special circumstances" which justified the Court in passing over the executor and granting administration with the will annexed.

IN THE GOODS OF WRIGHT, (1899) 79 L. T. 473—[Jeune, P.]

72. *Former Husband — Divorced Wife — Sureties required to Justify*—In the case of a divorced spouse dying intestate, the Court will pass over the surviving spouse without citation, but in granting administration to the next-of-kin will require the sureties to the administration bond to justify.

IN THE ESTATE OF WALLAS, [1905] P. 326; 75 [L. J. P. 8; 54 W. R. 172; 94 L. T. 102—Deane, J.]

73. *Husband — Grant to Heir-at-Law of Married Woman—Land Transfer Act, 1897* (60 & 61 Vict. c. 63).]—The words of sect. 2, sub-sect. 4, of the Land Transfer Act, 1897, give the power to grant letters of administration to the heir-at-law of a married woman in preference to the husband.

Where the real estate of the deceased is of much larger value than the personality, the Court will be inclined to prefer the heir-at-law in granting letters of administration.

IN THE GOODS OF ARDERN, [1898] P. 147; 67 [L. J. P. 70, 78 L. T. 536—Barnes, J.]

74. *Husband—Not Cited and Passed Over—Summary Separation Order—General Grant—Justifying Sureties—Summary Jurisdiction (Married Women) Act, 1895* (58 & 59 Vict. c. 39), s. 5—*Matrimonial Causes Act, 1857* (20 & 21 Vict. c. 85), s. 25.]—Upon the death of a married woman who has obtained a summary separation order, a grant with justifying sureties may be made without citing her husband and passing him over.

IN THE GOODS OF JONES, (1905) 74 L. J. P. 27—[Jeune, P.]

*Semble*, however, the grant should be limited to property acquired by her since the date of the separation order. See 74 L. J. P. 164.

75. *Wife — Wife's Right to Letters of Administration.*—Under special circumstances the wife of an intestate may be passed over, and letters of administration granted to a child, without citing the wife.

The fact that the wife eloped with another man during the husband's lifetime is among the most material of such circumstances.

IN THE GOODS OF STEVENS, [1898] P. 126; 67 [L. J. P. 60; 78 L. T. 389; 14 T. L. R. 327—Jeune, P.]

76. *Wife—Adultery.*—An intestate had obtained a divorce, but the decree was rescinded on the ground of his own adultery. His wife had not been heard of for several years prior to his death.

HELD—that a grant should be made to his son without requiring the widow to be cited.

*In the goods of Middleton* ((1888) 14 P. D. 23, 58 L. J. P. 23; 53 J. P. 103; 60 L. T. 237—Butt, J.) distinguished.

IN THE GOODS OF FROST, [1905] P. 140; 74 [L. J. P. 53; 92 L. T. 667—Deane, J.]

## (l) Presumption of Death of Next-of-Kin.

77. *Citation Dispensed with.*—Where the person first entitled to a grant of letters of administration is missing, and the evidence *prima facie* establishes that he is dead, a grant may issue without citing him, to an applicant who swears that he verily believes himself (or some other person who has renounced) to be next-of-kin.

*In the goods of Reid* ((1874) 29 L. T. 932) followed.

IN THE GOODS OF CHAPMAN, [1903] P. 192; 72 [L. J. P. 62; 89 L. T. 308—Jeune, P.]

78. *Commorientes—Husband and Wife—Form of Oath to lead Grants.*—A husband and wife together with their children were believed to have been massacred while engaged in missionary work in North China. Both husband and wife were believed to have died intestate and uninsured. On motion for leave to swear the deaths, and for grants of administration to next-of-kin of the husband and wife:

HELD—that leave should be given to the applicants respectively to vary the usual form of oath to lead the grants by stating therein that the husband and wife died on or since 9th July, 1900, and that after due inquiries there was no reason to believe that either survived the other.

*In the Goods of Ewart* ((1859) 1 Sw. & Tr. 258) followed.

IN THE GOODS OF BEYNON, [1901] P. 141; 70 [L. J. P. 31; 65 J. P. 246; 84 L. T. 271; 17 T. L. R. 324—Barnes, J.]

79. *Corroborative Affidavit—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 73.]—W. B. left England about 1843, and had not been heard of since. His wife remained in England and died in 1857. In 1904, the eldest son of their only child applied for a grant of administration to his grandmother's estate. W. B. had been advertised for, but no answers had been received; and he would have been, if living, over 100 years of age.

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**HELD**—that a grant might go without any corroborative affidavit by a member of the family.

**IN THE GOODS OF BOWDEN**, (1905) 21 T. L. R. [13—Jeune, P.]

**80 Oath of Person Applying for Grant—Form of—Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.**—When the next-of-kin of an intestate has not been heard of for many years, and the person, who (assuming the absent person to have died unmarried) would be the next-of-kin, applies for a grant, he ought to have evidence, and also be prepared to swear, (that the absent person is dead.

It is not yet settled whether, or no, it is sufficient for him to swear to his belief on the point.

*In the goods of Reid* ((1874) 29 L. T. 932) and *In the Goods of Pridham* ((1889) 61 L. T. 902—C. A.) considered.

**IN THE GOODS OF JACKSON**, (1903) 87 L. T. 747; [19 L. T. R. 74—Barnes, J.]

**81. Provisional Grant—Less than Seven Years' Absence.**—Where it is sought to presume death for purposes of administration on the ground merely of lapse of time, the Court, though not bound by any hard and fast rule as to the necessity for the expiration of seven years, may adopt the rule as a matter of caution.

Where a person was entitled to a share of property, the subject-matter of an action in the Chancery Division, and has not been heard of for a period less than seven years, the Court may grant letters of administration for the purpose of making a claim in the action, but order them to be returned into the registry till the seven years have expired.

**IN THE GOODS OF WINSTONE**, [1898] P. 143; 67 [L. J. P. 76; 78 L. T. 535—Barnes, J.]

**82. Son—Death of Father—Grant to Other Son—Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.**—The death of C. H., who left no will, had been presumed by the Court to have occurred in or since 1863. His father had in fact died in 1866 intestate, and had left no estate unless he survived his son C. H.

**HELD**—that a grant for administration upon C. H.'s intestacy might be made to his brother, W. J. H.

*In the goods of Peck* ((1860) 2 Sw. & Tr. 506; 29 L. J. P. 95) followed.

**IN THE GOODS OF HARLING**, [1900] P. 59; 69 [L. J. P. 32; 81 L. T. 791—Jeune, P.]

**83. Unheard of for Twenty-six Years—Citation and Advertisements Dispensed with—Justifying Security—Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.**—The intestate's son, who, if alive, was entitled to administration, left England with his

wife about twenty-six years before his father's death and had never since been heard of. The estate was worth about £200, and the applicant was entitled to at least one-half in any event.

The Court, under sect. 73 of the Court of Procedure Act, 1857, granted administration to the applicant—a grandson of the intestate—upon his swearing that he believed himself to be the sole next-of-kin of the intestate, and upon his giving justifying security without any advertisements.

*In the goods of Reed* ((1874), 29 L. T. (n.s.) 932) followed

*In the goods of Shoosmith* ([1894] P. 23; 63 L. J. P. 64; 70 L. T. 809—Gorell Barnes, J.) distinguished.

**IN THE GOODS OF CALLICOTT**, [1899] P. 189; 68 [L. J. P. 67; 80 L. T. 421—Jeune, P.]

**84. Wife—Disappearance—Special Circumstances—Citation Dispensed with—Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.**—The Court granted administration to the daughter of an intestate, under sect. 73 of the Probate Act, 1857, without citing the widow, the applicant's mother, who had not been heard of since 1884, the applicant swearing that she believed herself to be the sole next-of-kin and giving security.

**IN THE GOODS OF LOVE**, (1901) 17 T. L. R. 721—[Jeune, P.]

**(m) Renunciation by Next-of-Kin.**

**85. Grant to Assignee of Interest.**—A bachelor died intestate, leaving no very near relatives. His only next-of-kin were two cousins, one a widow and T. M., her brother, who could not be found. The widow had assigned all her interest to the applicant for administration, and had renounced her claim to the administration.

**HELD**—that, as T. M. had been cited and the citation duly advertised for a sufficient time with no result, his death was allowed to be presumed, and the applicant was entitled to the grant of letters of administration.

**IN THE GOODS OF QUILLIAM**, (1899) 68 L. J. P. [17, 79 L. T. 472—Barnes, J.]

**86. Special Circumstances—Grant to Intestate's Brother—Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.**—An intestate died a widow and without parent leaving two natural and lawful children and only next-of-kin and the persons alone entitled in distribution to her personal estate. One of the children did not take administration and died, the other renounced. The husband of the former child expressly consented to letters of administration being granted to the natural and lawful brother of the intestate, such grant being necessary to complete the title on sale of leaseholds.

**HELD**—that there were no "special circumstances" shown to bring the case

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within the operation of sect. 73 of the Probate Act, 1857, and that the application by the intestate's brother must be refused.

IN *THE GOODS OF BROUGHTON*, [1901] P. 139; [70 L. J. P. 33; 84 L. T. 330—Barnes, J.]

**87. Grant to Person having no Interest.**—Where the person who is sole next-of-kin, and the only person entitled in distribution to the estate, renounces her title to administrator to the estate of the deceased, the Court will make the grant to a person who would have been next-of-kin if the sole next-of-kin had been out of the way, although such person has no interest in the estate.

In *the goods of Johnson* ((1862) 2 S. & T. 595; 7 L. T. (N.S.) 337) followed.

IN *THE GOODS OF TRIGG*, [1901] P. 42; 69 [L. J. P. 47; 82 L. T. 626—Barnes, J.]

**(n) Revocation of Grant.**

**88 Distribution of Intestate's Estate—Res Judicata—Acquiescence—Laches.**—In 1892 letters of administration to an estate were granted to the defendant in the present action as the cousin and one of the next-of-kin of the intestate, and on the 27th of December, 1892, the defendant commenced Chancery proceedings for the administration of the estate. The present plaintiff made a claim in these proceedings to be entitled as one of the next-of-kin to a share in the distribution of the estate. This claim was disallowed by the chief clerk, and the plaintiff took no further steps in the proceedings. On the 21st of April, 1896, a final order for distribution of the estate was made in the Chancery action, and all further proceedings therein were stayed. On the 7th of June, 1898, the plaintiff commenced the present action to revoke the letters of administration granted in 1892, and to obtain a grant in her favour.

**HELD**—that, as the only object of the present action was to recover the property which had been distributed, the Court would not assist the plaintiff in her attempt to obtain a grant which would be useless to her, seeing that she could institute proceedings in Chancery, even though the letters of administration had not been revoked.

**HELD ALSO**—that, though the matter was not *res judicata* against the plaintiff by reason of the Chancery proceedings, she had been guilty of such delay and acquiescence as to disentitle her to maintain an action against those who had received the estate by virtue of those proceedings.

Decision of Gorell Barnes, J. ([1899] P. 211; 68 L. J. P. 91; 81 L. T. 211) affirmed.

*MOHAN v. BROUGHTON*, [1900] P. 56; 69 L. J. P. [20; 48 W. R. 371; 82 L. T. 29—C. A.]

**89. Suppression of Will Appointing Executor—Acts of Administrator done under**

*Grant—Effect of.*—E. suppressed the will of his father which appointed an executor; he then obtained a grant of letters of administration, and deposited a lease of his father's house as security for a debt due from his father.

Upon discovery of the will the grant was revoked.

In an action by the equitable mortgagee of the leasehold house,

**HELD**—that the grant obtained by suppressing the will was void *ab initio*; and that all acts done by E. as administrator (except acts which he could have been compelled to do *qua* administrator) were void also; and that, therefore, the deposit of the lease was void, and that the debt was barred by the Statute of Limitations.

*Abram v. Cunningham* ((1677) 2 Lev. 182) and *Graysbrook v. Fox* ((1564) 1 Plowd. 275) explained and applied.

*ELLIS v. ELLIS*, [1905] 1 Ch. 613; 74 L. J. Ch. [296; 53 W. R. 617; 92 L. T. 727—Warrington, J.]

**III. PROBATE.****(a) Costs.**

**90. Incidence—Unsuccessful Effort to Propound Earlier Will—New Rule—R. S. C. Order 65, r. 14 (d).**—Under the new rule 14 (d) of Ord. 65 the Court has power in any probate action to order costs to be paid out of any particular portion or portions of the estate.

In a case where executors propounded a will and a legatee under it unsuccessfully tried to set up an earlier will, under which he took a larger interest, the Court ordered the costs of both sides to be charged on and paid out of the *corpus* of real estate devised by the will upheld to the legatee for life with remainders over.

*DEAN v. BULMER*, [1905] 1 P. 1; 74 L. J. P. 12; [92 L. T. 426—Jeune, P.]

In another case the Court ordered the costs of all parties to be paid out of the share passing to four out of six defendants.

*HARRINGTON v. BUTT*, [1905] 1 P. 3 (n); 74 [L. J. P. 12 (n)—Barnes, J.]

**91. Incidence—Costs to be Paid out of "Estate"—Personalty Insufficient—Liability of Real Estate—Practice—Directions by Court as to Incidence of Costs—R. S. C. Ord. 65, r. 14 (d)—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2.**—In the case of a testator dying after 1897, if costs of a probate action are ordered to be paid "out of the estate," the reality is subject to the same liability for such costs as the personality.

As a result of Part I. of the Land Transfer Act, 1897, the decision to the contrary in *In re Shaw* ([1894] 3 Ch. 615; 64 L. J. Ch. 47; 43 W. R. 159; 71 L. T. 515—Kekewich, J.) is no longer law.

Unless the Court under Ord. 65, r. 14 (d) imposes such costs on a particular portion

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of the estate, they are payable out of the entire estate, in due order of administration.

IN RE VICKERSTAFF; VICKERSTAFF v. CHADWICK, [1906] 1 Ch. 762; 75 L. J. Ch. 419; 54 W. R. 414; 94 L. T. 463—Kekewich, J.

92. *Married Woman—"Proceeding" Instituted by—Independent Interest—Intervention—Separate Estate Subject to Restraint on Anticipation*—R. S. C., 1883, Order 12, r. 23—*Probate Court Rules*, 1862 (*Contentious Business*), r. 6—*Married Women's Property Act*, 1893 (56 & 57 Vict. c. 63), s. 2.]—A will was brought forward for probate under which three persons became entitled to the residuary estate of the testatrix in equal shares. The person who brought forward the will was one of those persons, and the will was opposed by the next of kin. An action was then brought by one of the three residuary legatees against the next of kin for the purpose of establishing the will. One of the other persons who was entitled under the same will to an equal share of the residue was a married woman, and under Order XII., r. 23, of the Rules of the Supreme Court, 1883, she, for the purpose of asserting her independent interest, intervened "as a plaintiff." Subsequently she delivered a pleading by which she said "that she adopts the pleadings of the plaintiff herein."

HELD—that she was an actor who, by intervening, had "instituted" a proceeding within the meaning of sect. 2 of the Married Women's Property Act, 1893; and that the Court had jurisdiction to order the costs of the action, as against the intervener, as from the date of the summons to intervene, to be paid out of her separate property, including property which was subject to a restraint on anticipation.

CRICKITT v. CRICKITT, [1902] P. 177; 71 [L. J. P. 65; 86 L. T. 635; 13 T. L. R. 584—C. A.

93. *Notice by Defendants only to Cross-examine*—R. S. C., Ord. 21, r. 18.]—The Court at the hearing of a probate suit, being of opinion that the defendants—who were opposing a will and codicil, and had given notice under Ord. 21, r. 18, that they merely insisted on the will being proved in solemn form of law, and that they only intended to cross-examine the witnesses produced in support of the will—had no reasonable ground for opposing the will, condemned the defendants to pay the costs of the plaintiffs who were propounding the documents.

SPICER v. SPICER, [1899] P. 38; 68 L. J. P. 19; [47 W. R. 271; 79 L. T. 707; 15 T. L. R. 40—Jeune, P.

94. *Notice by Defendant only to Cross-examine—Trustee*—R. S. C., Ord. 21, r. 18.]—In a proper case—a case anywhere near the dividing line—the fact that the defendant

is a trustee would lead the Court to pay attention to the argument that the trustee is justified in defending the interests of the *cestuis que trust*, and ought not to be condemned in costs where he, under Ord. 21, r. 18, gives notice that he desires only to cross-examine the witnesses to a will.

PERRY v. DIXON, (1899) 80 L. T. 297—Jeune, P.

95. *Notice by Defendants to Cross-examine*—R. S. C., Ord. 21, r. 18.]—Ord. 21, r. 18, as amended, was intended to establish a new and complete rule of practice, namely, that a defendant giving the notice of intention only to cross-examine is not to be liable to pay the costs of the other side, "unless the judge shall be of opinion that there was no reasonable ground for opposing the will." This rule governs the matter whether there be a jury or not, and whatever be the verdict of the jury.

HELD—that where a solicitor who drew the will opposed, and who was present at its execution, was dead, one of the attesting witnesses was dead, and the only living witness of its execution was a person whose uneducated recollection was extremely vague, it was not unreasonable that she should be put into the witness-box to state upon oath what took place, and to be cross-examined as to her recollection of the matter.

DAVIES v. JONES, [1899] P. 161; 68 L. J. P. 69; [80 L. T. 631—Jeune, P.

96. *Rules Guiding Court—Executors and Trustees who are also Residuary Legatees propounding Will of Person of Unsound Mind—Parties Reasonably Led into Litigation—Testator not Cause of Litigation.*—Speaking generally, there are in the Probate Division two classes of cases in which there should be, and generally is, a departure from the ordinary rule that costs after a trial should follow the event unless, according to the principles which are in force in this Court, there should be adequate reason for an order of a different character. The first class is where the litigation has been brought about through the conduct of the testator or testatrix; and the second class is where the parties who have failed have reasonably been led into the litigation by a *bonâ fide* belief in their case, and have, therefore, felt it desirable to inquire into the testamentary dispositions of the testator or testatrix.

The plaintiffs, as executors, trustees and residuary legatees under the last will of the deceased, propounded alternatively two wills. The testatrix was an old woman about ninety or ninety-one years of age at the time when these documents were made, and the questions were whether they were properly executed—about which there was really no dispute—whether they were executed when she was of sound mind, and whether she knew and approved the contents. The jury found due execution, but that the deceased was not of sound mind, memory, and

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understanding, and that she did not know and approve the contents. No impropriety of conduct was suggested.

**HELD**—that three plaintiffs could not be said to have been honestly led into this litigation by the fact that the testatrix seemed to all outward appearances to be capable of managing her affairs, nor that the testatrix herself was the cause of the litigation; but they took a view about the old lady which the jury found to be mistaken; that the costs ought not to be paid out of the estate, and there was nothing to warrant a departure from the ordinary rule, and costs must follow the event, as, however, some parties, other than the defendant, had applied for a separate order for their costs, and there was no reason why they should not have joined in supporting the defendant, there would only be defendant's costs.

*Boughton v. Knight* (1873) L. R. 3 P. & M. 64; 42 L. J. P. 25, 28 L. T. (N.S.) 562 distinguished.

*Twist v. Tye*, [1902] P. 92; 71 L. J. P. 47; [86 L. T. 259; 18 T. L. R. 211—Barnes, J.

**97. Rules Guiding Court—Circumstances Inviting Inquiry.**—Where a person, who is to derive a substantial benefit under a will, himself takes instructions for it and does not cause the solicitor who prepares it to intervene at any material time, the circumstances are such that they so far invite inquiry as to justify the Court in holding that there ought to be no order for costs against a defendant who has been put upon inquiry.

*Aylwin v. Aylwin*, [1902] P. 203, 71 L. J. P. [130; 87 L. T. 142—Jeune, P.

**98. Rules Guiding Court—Will Pronounced Against—Testatrix not of Sound Disposing Mind—Costs of Executor Propounding Will.**—The rule and practice of the Probate Court is that costs follow the event except under very rare and exceptional circumstances; litigants cannot reasonably expect to get costs out of the estate in almost every case.

Where, if inquiries had been made before action, it would have been disclosed that the will of a very old woman had come into existence through the instrumentality of the sole residuary legatee thereunder, the executor chooses to take the risk of propounding the will, costs will follow the event, as the executor need not have intermeddled in litigation.

*Twist v. Tye* ([1902] P. 92; 86 L. T. 259; 18 T. L. R. 211, No. 96, *supra*) followed.

*PAGE AND ANOTHER v. WILLIAMSON*, (1902) 87 [L. T. 146; 18 T. L. R. 770—Barnes, J.

**99. Rules Guiding Court—Circumstances Inviting Inquiry—Allegations of Undue Influence.**—Where the circumstances under which a will is made entitle the defendant to

call upon the plaintiff propounding such will to prove that it was not obtained by undue influence or fraud, the defendant, though ultimately unsuccessful, is entitled to his costs out of the estate as between party and party subject to the plaintiff's costs as between solicitor and client.

*Orton v. Smith* (1873) L. R. 3. P. & M. 23; followed.

*WILSON v. BASSIL*, [1903] P. 239; 52 W. R. [271; 89 L. T. 586—Walton, J

**100. Rules Guiding Court—Circumstances Inviting Inquiry—Plea of Undue Influence.**—Where a probate suit has been occasioned by the acts of the testator or his residuary legatees, the costs of a person who unsuccessfully opposes probate may be ordered to come out of the estate. Again, if it is under the circumstances reasonable to investigate a propounded document, parties may be left to bear their own costs.

A person who without reasonable ground puts forward a plea of undue influence can not rely on either of these rules.

*Quære*, whether the fact that the propounder of a will in his own favour himself made it raises in law any presumption against it.

*Wilson v. Bassil* (No. 99, *supra*) commented on.

*SPIERS v. ENGLISH*, [1907] P. 122; 76 L. J. P. [28; 96 L. T. 582—Barnes, P

**101. Several Defendants—Divergence of Interests—Separate Appearance—Separate Costs—Rules of Supreme Court, Ord 65, r 1.**—In a probate action the validity of three wills was established. Of the four defendants in the action, who were all beneficiaries under the first will, the two who were executors of the first and second will received the same benefits under the second will, while the other two were cut out under the second will. All four were cut out under the third will.

**HELD**—that there was such a divergence of interest between the two pairs of defendants that the latter pair was justified in appearing separately, and was therefore entitled to have a separate taxation and payment of costs.

Decision of Barnes, J. (80 L. T. 360) reversed.

*BAGSHAW v. PIMM*, [1900] P. 148; 69 L. J. P. [45; 48 W. R. 422; 82 L. T. 175—C. A

**(b) Effect.**

**102. Husband Proving Married Woman's Will—Implied Assent of Husband to Dispositions.**—Where a married woman, who had no power of disposition by will except with the assent of her husband, bequeathed all her property to her husband, subject to the payment of a legacy of £10,000, and appointed him sole executor,

**HELD**—that as probate of a married woman's will is now granted only in genera

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terms, the husband did not by merely proving the will thereby assent to the dispositions it contained.

HELD also—on the construction of the will, that, whether or not the husband had assented, it did not dispose of the property, which would have gone to the husband if the testatrix had not made a will.

Decision of Stirling, J. ([1898] 1 Ch. 637, 67 L. J. Ch. 349; 46 W. R. 439; 78 L. T. 317) affirmed.

IN RE ATKINSON; WALLER v. ATKINSON, [1899] 2 [Ch. 1; 68 L. J. Ch. 404, 47 W. R. 469, 80 L. T. 505—C. A.

103. *Proof of Will in Solemn Form—Citation to see Proceedings—Compromise—Res inter alios acta—Cognition of Proceedings and Power to Intervene—Estoppel.*—A person, although cited to see proceedings, is not estopped by judgment therein as the result of a compromise, to which he was not a party, and of which he knew nothing; and he is not estopped from questioning the validity of a will proved in solemn form as the result of such verdict and compromise.

RITCHIE v. MALCOLM, [1902] 2 Ir. R. 403—K. B. [Div. (Prob.).

**(c) Executor according to the Tenor.**

104. *Alteration in Will—Appointment of Executors.*—A reference in a marginal note to certain persons as executors whose express appointment as executors has been cancelled, but who are left trustees of the will, may have the effect of appointing them executors, and not only according to the tenor.

IN THE GOODS OF NUSSEY, (1898) 78 L. T. 169—[Barnes, J.

105. *Desire that a Person should Pay Debts—No Bequest to him.*—A testatrix by her will, after bequeathing certain pecuniary legacies, desired J. G. to pay all her just debts, and then bequeathed to her niece all her furniture and effects, and all money she possessed.

HELD—that inasmuch as under the will the debts which J. G. was directed to pay must of necessity be paid out of the estate, the effect of the will was to appoint J. G. executor according to the tenor.

IN THE GOODS OF COOK, [1902] P. 114; 71 [L. J. P. 49; 86 L. T. 537—Jeune, P.

106. *Trustee.*—A testator appointed E., one of the trustees, “to hold and to administer in trust all my estate . . . to pay to my wife, E. P. W., £12 per month as long as the said E. P. W. shall live, and after her decease to continue paying the same sum to my three daughters collectively . . . In case of any dispute I give the said trustees power to withhold payment until they settle it amicably among themselves. I wish to give the said trustees the same power I have now myself.”

HELD—that E. was executor according to the tenor.

IN THE GOODS OF WAY, [1901] P. 345; 17 [T. L. R. 758; 71 L. J. P. 13; 85 L. T. 643—Barnes, J.

107. *Word “Trustees” used Loosely.*—A testator by his will directed all his just debts, funeral and testamentary expenses to be paid by “my executors hereinafter named,” and then expressed his intentions with respect to his younger children’s education and advancement, and he named three persons as “trustees”; but there was no vesting in them of any trust property. He, however, failed to name any persons as executors.

HELD—that the testator used the word “trustees” loosely, and that he really meant the persons so named to be his executors; and that probate might be granted to them, as executors according to the tenor.

IN THE GOODS OF KIRBY, [1902] P. 138; 71 [L. J. P. 116; 87 L. T. 141—Jeune, P.

**(d) Executor Misdescribed.**

108. *Erroneous Surname Struck Out.*—Thomas Cooper by his will appointed his wife, “the said Thomas Cooper,” and another executors of his will. The testator had no friend, child, or relative named Thomas Cooper. It appeared that the word “Cooper” after the word “Thomas” was a draftsman’s error. A friend named Thomas Stevenson was a trustee with the other two executors.

The Court struck out the name “Cooper,” so that in the exemplification for probate the name would appear as “Thomas —,” and granted probate to the applicant, who would be identified in the probate as “Thomas Stevenson, in the will described as Thomas —.”

In the goods of De Rosaz ((1877), 2 P. D. 66; 46 L. J. P. 6; 25 W. R. 352; 36 L. T. 263) followed.

IN THE GOODS OF COOPER, [1899] P. 193; 68 [L. J. P. 65; 80 L. T. 632—Jeune, P.

109. *Probate in Real Name.*—Where it is shown that a testator has misdescribed the name and residence of an executor, probate may be granted to the executor in his real name and as to his real residence, described in the will as of another name and another residence.

IN THE GOODS OF BASKETT, (1898) 78 L. T. 843—[Barnes, J.

**(e) Foreign Wills.**

110. *English Domicil Acquired after Marriage—Will not Revoked by the Marriage—Law of Foreign Domicil—Limited Executorship—Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3.*—A foreigner made a will in strict accordance with the law of her domicil, under which marriage does not revoke a will. She then married a man of the same

**Probate—Continued.**

nationality. Subsequently she acquired an English domicile.

**HELD**—that the will could not now be regarded in England as revoked by the marriage; and, further that, as it provided (in accordance with the law of the foreign domicile) that the executorship should be limited to one year, the grant of probate must be so limited.

IN THE ESTATE OF GROOS, [1904] P. 269; 73 [L. J. P. 82; 91 L. T. 323—Barnes, J.

111. *Affidavit of Notary Public.*—Where a will had been established in Chili of a testator domiciled there the affidavit of a solicitor practising in England, and who had as notary public had extensive practice for many years in the law of the South American Republics generally and of Chili in particular, was accepted as proving the state and effect of the law of the testator's domicile.

IN THE GOODS OF WHITELEGG, [1899] P. 267; [68 L. J. P. 97; 81 L. T. 234—Jeune, P.

112. *Foreign Land—English Wills—Codicil—Revoking Will—Foreign Will Confirming Original Will—Revival—Probate of all Three Documents.*—A testatrix made a will in 1888, leaving her property in trust for various persons, and appointed A. W. G. and J. H. G. executors and trustees. J. H. G. died. The testatrix afterwards executed a codicil, which was headed "A memorandum for my trustee, A. W. G.," and left the whole of her property to her daughter.

The testatrix subsequently went to New Zealand, and there executed a will disposing only of her New Zealand property, by which, except in so far as it was varied by this will, she confirmed her will made in England "about the year 1889," and she appointed T. J. executor thereof. T. J. obtained probate of this will in New Zealand.

**HELD**—that the proper course was to allow A. W. G. to take probate of all three documents, with liberty to T. J. to come in.

IN THE GOODS OF GREEN, (1899) 79 L. T. 738—Barnes, J.

113. *Foreign and English Wills—Incorporation.*—A testatrix, possessing large property in America, made in 1896 English and American wills dealing separately with her English and American property. In 1903 she made another English will which revoked the earlier English will, and referred to the American will and to a French will, which could not be found. The trustees of the American will were to realise the American property at their absolute discretion, and hand over the proceeds to the trustees of the English will.

**HELD**—that, as it was clearly her intention to keep her English and American properties quite distinct, probate should be granted of

the English will without incorporating either the American or French wills.

IN RE SCHENLEY, (1904) 20 T. L. R. 127—[Bucknill, J.

114. *Foreign and English Wills—American Will Dealing Solely with American Property—Copy of American Will to be Lodged*—In a probate action the jury found for the will and codicil propounded by the plaintiffs, and the Court accordingly pronounced for them. At the Probate Registry the officials refused to deliver out probate until either an American will which the testator had made dealing solely with his American property or an exemplification of probate thereof was lodged.

**HELD**—that probate of the English will and codicil should issue on the plaintiffs lodging a copy of the American will.

IN RE PAUL; GILMER v. OVERMAN, (1907) 23 [T. L. R. 716—Bucknill, J.

115. *Probate of Exemplification—Foreign Grant Including a Revoked Codicil*—Probate granted of the exemplification of a will and two codicils as sent from Calcutta, although the latter codicil revoked the former.

IN THE GOODS OF GUBBOY, (1899) 80 L. T. 808—[Barnes, J.

**(f) Lost Will.**

116. *Draft of Will—Testatrix in Lunatic Asylum—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, sub-s. 1 (e).*—A testatrix, after having made her will, became of unsound mind, and was confined in a lunatic asylum. The will was subsequently lost. The Court granted probate of a draft of the will to the testatrix's next-of-kin, with the consent of the master in lunacy and of the receiver of the deceased lunatic's property under sect. 116, sub-sect. 1 (e), of the Lunacy Act, 1890.

IN THE GOODS OF CRANDON, (1901) 84 L. T. 330; [17 T. L. R. 341—Barnes, J.

117. *Proof on Motion—Without Consent of Next-of-kin.*—The contents of a lost will may, in clear cases of small estates, be allowed to be proved on motion without the consent of the next-of-kin.

In the goods of Pearson ([1896] P. 289; 66 L. J. P. 8; 45 W. R. 143—Gorell Barnes, J., modified.

IN THE GOODS OF APTEO, [1899] P. 272; 68 [L. J. P. 123; 81 L. T. 459—Barnes, J.

118. *Verified Copy.*—The testatrix's son took her will to a solicitor with instructions to obtain probate. After the will had been copied and the copy verified, the original was lost or mislaid and had not since been seen or heard of.

**HELD**—that the verified copy might be admitted to probate.

IN THE GOODS OF CROFTS, (1901) 17 T. L. R. [16—Jeune, P.



Probate—Continued.

(g) Practice.

119. *Conduct Money—Probate Act, 1857* (20 & 21 Vict. c. 77), s. 26—*Witness Attending under Order of Court.*—A subpoena having been issued on the 6th July directing Thomas Hill, of College Farm, Purton, Wilts, to bring in and lodge in the principal Probate Registry a testamentary document, believed to be in his possession or power, or under his control, the said Thomas Hill was ordered by the Court to attend for the purpose of being cross-examined in open Court touching his alleged knowledge of the document in question.

On the day appointed he attended, but, before he was sworn, counsel on his behalf objected that no conduct money had been paid the witness.

HELD—that, as the witness attended pursuant to order of the Court, and not upon subpoena issued by a party or proposed party, he was not entitled to conduct money, and he must be sworn and give his evidence, the question of his costs of attending being left for determination in the cause; or, if no suit were commenced within a reasonable time, leave was given to apply to the Court for an order that his costs should be paid by the party who obtained the order for his attendance.

IN THE GOODS OF WYATT, [1898] P. 15; 67 [L. J. P. 7; 78 L. T. 80; 46 W. R. 425—  
Jeune, P.

120. *Conduct Money—Court of Probate Act, 1857* (20 & 21 Vict. c. 77), s. 26.]—Conduct money must be tendered if it be desired to enforce by attachment an order under sect. 26 of the Court of Probate Act, 1857, directing a person to attend for cross-examination as to his knowledge of a certain testamentary document.

IN THE GOODS OF HARVEY, [1907] P. 239; 76 [L. J. P. 61; 23 T. L. R. 433—Barnes, P.

121. *Earlier Will dealing only with Personality Abroad—Confirmed and Certified Copy*—Where a later will confirms an earlier will dealing only with assets out of the jurisdiction, both wills must be proved.

Where a will has been filed in a Court in the colonies for probate, but has not yet been proved, a certified copy issuing from that Court will be admitted to probate.

IN THE GOODS OF WESTERN, (1898) 78 L. T. 49—  
[Barnes, J

122 *Fresh Grant—Executors Proving Will—Subsequent Lunacy of One—Fresh Grant to Remaining Executors.*—Three executors proved a will; subsequently one became a lunatic.

HELD—that the proper course was to revoke the grant and make a fresh grant to the other executors, reserving power to the lunatic on recovery to apply to join.

IN THE ESTATE OF SHAW, [1905] P. 92; 74 [L. J. P. 39; 92 L. T. 423—Barnes, J.

123. *Proof of Execution of Will—Subsequent Denial by Attesting Witness—Evidence.*—Probate in common form was granted of a will of a person who died domiciled and resident in Bermuda on the oaths of the two attesting witnesses, that the will was duly executed and attested according to the law of Bermuda, which is the same as the law of England. One of the witnesses afterwards denied the execution of the will, and the other was not called on the hearing of a bill of complaint in the Court of General Assize of Bermuda in Chancery, when the will was confirmed, and an order of administration granted.

HELD—that the witness who denied the execution was not to be believed, and that the absence of the other witness was sufficiently explained, and that the decree of the Lower Court must be affirmed.

PILKINGTON v. GRAY, [1899] A. C. 401; 68 L. J. [P. C. 63—P. C.

124. *Proof of Execution of Will—Neither Attesting Witness to be found—Affidavit by one of them—R. S. C. Order 37, r. 1.*—A suit for probate in solemn form was undefended, but neither of the witnesses who attested the execution of the will could be found. One of them had previously sworn an affidavit of due execution in support of an application for probate in common form.

HELD—that the affidavit might be admitted.

HAYES v. WILLIS, (1906) 75 L. J. P. 94—  
[Barnes, P.

125. *Service of Citation on Lunatic—Ord. 9, r. 5.*—Where in probate cases a citation has to be served on a lunatic, the Court may be satisfied with service thereof upon the doctor of the asylum in accordance with Ord. 9, r. 5, although such is not really the correct practice in such cases.

IN THE GOODS OF PRICE; WATKINS v. BUSHELL  
[AND ANOTHER, (1904) 20 T. L. R. 540—  
Barnes, J.

126. *“Short Cause”—Proof in Solemn Form.*—Counsel must apply to the judge taking probate motions for leave to have any short cause put in Monday's list. Unless such leave is obtained no case can be put in Monday's list.

RE SUGDEN, [1904] W. N. 70—Jeune, P.

127. *Two Testamentary Documents—Grants to Executors Named in Both.*—Where probate was granted of two testamentary documents as together constituting a testator's last will, the grant was made to the two executors named in the first and one of the executors named in the second instrument, the second executor named in the latter having renounced.

**Probate—Continued.**

IN THE GOODS OF STRAHAN, [1907] 2 Ir. R. 484—  
[Andrews, J.]

**(h) Revocation of Probate.**

**128 Action to Revoke — Allegation of Fraud—Fraud that of Person not Party to the Former Suit—Duty of Court.**—An action to set aside a judgment establishing a will (which is good or bad against all the world) on the ground that it was obtained by fraud may be maintained when the judgment has been procured by the fraud of a person not a party to the action. It is not sufficient for the plaintiff to allege fraud. It is the duty of the Court to receive such evidence, *pro* and *con*, as is material to the question whether there really has been since the former judgment a new discovery of something material to disturb the former judgment.

**HELD**—that upon the materials before the Court, which were different from those before Gorell Barnes, J., it would be wrong to allow the issue to be again tried between the parties as to the validity of the will, which had been admitted to probate.

Decision of Barnes, J., ([1902] P. 62; 50 W. R. 192; 86 L. T. 118; 18 T. L. R. 151), reversed

**BIRCH v. BIRCH**, [1902] P. 130; 71 L. J. P. 58; [50 W. R. 437; 86 L. T. 364; 18 T. L. R. 485]—C. A.

**129. Action to Revoke—Opposing Probate—Costs—Notice under R. S. C. Ord. 21, r. 18.**—The Probate Court follows the principles which guided the Ecclesiastical Courts in drawing a distinction between a person who seeks to revoke probate of a will already proved and a person who opposes the proving of a will. The latter will not, in an ordinary case, be condemned to pay costs if he serves a notice under Ord. 21, r. 18.

Ord. 21, r. 18, does not apply to a plaintiff seeking to revoke probate, for he is not a party "opposing a will."

**Beale v. Beale** ((1874) L. R. 3 P. & M. 179; 43 L. J. P. 70; 22 W. R. 712; 30 L. T. 770—approved.

**TOMALIN v. SMART**, [1904] P. 141; 73 L. J. P. [37; 90 L. T. 171; 20 T. L. R. 197—Jeune, P.]

**130. Action to Revoke — Laches — Acquiescence.**—The plaintiff, who claimed to be sole next-of-kin of a testator who died ten years before, having made a will leaving his property, very small in amount, to a stranger, brought an action to revoke the grant of probate made to the executor in common form. The plaintiff was shortly after the death of the testator aware of the existence of the will and of its terms, but took no step to contest the will, and allowed the executor to administer the estate. No grounds were alleged for disputing the will.

**HELD**—that it would be contrary to settled principle to allow the plaintiff to proceed

with the action, which was groundless and vexatious, and that it should be stayed.

**MAHON v. QUINN**, [1904] 2 Ir. R. 267—  
[Andrews, J.]

**IV. PAYMENT OF DEBTS AND DISTRIBUTION OF ASSETS.****(a) Conveyance of Real Estate.**

**131. Personal Representative — Devisee — Assent — Conveyance — Land Transfer Act, 1897** (60 & 61 Vict. c. 65), s. 3, ss. 1, 2.]—The personal representative of a deceased owner of land is, under sect. 3, sub-sects. 1 and 2, of the Land Transfer Act, 1897, entitled to assent to a devise of land contained in his will in preference to executing a conveyance to the devisee. Where, after the expiration of a year from the death of an owner of land, the devisee of land under his will requested a conveyance to be executed to him, and the personal representative failed to comply with the request, but before service of a summons which had been issued asking for a conveyance sent the devisee a written assent to the devise, upon the summons afterwards being brought to a hearing it was dismissed with costs. A devisee cannot require an assent to describe the land devised in more precise terms than those comprised in the will.

**IN RE PIX; PLOMLEY v. STILEMAN**, [1901] W. N. [165; 36 L. J. N. C. 404—Byrne, J.]

**132. "Personal Representatives" — Concurrence of Executors — Disclaimer — Land Transfer Act, 1897** (60 & 61 Vict. c. 65), ss. 1, 2 (sub-s. 2), 3, 24 (sub-s. 2).]—Real estate under sect. 1, sub-sect. 1, of the Land Transfer Act, 1897, devolves to and becomes vested in all the executors named in the will who survive the testator; and in order that the legal estate may pass on a conveyance by the executors who have obtained probate, it is necessary for those executors to whom power to prove the will has been reserved either to expressly disclaim or to concur in such conveyance.

**IN RE PAWLEY AND LONDON AND PROVINCIAL [BANK]**, [1900] 1 Ch. 58; 69 L. J. Ch. 6; 48 W. R. 107; 81 L. T. 507—Kekewich, J.]

**133. Real Representative—Executors Appointed Solely for Foreign Property of Testator—Necessary Parties to Conveyance—Land Transfer Act, 1897** (60 & 61 Vict. c. 65), ss. 1, 2, sub-s. 2; s. 24, sub-s. 2.]—A personal representative in the sense in which the expression is used in the Land Transfer Act, 1897, means a personal representative in whom, prior to the Act, a chattel real belonging to the deceased would have vested.

Executors appointed solely for the foreign property of a testator are not, under the Land Transfer Act, 1897, necessary parties to a conveyance of the testator's English real estate.

**IN RE COHEN'S EXECUTORS AND LONDON COUNTY [COUNCIL'S CONTRACT]**, (1901) 50 W. R. 117;

**Payment of Debts and Distribution, etc —Contd.**

[1902] 1 Ch. 187; 71 L. J. Ch. 164—  
Byrne, J.

**(b) Insolvent Estate.**

**134. Contribution—Real Estate—Personal Estate.**—The master certified that £3,701 was to be contributed rateably in the proportions set forth in the schedule to his certificate by the specific devisees and legatees, and in the schedule £315 was set against the name of H. P., £1,614 against E. P. as administratrix, and £124 against her name "in respect of her right to dower." The contributories other than H. P. claimed that E. P., being unable to pay the sums found due from her, and the personal estate taken by her as administratrix having been sold, all the three sums must be raised out of the real estate taken by H. P., inasmuch as J. C. P., if living, would have been liable to contribute in respect of the whole of the property given him by the will. H. P. admitted his liability to pay the £124 as well as the £315. The Court, following *Conolly v Farrell*, (1846) 10 Beav. 142, directed an additional contribution to be made amongst the solvent devisees and legatees, the amount which ought to have been contributed by E. P. being apportioned amongst them, including H. P., according to the value of their devises and bequests.

IN RE PEERLESS; *PEERLESS v. SMITH*, [1901]  
[W. N. 151; 36 L. J. N. C. 377—Byrne, J.]

**135. Priority—Debt Due for Rates—Application of Rules According to the Law of Bankruptcy—Practice—Construction—Preferential Payments in Bankruptcy Act, 1888** (51 & 52 Vict. c. 62), s. 1, sub-ss. 1 and 6, and s. 3—*Judicature Act, 1875* (38 & 39 Vict. c. 77), s. 10.]—A debt due from the estate of a person dying insolvent for such rates as are within the meaning of sect. 1, sub-sect. 1, of the Preferential Payments in Bankruptcy Act, 1888, is entitled to take priority over the ordinary debts, notwithstanding that the estate is being administered in the Chancery Division.

*Dictum* of Lindley, M.R., in *Re Leng; Tarn v. Emmerson* ((1895) 1 Ch. 652) approved.

RE HEYWOOD; *PARKINGTON v. HEYWOOD*, (1898)  
[2 Ch. 593; 67 L. J. Ch. 25; 77 L. T. 423;  
4 Manson, 321; 46 W. R. 72—Stirling, J.]

**136. Priority—Voluntary Debts—Debts for Value—Old Rule in Chancery—Rule in Bankruptcy—Judicature Act, 1875** (38 & 39 Vict. c. 77), s. 10—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 40, sub-s. 4.]—The old rule of the Court of Chancery that in the administration of an insolvent estate in the Chancery Division creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration no longer prevails, since sect. 10 of the Judicature Act, 1875, introduced the rule in

bankruptcy, that voluntary debts are to be paid *pari passu* with debts for value, into the administration of insolvent estates by the Chancery Division.

IN *re Maggi* ((1882) 20 Ch. D. 545; 51 L. J. Ch. 560; 30 W. R. 729; 46 L. T. 362—Fry, J.) and *Smith v. Morgan* ((1880) 5 C. P. D. 337; 49 L. J. C. P. 410) disapproved.

Decision of Cozens-Hardy, J. ([1900] 2 Ch. 676; 69 L. J. Ch. 774; 49 W. R. 56; 83 L. T. 342; 16 T. L. R. 531) affirmed.

IN RE WHITAKER; *WHITAKER v. PALMER*, [1901] 1  
[Ch. 9; 70 L. J. Ch. 6; 49 W. R. 106; 83 L. T. 449; 17 T. L. R. 24—C. A.]

**137. Priorities of Judgment Creditors** ]—In the administration of the assets of a person whose estate has proved insufficient to pay his debts, judgment creditors will be paid *pari passu*, and not in priority of time.

M'CAUSLAND v. O'CALLAGHAN, [1904] 1 Ir. R.  
[376—C. A.]

**138. Proof by Creditor—Calculation of Interest and Income Tax—Practice.**—A question having arisen as to the incidence of income tax on a claim by a creditor, *Keke-wich, J.*, referred the matter for consideration to the masters, who stated that in such an administration creditors are admitted to prove for the amount of their debt with interest (less income tax) on debts carrying interest to the date of the judgment or order for administration. The interest less tax, and any costs allowed are added to the principal, and the dividend is calculated on the total debt thus found due. Income tax so deducted is not accounted for to the revenue, because, until the principal sum is paid, it is considered that no income tax is in fact payable.

IN RE GREEN; *BALL v. ELLIS*, [1904] W. N. 78,  
[105, 116 L. T. Jo. 523; 117 L. T. Jo. 60; 39  
L. J. N. C. 172—Kekewich, J.]

**139. Secured Creditor—Withdrawal of Proof by—Certificate—Application to Vary Certificate and Establish Claim—Bankruptcy Rules—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), *Sched. II.—Judicature Act, 1875* (38 & 39 Vict. c. 77), s. 10—*R. S. C., Ord. 55, rr. 44, 57, 70, 71.*]—E. McM., a testator, died in 1889 insolvent, and an order was made at the suit of a creditor for administration of his estate. In answer to advertisements for creditors the N. O. Bank sent in a large claim secured by shares and debentures of the Delagoa Bay Railway Co., of very uncertain value, which belonged to the testator. On June 23rd, 1892, the N. O. Bank went into voluntary liquidation, and the liquidator declined to prove, preferring to rely upon the securities. The railway and assets of the Delagoa Bay Railway Co. were seized by the Portuguese Government, and an arbitration tribunal was appointed on June 13th, 1891. On December 15th, 1893, the chief clerk filed a certificate of debts in which the liquidator's claim was entered as having been disallowed. The

**Payment of Debts and Distribution, etc.**—*Contd*  
award in the arbitration was made in 1890, and on December 4th, the liquidator of the N. O. Bank received only £1,448 6s. 7d., being a dividend of 50 per cent. on the amount due upon the debentures held as security. There was evidence that nothing more would be received either on the debentures or the shares. In December, 1901, the liquidator took out a summons for leave to prove his claim, notwithstanding the expiration of the time limited for making claims. This summons was dismissed by the Master on December 16th, 1901. On January 14th, 1902, the liquidator took out a summons to vary the certificate by allowing his claim, and that he might be at liberty to make and establish his claim, which amounted to £47,198 with interest. The estate had not been distributed.

**HELD**—that the disallowance of the proof by the Master did not amount to an adjudication upon the merits in respect of the right to prove, as it was merely a declaration that *rebus sic stantibus* there was no right of proof; that the liquidator had not allowed an unreasonable time to elapse after the award had been made before he applied for leave; that sect. 10 of the Judicature Act, 1875, applied to the case so far as it is consistent with the Chancery practice; the Bankruptcy Rules apply, and ought to be applied; that the liquidator ought to be allowed to come in the Chancery administration and prove notwithstanding the certificate; that he must comply with such orders as the judge might think fit with regard to the securities (if any) held by him other than the debentures and shares in the Delagoa Bay Railway Co., and account on the footing of a mortgagee in possession in respect of his dealings with all securities; the order must not delay any proceedings in the action so far as concerned the other creditors; and the liquidator was to be at liberty in case of any contemplated distribution of assets before his claim was ascertained to apply for a sum being set apart to answer his claim to share in the distribution.

A mortgagee holding shares is not bound, as mortgagee, to be looking about for every turn of the market to see whether he can sell, nor is he bound to sell at the highest price the market can give: per Romer, L.J.

Decision of Eady, J. ((1902) 86 L. T. 553), reversed.

**IN RE MCMURDO; PENFIELD v. MCMURDO**, [1902]  
[2 Ch. 684; 71 L. J. Ch. 691; 50 W. R. 644;  
86 L. T. 814—C. A.]

**140. Surplus — Administration Order — Estate Subsequently found Sufficient to Pay Principal of Debts—Small Surplus Available to Pay Interest—How to be Distributed—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40—R. S. C. Ord. 55, rr. 62, 63.**—An order was made for the administration of an estate, certified to be insolvent; but subsequently sufficient assets were realised to

pay to all creditors the principal of their debts in full. The surplus was not sufficient to pay the interest on the debts carrying interest by law.

**HELD**—that the payment of interest must be governed by the rules of bankruptcy, and not those of the Chancery division.

*Semble*, the same would be the rule even if the surplus were sufficient to pay the interest on all debts carrying interest by law, but insufficient to pay the interest allowed on other debts by Ord. 55, rr. 62, 63.

*In re Henley* ((1896) 75 L. T. 307) not followed.

**IN RE WHITAKER; WHITAKER v. PALMER**, [1904] 1  
[Ch. 299; 73 L. J. Ch. 166; 90 L. T. 277—  
Farwell, J.]

**141. Transfer of Proceedings to County Court—Rules upon which Court Acts—Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), s. 125, sub-s. 4.]**—By sect. 125, sub-sect. 4 of the Bankruptcy Act, 1883, a Court in which proceedings for the administration of a deceased debtor's estate have been commenced may, on proof that the estate is insufficient to pay debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy.

Under this section proceedings commenced in Chancery for the administration of a deceased's insolvent estate will be transferred at the instance of a creditor to bankruptcy, unless there are special reasons to the contrary, *e.g.*, unless difficult questions of law arise, or unless the Chancery proceedings are far advanced.

Where proceedings for the administration of the estate of a deceased debtor, who had carried on business as a miller in the country and who died insolvent, were commenced by a creditor's petition in the Chancery Division, and where the principal asset of the estate was the mill, and where the debts were mainly owing to local farmers, the Court, upon the application of certain other creditors, transferred the proceedings to the local Bankruptcy Court under sect. 125.

In cases where questions of difficulty will arise necessitating a reference to the judge from time to time, or where the proceedings are far advanced, the Court will consider it better to retain the case and not to transfer it.

The intention of the enactment is that the transfer shall take place unless there is some reason against it; and the mere fact that the creditor who commenced the proceedings in the Chancery Division wishes the case to be retained there is not a sufficient reason for refusing to transfer it.

**IN RE EADE**, (1906) 22 T. L. R. 239; *sub nom re*  
[Kenward; Hammond v. Eade, 94 L. T. 277  
—Kekewich, J.]

#### (c) Payment of Debts.

*And see* BANKRUPTCY, No. 234; *MORFAGUES*, No. 3.

**142. Charge of Debts on Realty—Non-exoneration of Personality.**—A testator left

**Payment of Debts and Distribution, etc.—Contd.** all his personalty to his daughter-in-law K.B., and, after certain specific devises, devised all his realty to trustees "subject to the payment of my just debts and testamentary expenses" upon trusts in favour of K. B. and her children. He concluded by expressly desiring "that none of my real estate shall be sold whilst there are any of my male descendants living of the name of B."

**HELD**—that there was no intention shewn by express words or necessary implication that the personalty should be exonerated; and that, therefore, the ordinary rule must govern the case, viz., that personalty is the primary fund for payment of debts and funeral and testamentary expenses.

*Greene v. Greene* ((1819) 4 Madd. 148); *Michel v. Michel* ((1820) 5 Madd. 69); *Blount v. Hopkins* ((1834) 7 Sim. 43) and *Gilbertson v. Gilbertson* ((1865) 34 Beav. 354), distinguished.

**IN RE BANKS; BANKS v. BUSBRIDGE**, [1905] 1 Ch. 547; 74 L. J. Ch. 336; 92 L. T. 225—**Buckley, J.**

**143. Claims against Estate of Deceased Person—Evidence of Claimant—Corroboration.**—There is no rule that the Court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant. Such uncorroborated evidence should be examined with care, and even with suspicion, but if in the result it convinces the Court that the claim should be allowed, the Court should allow the claim.

*Re Hodgson; Beckett v. Ramsdale* (31 Ch. D. 183) followed.

*Re Finch; Finch v. Finch* (23 Ch. D. 267) dissented from.

**RAWLINSON v. SCHOLDS**, (1898) 79 L. T. 350—**[Div. Ct.]**

**144. Exoneration—Contrary Intention—Direction to Pay Debts out of Residue "except mortgage on Blackacre"—Other Mortgages—Real Estate Charges Act, 1867** (30 & 31 Vict. c. 69), s. 1.]—A testator specifically devised Blackacre and his other real estate, and directed his executors to pay his debts, "except charges and mortgage debts (if any) on Blackacre," out of residue.

**HELD**—a "sufficient contrary intention" within sect. 1 of the Real Estate Charges Act, 1867, that mortgage debts on other realty were to be paid out of residue.

**IN RE VALPY; VALPY v. VALPY**, [1906] 1 Ch. 531; 75 L. J. Ch. 301; 54 W. R. 401; 94 L. T. 472—**Eady, J.**

**145. General Personalty Insufficient—Will—Residuary Bequest—Memorandum Requesting Specified Part of Residue should go to Third Persons—Trust imposed on Residuary Legatee.**—A testatrix, by her will bequeathed all her real estate, and the resi-

due of her personal estate to W. (one of the trustees and executors of the will), absolutely. By a subsequent memorandum she requested that "all the money I have saved should go to certain persons therein named." It was admitted by W. that this memorandum gave rise to a valid trust in favour of the persons therein named. The testatrix's residuary personal estate (apart from the portion affected by the memorandum) was insufficient for the payment of her debts.

**HELD**—that W., who attested the memorandum, must be taken to be subject in equity to a personal obligation to give effect to it, precisely as if it had been duly executed as a codicil and admitted to probate; that W. in dealing with the residuary real and personal estate given to her by the will, must treat the property comprised in the memorandum as though it had been specifically bequeathed; that the residuary personal estate not comprised in the memorandum must first be exhausted in the payment of debts, &c.; and that any deficiency must be borne rateably by the property comprised in the memorandum and by the real estate devised to W.

**Decision of Kekewich, J.** ([1901] 2 Ch. 372; 70 L. J. Ch. 660; 50 W. R. 54; 85 L. T. 12), reversed.

**IN RE MADDOCK; LLEWELYN v. WASHINGTON**, [1902] 2 Ch. 220; 71 L. J. Ch. 567; 50 W. R. 598; 86 L. T. 644—**C. A.**

**146. Marrelling—General Direction for Payment of Debts—Insufficiency of Personal Estate—Pecuniary Legatees and Specific Devises.**—A testator by his will directed that all his just debts and funeral and testamentary expenses should be paid as soon as possible after his decease. The personal estate of a testator and also the proceeds of a small undisposed of real estate were taken to pay the debts.

**HELD**—that the pecuniary legatees were entitled to marshal as against the specifically devised real estate.

*In re Bate* ((1890) 43 Ch. D. 600; 59 L. J. Ch. 277; 62 L. T. 559) treated as overruled.

*In re Stokes* ((1892) 67 L. T. 223), and *In re Salt* ([1895] 2 Ch. 203; 64 L. J. Ch. 494; 43 W. R. 500; 13 R. 499) followed.

**IN RE ROBERTS; ROBERTS v. ROBERTS**, [1902] 2 Ch. 834; 51 W. R. 89; 72 L. J. Ch. 38; 87 L. T. 523—**Kekewich, J.**

**147. Marrelling—Voluntary Settlement of Realty—Settlor Mortgaging Realty—Rights of Beneficiaries against Unsettled Estate.**—In 1866 a settlor settled some real estate by a voluntary settlement, and he subsequently mortgaged such real estate.

**HELD**—that, on his death, the beneficiaries were entitled to have the mortgage paid off primarily out of his unsettled assets.

*Hales v. Cox* ((1863) 32 Beav. 113) followed.

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MALLOTT v. WILSON, [1903] 2 Ch. 494; 72 [L. J. Ch. 664; 89 L. T. 522—Byrne, J.

148. *Marshalling—Charge of Debts—Direction for Payment—Personalty Insufficient—Pecuniary Legatees—Specific Devisees of Realty—Land Transfer Act, 1897* (60 & 61 Vict. c. 65), ss. 1, 2.]—An express charge of debts on realty is now unnecessary in consequence of Part I. of the Land Transfer Act, 1897; but that statute has not rendered inapplicable the doctrine of marshalling in favour of pecuniary legatees where the personality is exhausted in paying debts, but the realty is devised subject to an express charge of debts.

IN RE KEMPSTER, KEMPSTER v. KEMPSTER, [1906] 1 Ch. 446, 75 L. J. Ch. 236; 54 W. R. 385; 94 L. T. 248—Kekewich, J.

149. *Mortgage by Administrator—Payment of Debts and to one of Next-of-kin—Mortgage in due course of Administration.*—By mortgage dated February 10, 1876, D. O. mortgaged certain lands to G. L. to secure £350. G. L. died on August 11, 1878, intestate and unmarried, leaving him surviving six brothers and one sister, his only next-of-kin. On September 23, 1878, letters of administration to his estate were granted to J. L., a brother of the deceased. On December 20, 1886, J. L. executed a sub-mortgage of the lands in question to H. to secure £200. At the time the sub-mortgage was executed J. L. stated to H. that he required the money partly for the purpose of paying the debts of G. L., and also to pay one of the next-of-kin who was going abroad.

Held—that the mortgage was made in the ordinary course of administration, and was valid.

IN RE O'DONNELL'S ESTATE, [1905] 1 Ir. R. 406; [—C. A.

150. *Real Estate—Devise of Mortgaged Estate—Partition Action—Fund in Court Representing Rents and Profits—Administration Action—Right of Creditors to Attach Fund Before Judgment—Administration of Estates Act, 1833* (3 & 4 Will. 4, c. 104).—The Administration of Estates Act, 1833, in making the real estate of a deceased person assets for the payment of his debts, whether due on simple contract or on speciality, gives no lien or charge on such real estate until a judgment has been obtained.

M., who died in 1876, left his residuary estate to three persons in equal shares. At the time of his death he was entitled to certain real estate which he had mortgaged in 1839. In 1902 the devisees commenced an action for sale in lieu of partition, and in that action certain sums, representing the rents and profits of the mortgaged property, had been paid into Court. In 1903 judgment in the action was given directing the usual accounts and inquiries, and ordering the property to be sold, which had not, however,

yet been done. In 1907 the plaintiffs, in whom the benefit of the mortgage of 1839 was now vested, issued a writ on behalf of themselves and all other creditors of M. against the devisees, claiming (1) administration, and (2) that the devisees might be restrained from applying for the transfer and payment to them of the fund in Court to the credit of the partition action, and that such fund might be ordered to be transferred to the credit of the present action. No judgment has as yet been obtained in this action.

Held—that under the Act of 1833 neither the corpus nor the rents and profits of the real estate became liable to creditors until a judgment had been obtained, and that, as no judgment had been obtained in the present case, the application must be refused.

IN RE MOON; HOLMES v. HOLMES, [1907] 2 Ch. [304; 76 L. J. Ch. 535—Warrington, J.

151. *Specialty Debt—Simple Contract Debt—Right of Preference—Hinde-Palmer's Act, 1869* (32 & 33 Vict. c. 46), s. 1.]—The right of an executor to prefer one creditor and the right to retain his own debt are in many respects the same thing in substance and principle: though the latter can and the former cannot be exercised after an administration decree. The right of preference has not been enlarged so as to enable an executor to prefer one creditor against another of a higher degree; he has no power to pay the simple contract creditors in full to the prejudice of the specialty creditors.

In re Orsmond ((1887), 58 L. T. 24—Kekewich, J.) not followed.

IN RE HANKEY, CUNLIFFE SMITH v. HANKEY, [1899] 1 Ch. 541; 68 L. J. Ch. 242; 47 W. R. 444; 80 L. T. 47, 15 T. L. R. 162—North, J.

N.B.—Overruled in *Re Samson; Robbins v. Alexander, infra*.

152. *Specialty Debt—Simple Contract Debt—Right of Executor to pay in any Order—Administration of Estates Act, 1869* (32 & 33 Vict. c. 46).—Hinde Palmer's Act, in placing specialty and simple contract creditors on an equal footing *inter se*, has not deprived an executor of his right to pay debts in any order: thus he may give preference to a simple contract debt, although in consequence a specialty debt may remain unpaid.

In re Hankey (*supra*) overruled.

IN RE SAMSON; ROBBINS v. ALEXANDER, [1906] 2 [Ch. 584; 76 L. J. Ch. 21; 95 L. T. 633—C. A.

153. *Transfer to Devisees Subject to Charge Provided by sect. 3, sub-sect. 1 of the Land Transfer Act, 1897—Liabilities of Personal Representatives—Statutory Notice to Creditors—Purchase of the Real Estate—Indemnity against Unpaid Debts—Law of Property Amendment Act, 1859* (22 & 23 Vict. c. 35), s. 29—*Land Transfer Act, 1897* (60 & 61 Vict. c. 65), s. 2, sub-s. 2; s. 3, sub-s. 1.]—Executors published the usual statutory notice to cre-

**Payment of Debts and Distribution, etc.—Contd**  
 ditors to send in particulars of their claims, and before a year after the testator's death had paid or provided for all claims on the testator's estate of which they had notice. More than a year after the testator's death the executors were called upon by the devisees in trust of the real estate to convey the said real estate to them, and this was effected by a conveyance which contained a declaration that the property was granted "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay," following the words of sect. 3, sub-sect. 1, of the Land Transfer Act, 1897. The trustees agreed to sell a portion of the property.

**HELD**—that if it were thereafter discovered that there were debts unpaid of which the personal representatives of the testator had no notice, such debts would not be charged on the freeholds; that the purchaser was not entitled to any indemnity in respect of claims against the testator's estate of which the executors had no notice at the date of the conveyance; and that there is nothing in the Land Transfer Act, 1897, making the executors liable for moneys for which they would not otherwise have been liable, but only the assets available for satisfaction if the liabilities are increased.

*IN RE CARY AND LOTT'S CONTRACT*, [1901] 2 Ch. 463, 70 L. J. Ch. 653; 49 W. R. 581; 84 L. T. 589; 17 T. L. R. 598—Kekewich, J.

#### (d) Payment of Legacies.

*And see* BANKRUPTCY, No. 235.

**154. Admission of Assets—Payment of Legacy in Full.**—The mere payment of a legacy by an executor is not conclusive as an admission of assets.

*IN RE SCHNEIDER, KIRBY v. SCHNEIDER*, (1906) 22 [T. L. R. 223—Warrington, J.

**155. Appropriation—Contingent Legacy—Interest in Meantime—Security by Residuary Legatee.**—Where a contingent legacy (as distinguished from one payable *in futuro*) is given to a person without interest until the happening of the contingency, the amount of the legacy and any interest earned by it remain a portion of the testator's estate.

The executor may set aside and invest a reasonable sum to provide for such a legacy, and distribute the residue of the estate, but he is not entitled to appropriate to it a specific sum or investment so as to make the legatee a gainer or a loser by fluctuations in the value of the security. The legatee can insist on receiving the exact amount on the happening of the contingency.

Decision of Kekewich, J. (72 L. J. Ch. 74; 51 W. R. 107; 87 L. T. 560) reversed.

*King v. Malcott* ((1853) 22 L. J. Ch. 157; 9 Hare 692) applied.

*IN RE HALL; FOSTER v. METCALFE*, [1903] 2 Ch. [226; 72 L. J. Ch. 554; 51 W. R. 107; 88 L. T. 619—C. A.

**156. Appropriation—Real Estate—Personal Estate—Trust for Sale and Conversion—Legacies—Shares of Residue—Land Transfer Act, 1897** (60 & 61 Vict. c. 65), s. 4, sub-s 1.]—The power of executors and trustees holding residuary estate upon trust for sale and conversion to appropriate unconverted parts of the personal estate in respect of legacies and shares of residue extends to all personal estate, including chattels real and reversionary interests in stock in a company; and this has not been taken away or modified by the Land Transfer Act, 1897.

**SEMBLE**—that this power of appropriation extended—previously to the said Act, and still extends—to real estate, where there is a trust for sale and conversion; and that, where there is no trust for sale and conversion, the executors had, and have, the same powers over the whole personal estate.

Section 4, sub-sect. 1 of the Land Transfer Act, 1897, applies to all the residuary estate, whether personal or real.

The principle upon which appropriation is proper is that where there is no trust to convert, but simply a gift of property amongst certain parties, appropriation would seem easy; the parties are to have the property unconverted, and the executors must arrive at equality as best they can. Where there is a trust for conversion each person is entitled of course to money, and the principle is that where the trustee is directed to convert and to pay the beneficiary money, it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him; but it is not necessary to go through the form of first converting the property and then giving the beneficiary the money which the beneficiary may be desirous immediately to re-invest in the property which has just been sold.

*IN RE BEVERLEY, WATSON v. WATSON*, [1901] 1 [Ch. 681; 70 L. J. Ch. 295, 49 W. R. 343; 84 L. T. 296; 17 T. L. R. 228—Buckley, J.

**157. Annuity—Gift of Money to Executors to be Laid out in Purchasing Annuity for A.—Interest Running from Date of Death or Twelve months After.**—A sum of money bequeathed to executors to be laid out by them in the purchase of an annuity carries interest only from a date twelve months after the death of the testator.

A testator bequeathed to his executors the sum of £1,000, free of duty, to be laid out by them in the purchase of an annuity for his daughter M. The will contained no clause for maintenance, nor was there any further provision made for M.

**HELD**—that interest only commenced to run twelve months after the testator's death.

*RE FRIEND, FRIEND v. YOUNG*, (1898) 78 L. T. [222—Stirling, J.

**158. Annuity—Restraint on Anticipation—Appropriation of Capital Sum—Death of Annuitant before Purchase of Annuity—**

**Payment of Debts and Distribution, etc.—Contd.**  
**Right of Personal Representatives.]**—A testator bequeathed an annuity to a married woman with restraint on anticipation. The testator's estate turned out insufficient to pay in full all the legacies and annuities bequeathed by his will, and an action was instituted for the administration of his estate.

**HELD**—that the right of the annuitant would have been to have the value of the proportionate part of the annuity paid in cash, but as she was restrained from anticipating it the amount was directed to be laid out in purchasing an annuity upon her life. She, however, having died after the amount was fixed, but before the annuity was actually purchased, the fund belonged to her estate.

*Long v. Hughes* ((1831) 1 De G. & Sm. 364, n.) followed.

**IN RE ROSS; ASHTON v. ROSS**, [1900] 1 Ch. 162, [69 L. J. Ch. 192, 48 W. R. 264; 81 L. T. 578—North, J.

**159. Annuity to be Purchased—Death of Annuitant before Purchase—Right of her Representatives to Purchase Price of Annuity.]**—R. directed his trustees to purchase a Government annuity for his widow out of the proceeds of his residuary estate. She died before this could be done or the will proved.

**HELD**—that her representatives were entitled to such sum as would have purchased the annuity at the date of R.'s death.

*Dawson v. Hearn* ((1831) 9 L. J. (o. s.) Ch. 249; 1 Russ. & M. 606) discussed.

**Decision of Eady, J.** [1906] 2 Ch. 648; 75 L. J. Ch. 751; 95 L. T. 779) affirmed.

**IN RE ROBBINS; ROBBINS v. LEGG**, [1907] 2 Ch. [8; 76 L. J. Ch. 531; 96 L. T. 755—C. A.

**160. Claim by Four out of Seven Legatees—Compromise by Defendant—Absence of Some Legatees—Order Made Binding on All—R. S. C., Ord. 16, r. 9a.]**—Four out of seven residuary legatees claimed a declaration that a certain sum of money invested on mortgage formed part of the residuary estate of a testatrix. The defendant, who was the surviving husband of the testatrix and her executor, was entitled to the income of the residuary estate during his life. He claimed the sum in question absolutely; but at the hearing offered a sum of money in settlement, which was to be divided amongst all the legatees. The other three were out of the jurisdiction.

**HELD**—that the settlement being advantageous, the Court would make the order even to bind the absent legatees, their shares being carried to separate accounts.

**RE WRIGGLESWORTH; WILKINSON v. WRIGGLESWORTH**, [1901] W. N. 172—Farwell, J.

**161. Duty towards Legatee—Duty to give**

**Notice of Condition attached to Legacy—Gift over to Executor if Condition not Complied with.]**—An executor owes no duty to a legatee to inform him of a condition attached to his legacy upon non-compliance with which a "gift over" will operate.

And, in the absence of fraud, the same rule applies even though the executor himself will take the legacy under the "gift over."

**RE LEWIS; LEWIS v. LEWIS**, [1904] 2 Ch. 656; [73 L. J. Ch. 748; 91 L. T. 242; 53 W. R. 393—C. A.

**162. Interest on Legacies—Trust for Payment of Legacies in futuro.]**—Y. directed the trustees of her will to hold her residuary estate upon trust for investment and to pay one moiety of the annual income to a niece for life, and another moiety to another niece for life, but so that the annual income of each should not exceed £250. Subject as aforesaid, the trustees were to hold the estate in trust to pay certain legacies, and ultimately to divide the estate amongst certain persons.

**HELD**—that no special time was fixed by the will for the payment of the legacies; and that, therefore, interest was payable thereon from one year after Y.'s death.

*Lloyd v. Williams* (2 Atk. 108) and *Wood v. Penoyre* (13 Ves. 325) discussed.

**RE YATES; THROCKMORTON v. PIKE**, (1907) 96 [L. T. 758—C. A.

**163. Interest on Legacies—Legacies to Infants—Infant en ventre sa mère—Interest Until Payment—Appropriation to Meet Legacies—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42.]**—S. by his will gave amongst other legacies £500 to each of his great-nieces "born previously to the date of this my will." He then gave his residuary estate to trustees upon trust for sale and conversion, directing them out of the proceeds to pay expenses, debts, and legacies, and to divide the net residue in a certain manner; he empowered them to postpone the sale and conversion, and also to postpone the payment of legacies until after such sale and conversion, but directed that legacies not paid within a year of his death should carry interest at 4 per cent.

**HELD**—(1) that a grand-niece *en ventre sa mère* at the date of the will and born alive subsequently was not entitled to £500; and (2) that the trustees could not set free the residue by appropriating securities to meet the legacies due to such of the legatees as were infants, but could pay the legacies into Court under sect. 42 of the Trustee Act, 1893, and that, upon their so doing, the provision as to interest would cease to operate.

**IN RE SALAMAN; DE PASS v. SONNENTHAL**, [1907] 2 Ch. 46; 76 L. J. Ch. 419; 96 L. T. 809—Kekewich, J.

**164. Interest on Legacies—Time Fixed for Payment.]**—G., in exercise of a general



**Payment of Debts and Distribution, etc.—Contd**  
power of appointment over a trust fund subject to the life interest of her husband, appointed by her will that after his death the trust fund should be held by the trustees upon trust to pay a number of legacies, and she appointed her husband residuary legatee. Her husband survived her, and, upon his death, the trust fund was transferred by the trustees to her executor, who proceeded to pay the legacies. The executor of the husband, who was also executor of the wife, claimed that interest was not payable upon the legacies until the expiration of one year from the death of the husband.

**HELD**—first, that a time was fixed by the will for payment of the legacies—namely, the death of the tenant for life, and that, therefore, interest ran from that date; and secondly, that, even if no time had been fixed, the fund out of which they were payable being a reversionary one the period of grace given to G.'s executor for payment of legacies was extended from one year after her death to the date at which the fund fell into possession, and that on this ground also interest would begin to run from the death of the tenant for life.

**IN RE GILES; GIBBON v. CHAYTOR**, [1907] 1 Ir. R. [65—M. R.]

**165. Order of Payment to Beneficiaries—Pecuniary Legacies charged on Residue—Annuitants in Capacity of Residuary Legatees—Specific Devises free from Mortgages—Marshalling—Real Estates Charges Act, 1854 [Locke-King's Act] (17 & 18 Vict. c. 113).—**S., by his will, after giving four pecuniary legacies, made several specific devises freed and discharged from any mortgages there might be at the time of S.'s death on the respective properties devised; and S. declared that, if he should sell any of certain houses comprised in certain of the said devises, his trustees should out of his residuary estate stand possessed of a sum equivalent to the proceeds of sale on similar trusts to those declared of the houses. S. then gave to his trustees all other his real and personal estate upon trust to pay an annuity to each of his sons, and out of the balance of the income of his said residuary estate to pay off incumbrances upon his said estate, and after payment off thereof to assign his said residuary estate to his said sons equally. S. afterwards sold one of the houses, for £9,800. S.'s estate proving insufficient for payment in full to the beneficiaries under his will,

**HELD**—(1) that the pecuniary legacies were charged on the entire residue, and had priority of all payments directed to be made out of the residue; (2) that the annuities were given to the sons in their capacity of residuary legatees, and were therefore not payable until the mortgage debts on the specifically devised realty and the sums representing houses sold were paid; (3) that the £9,800 was to be treated as an ordinary

legacy made payable out of the residue; (4) that as between the devisees of mortgaged realty and the pecuniary legatees, the rule of *Lutkins v. Leigh*, Cas. temp. Talb. 52, that the pecuniary legatee had priority over the devise, must be applied, the testator having negatived the application of Locke-King's Act and the amending Acts.

**Porcher v. Wilson** ((1866), 14 W. R. 1011) followed.

**Smith v. Smith** ((1860), Ir. Ch. Rep. 89 and 461) not followed.

**IN RE SMITH; SMITH v. SMITH**, [1899] 1 Ch. 365; [68 L. J. Ch. 333; 47 W. R. 223; 80 L. T. 113—Romer, J.]

#### (e) Possible Future Liabilities.

**166. Distribution of Assets—Retainer of Assets—Protection to Executors—Order of Court—Practice—Parties—Company Having Issued Partly Paid Shares—Rules of the Supreme Court, Ord. LV., rr. 3, 5.**—It is not the practice of the Court in administration proceedings to retain assets in Court to protect a possible future creditor. The executors are protected against claims by such a creditor by the order of the Court if made in the administration of the estate; *quære*, whether they would be protected by an order made without administration under R.S.C., Ord. 55, r. 3.

A testator left some partly paid shares in a limited company of no apparent value, which the company could (and did) refuse to allow to be transferred to his beneficiaries.

His executors took out a summons for leave to distribute his estate; they made the company and the beneficiaries parties.

**HELD**—(1) that the company were wrongly made parties;

(2) that there must be an inquiry as to debts and legacies before the Court could direct distribution.

**IN RE KING; MELLOR v. SOUTH AUSTRALIAN LAND [MORTGAGE AND AGENCY CO., LD.]**, [1907] 1 Ch. 72; 76 L. J. Ch. 44; 95 L. T. 724—Neville, J.]

**167. Fee Farm Grant—Sale of, by Executors—Liability for Future Rent and Breaches of Covenant—Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), ss. 27, 28.**—A fee farm grant is within the provisions of sects. 27 and 28 of Lord St. Leonards' Act, and the executors of the grantee, upon assigning it to a purchaser, are released from any personal liability; and in administering the estate they cannot retain money to meet any possible future demands by the head landlord.

**MILLAR v. SINCLAIR**, [1903] 1 Ir. 150—V.-C.]

**168. Leaseholds—Retention of Assets to Meet.**—The Court, when ordering the distribution of a testator's estate among his residuary legatees, will not set aside moneys to indemnify his executors against possible future liabilities in respect of leases once vested in him, unless there be privity of estate between the executors and the lessors.

Payment of Debts and Distribution, etc.—*Contd.*

IN RE NIXON; GRAY v. BELL, [1904] 1 Ch. 638;  
[73 L. J. Ch. 446—Byrne, J.]

(f) Right of Retainer.

169. *Administration Bond of Creditor—Alteration of Form*—"Not, however, preferring his own debt."—In future the administration bond will be granted with the substitution of the words "not, however, preferring," instead of "not unduly preferring." The consequence of that will be that the administrator will not have an injustice done to him, upon which Mr. Justice Romer commented in the case of *Davies v. Parry* ([1899] 1 Ch. 602; 68 L. J. Ch. 346; 47 W. R. 429; 15 T. L. R. 186, No. 183, *infra*).

PRACTICE NOTE, (1900) 16 T. L. R. 122—

[Jeune, P]

170. *Creditor—Administration Bond of—Creditor's Power to Retain his Own Debt—"Not Unduly Preferring."*—A creditor of the deceased to whom letters of administration have been granted, and who has entered into the usual bond to administer according to law "rateably and proportionally and according to the priority required by law and not unduly preferring his own debt," can in due course of administration retain his own debt, even though it may exhaust the assets. He must not, however, pay his own debt in priority to any debt which, according to law, ought to be paid before it.

*Davies v. Barry* ([1899] 1 Ch. 602; 68 L. J. Ch. 346; 47 W. R. 429; 15 T. L. R. 186, No. 183, *infra*) approved.

Opinion of Barnes, J. (49 W. R. 448; 84 L. T. 306; 17 T. L. R. 340) dissented from.

IN RE BELHAM; RICHARDS v. YATES, [1901] 2 [Ch. 52; 70 L. J. Ch. 474; 49 W. R. 498, 84 L. T. 440—C. A.]

171. *Bank's Manager—Grant to—Right to Retain Debt due to Bank.*—Letters of administration were granted to the manager of a bank who were creditors. The grant was not expressed to be made for the use of the bank: it was made to him as an individual, and he was not a creditor in his own right. An administration decree was made before the administrator had appropriated any money towards satisfaction of the debt due to the bank.

HELD—that the administrator could not retain the amount of the debt due to the bank.

IN RE RICHARDS; LAWSON v. HARVEY, [1901] 2 [Ch. 399; 70 L. J. Ch. 699; 50 W. R. 57; 85 L. T. 273; 17 T. L. R. 650—Cozens-Hardy, J.]

172. *Creditor of Higher Degree—No Notice—Plene administravit.*—An executrix distributed her testator's estate in paying his debts (including a debt due to herself which she retained out of the assets) in good faith and without undue haste, and without

notice of the plaintiff's claim as creditors of a higher degree.

HELD—that the retainer of the debt by the executrix was payment, and it being settled law that an executor who pays creditors without notice of the existence of a creditor of higher degree is not liable to account for the sums so paid, the plaintiffs were not entitled to follow the assets retained by the executrix in discharge of her debt.

RE FLUDYER; WINGFIELD v. ERSKINE, [1898] [2 Ch. 562; 67 L. J. Ch. 620; 79 L. T. 298; 47 W. R. 5—Romer, J.]

174. *Equitable Tenant for Life under a Settlement—Administratrix with Will Annexed—Claim by her of Retainer—Claim by Trustees of Settlement to Fund.*—By a settlement made on his marriage a testator covenanted with the trustees thereof for the payment of £5,000 six months after his death, to be held upon trust for his wife for life, and in default of children for the testator absolutely. The testator devised and bequeathed his residuary real and personal estate to his wife absolutely, to whom letters of administration with the will annexed were afterwards granted. She claimed to retain the £5,000 in respect of her life interest in priority to all other creditors. There were no children and the estate was insolvent.

HELD—that the right to receive the £5,000 and the liability to pay the same were not centred in the same person, for the trustees of the settlement were competent and bound to sue for the £5,000, and the widow was not the person in whom the right to recover the sum was vested; she was not therefore entitled to retain it.

IN RE DUNNING, HATHERLEY v. DUNNING ([1885] 54 L. J. Ch. 900; 33 W. R. 760; 53 L. T. 413—C. A.) followed.

*Loomes v. Stotherd* (1823) 1 S. & S. 458; 1 L. J. (o.s.) Ch. 220; 24 R. R. 209) considered.

IN RE HAYWARD; TWEEDIE v. HAYWARD, [1901] [1 Ch. 221; 70 L. J. Ch. 155, 49 W. R. 296, 84 L. T. 256—Byrne, J.]

175. *Fund in Court—Payment out of Court.*—A right of retainer is only applicable to a fund which a legal personal representative has in his actual or constructive possession.

Where A. B., holding the double capacity of creditor and administrator with the will annexed, applied for an order dealing with a fund standing to the credit of a suit to the separate account of his testator, whose estate was insolvent, the Court ordered the fund to be transferred to the credit of the suit for the administration of the testator's estate. An order was afterwards made for the payment of certain costs out of the fund. An application was made by A. B. to have the remnant of the fund in Court.

HELD—that the money had never got into A. B.'s possession actually or otherwise and that he was not entitled to retain it, that it

**Payment of Debts and Distribution, etc.—Contd.**

must be divided rateably among all the creditors, and that it was not the habit of the Court to pay out a fund, under such circumstances, to a legal personal representative, but inquiries are usually made as to persons beneficially entitled.

**PULMAN v. MEADOWS**, [1901] 1 Ch. 233, 70 [L. J. Ch. 97; 84 L. T. 26—Cozens-Hardy, J.]

**176. Insolvent Estate—Order under sect 125 of the Bankruptcy Act, 1883** (46 & 47 Vict. c. 52)—*Debt due to Executor of larger Amount than the Estate—Right to Retain in specie.*—Where the debt due to the executor of an insolvent estate is of a larger amount than the estate, the executor is not obliged to realise the estate, but may retain it in specie in satisfaction of his debt.

**Woodward v. Darcey** (1 Plow. 185) and **Chapman v. Turner** (9 Mod. Rep. 268; 11 Vin. Abr. 72, *tit. Exors.* (D.) 2) considered.

**RE GILBERT, EX PARTE GILBERT**, [1898] 1 Q. B. 282; 67 L. J. Q. B. 229; 77 L. T. 775; 4 Manson, 337; 14 T. L. R. 125; 46 W. R. 351—Wright, J.

**177. Insolvent Estate—Retainer by Executor—Mistake—Repayment—Bankruptcy Act, 1883** (46 & 47 Vict. c. 52), s. 125.]—The executor of an insolvent testator, against whose estate an order for administration in bankruptcy has been made, is entitled to exercise his right of retainer, notwithstanding that, in ignorance of his rights, he has paid over to the official receiver all the assets he has collected, and has put in a proof (afterwards withdrawn) for the amount of the debt due to him.

Decision of **Wright, J.** ([1899] 1 Q. B. 905; 68 L. J. Q. B. 536; 47 W. R. 432; 80 L. T. 493), affirmed.

**IN RE RHOADES, EX PARTE RHOADES**, [1899] 2 [Q. B. 347; 68 L. J. Q. B. 804; 47 W. R. 561; 80 L. T. 742; 15 T. L. R. 407; 6 Manson, 277—C. A.]

**178. Judgment against Executrix de bonis testatoris—Order for Administration of Estate—Right of Retainer lost.**—The plaintiff recovered judgment *de bonis testatoris* against an executrix of a will. Although the testator owed her a debt she had omitted to plead her right of retainer, or *plene administravi*.

Subsequently the assets proved insufficient to pay all the debts of the testator, and the plaintiff obtained an order for the administration of the estate.

**HELD**—that it was too late for the defendant to claim to exercise her right of retainer, and that the judgment was conclusive that she had assets to satisfy it.

**Wheatley v. Lane** ((1668) 1 Wms. Saund. 216) and **In re Hubbach** ((1885) 29 Ch. D. 934; 54 L. J. Ch. 923) discussed.

**IN RE MARVIN; CRAWTER v. MARVIN**, [1905] 2 [Ch. 490; 74 L. J. Ch. 699; 54 W. R. 74; 21 T. L. R. 765; 93 L. T. 599—Eady, J.]

**179. Money paid into Court for Convenience of Administration.**—Where money is paid into Court for convenience of administration the executor's right of retainer is not interfered with; but where that result follows not from convenience of administration, but because the executor is not a proper person to receive it, and the Court has appointed its own officer in his place, then his right is ousted. The order need not express that it is made without prejudice to the right

**Richmond v. White** ((1879), 12 Ch. D. 361; 48 L. J. Ch. 798, 27 W. R. 878; 41 L. T. 570—C. A.) followed.

**IN RE LANGLEY, JOHNSON v. LANGLEY**, (1899) 68 [L. J. Ch. 361—Kekewich, J.]

**180. Obligation to Retain—Executor of a Fraudulent Trustee—Estate Insolvent—Executor Disclaiming Trust—Duty to Exercise Retainer at Request of Beneficiaries.**—The executor of a sole trustee, who had died insolvent and proved to have misappropriated the trust funds, declined to act in the trust, and also to exercise any right of retainer at the request of the beneficiaries under the trust so as to assist them as against other creditors.

**HELD**—that he was at liberty so to decline.

**IN RE RIDLEY'S TRUSTS**, [1904] 2 Ch. 775, 73 [L. J. Ch. 696; 91 L. T. 189—Joyce, J.]

**181. Obligation to Retain—Death of Insolvent Trustee—Beneficiaries Requesting Administratrix to Retain on Their Behalf.**—Where a sole surviving trustee dies indebted to the trust estate and insolvent, his legal personal representative, not having elected to act as trustee of the trust, cannot be required by the beneficiaries under it to exercise his right of retainer in their interest.

B., a trustee under a will, died insolvent, and indebted to the trust in respect of a breach of trust. His administratrix appointed new trustees under a power contained in the will, and transferred any trust property to them as it came into her hands.

She, however, declined in any way to act as trustee, or to retain as against other creditors in favour of the beneficiaries in order to make good to them the lost trust property.

**HELD**—That she could not be compelled to do so;

And *quære*, whether after appointing new trustees, she had a right to do so.

**In re Ridley** ([1904] 2 Ch. 775; 73 L. J. Ch. 696; 91 L. T. 189, No. 180, *supra*) followed. **Fox v. Garrett** ((1860) 1 L. T. 474; 28 Beav. 16); and **In re Owens** ((1889) 23 L. R. Ir. 328) disapproved.

Decision of **Buckley, J.** (92 L. T. 593) reversed.

**IN RE BENETT; WARD v. BENETT**, [1906] 1 Ch. [216; 75 L. J. Ch. 122; 54 W. R. 337; 94 L. T. 72—C. A.]

Payment of Debts and Distribution, etc.—*Contd.*

182. *Realty—No Right to Retain out of—Land Transfer Act, 1897* (60 & 61 Vict. c. 65), ss. 1, 2.]—The Land Transfer Act, 1897, though vesting the real estate of a deceased person in his legal personal representative has given such personal representative no right of retainer or priority in respect of a debt due to him as against the real assets.

The Court views with disfavour the right of retainer and never assists it.

IN RE WILLIAMS; HOLDER v. WILLIAMS, [1904] 1 Ch. 52; 73 L. J. Ch. 82; 50 W. R. 318; 89 L. T. 580; 20 T. L. R. 54—Joyce, J.

183. *Right to Retain—Creditor's Administration Action—Form of Bond.*]—The right of the personal representative to retain his own debt is not affected by an administration decree being made in a suit by other creditors, even though the assets came to his hands after the decree, and notwithstanding the usual form of a creditor's administration bond. [See No. 169, *supra*, as to alteration in form of administration bond in consequence of this decision.]

Nunn v. Barlow, 1 Sim. and S. 588; 2 L. J. (n.s.) Ch 123; 24 R. R. 242, examined and followed.

Jones v. Evans, (1876) 2 Ch. D. 420, 452 J. Ch. 751; 24 W. R. 778, distinguished.

DAVIES v. BARRY, (1899) 1 Ch. 602; 68 L. J. Ch. [346; 47 W. R. 429; 15 T. L. R. 186—Romer, J.

184. *Set-off—Tenant for Life—Mortgage of Reversion—Statute-barred Debt—Foreclosure by Executor—Damages for Non-Repair—Arrears of Interest—Real Property Limitation Act, 1833* (3 & 4 Will. 4, c. 27), s. 42.]—A tenant for life, with the duty of keeping the property in repair, became mortgagee of the reversion. After her death her executors brought an action for foreclosure. The mortgagor counter-claimed for redemption and also for damages for non-repair, and he was held entitled to them. The tenant for life had lent him a sum of money greater than the amount of such damages, but this debt was statute-barred. There were arrears of interest owing under the mortgage deed for more than six years.

HELD—that the executors of the tenant for life could not treat the mortgagor as having been repaid his damages out of the statute-barred debt.

HELD ALSO—that in taking the accounts between mortgagor and mortgagee, all the arrears of interest must be brought in, and not merely those which had accrued within six years.

Edmunds v. Waugh, ((1866) L. R. 1 Eq. 418; 35 L. J. Ch. 234; 14 W. R. 257; 12 Jur. (n.s.) 326; 13 L. T. 739) and *In re Marshfield* ((1887) 34 Ch. D. 721; 56 L. J. Ch. 599; 35 W. R. 491, 56 L. T. 694) followed.

DINGLE v. COPPEN, [1899] 1 Ch. 726; 68 L. J. Ch. [337; 47 W. R. 279; 79 L. T. 693—Byrne, J.

185. *Set-off—Intestacy—Debt Due from One of Next of Kin to Intestate's Estate*]—Upon a partial intestacy an executor may retain, or set off the share of the next of kin against a debt owing by him to the estate, although the debt is barred by the Statute of Limitations; but the debt must be one which, but for the statute, could have been recovered in an action.

IN RE WHEELER; HANKINSON v. HAYTER, [1904] 2 [Ch. 66—Warrington, J.

186. *Wife Executrix of Husband—Money lent to Husband for his Business—Death of Husband insolvent—Judicature Act, 1875* (38 & 39 Vict. c. 77), s. 10—*Married Women's Property Act, 1882* (45 & 46 Vict. c. 75), s. 3.]—Where a married woman has lent money out of her separate estate to her husband for the purpose of his business, and he dies insolvent leaving his wife his executrix, she has a right to retain the amount of the debt due to her out of her husband's assets.

Sect. 3 of the Married Women's Property Act, 1882, has not taken away the wife's right of retainer in such a case, although it would (in combination with the Judicature Act, 1875, s. 10) prevent her from proving for such a loan in the administration of the husband's estate in competition with creditors for value.

*In re May* ((1890) 45 Ch. D. 499; 60 L. J. Ch. 34; 38 W. R. 765; 63 L. T. 375) and *In re Leng* ((1895) 1 Ch. 652; 64 L. J. Ch. 468, 43 W. R. 406; 72 L. T. 407—C. A.) followed.

IN RE AMBLER; WOODHEAD v. AMBLER, [1905] 1 [Ch. 697; 74 L. J. Ch. 367; 53 W. R. 584; 92 L. T. 716; 21 T. L. R. 376—C. A.

#### (g) Testamentary Expenses.

187. *Costs of Administering Estate—Apportionment between Realty and Personality—Direction to Pay Testamentary Expenses Out of Personality—Inquiry as to Heir-at-Law—Incidence of Costs—Land Transfer Act, 1897* (60 & 61 Vict. c. 65), ss. 1, 2, 3.]—B. by her will directed her testamentary expenses to be paid out of her personality: she died intestate as to her real estate, the devisee having predeceased her.

HELD—that the costs of administration so far as they were increased by the administration of the realty—e.g., the costs of the inquiry for the heir-at-law—must be borne by the realty notwithstanding the direction in the will.

The ordinary practice of the Chancery Division to the above effect has not been rendered inapplicable by the Land Transfer Act, 1897, and holds good in the absence of a clear direction to the contrary.

*In re Jones* ([1902] 1 Ch. 92; 71 L. J. Ch. 6; 50 W. R. 215; 85 L. T. 608 (See PRACTICE, 325)) and *Patching v. Barnett* ((1881) 51 L. J. Ch. 74; [1907] 2 Ch. 154n—C. A.) followed.

IN RE BETTS; DOUGHTY v. WALKER, [1907] 2 Ch.

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[149, 76 L. J. Ch 463, 96 L. T. 875—  
Kekewich, J.]

**188 Costs of Identifying Legatees—Costs out of Residue**—The costs of ascertaining who were the persons entitled to the legacies bequeathed by a testator, whose trustees were directed to pay "testamentary expenses" out of the residue

**HELD**—that such costs must come out of the residue as testamentary expenses.

**RE BAUMGARTEN; BEVAN v. ROSENBAUM, (1900) 82**  
[L. T. 711—Farwell, J.]

**189. Costs of Probate Action—Devise of Real Estate subject to Payment of Testamentary Expenses—Costs of Parties Disputing Will**—The costs of a plaintiff in a probate action, where a will proved by the executors in solemn form has been unsuccessfully challenged in an action for the purpose of revoking probate of the will and establishing a former will, are not "testamentary expenses", such costs will not be allowed out of the real estate if there is no personal estate, although the will contains a charge on the real estate for payment of testamentary expenses and notwithstanding that the Court of Probate orders the costs of all parties to be paid out of the estate

The Court will not define testamentary expenses narrowly, and *semble* that the costs of all parties incurred in an action in the Probate Division for probate of a will in solemn form will usually be allowed as testamentary expenses in an action in the Chancery Division when the Court in the probate action directs payment of such costs out of the personal estate.

The circumstances under which costs incurred in an action in the Probate Division will be allowed as testamentary expenses, discussed

**RE PRINCE; GODWIN v. PRINCE, [1898] 2 Ch.**  
[225, 67 L. J. Ch 531, 78 L. T. 790, 47 W. R. 25—Stirling, J.]

**190 Interpretation—Costs and Expenses of Administration—Costs of Probate Action—Estate Duty—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, sub-s. 2.]**—The expression "testamentary expenses" includes estate duty. A testator, after giving the income of his residue to his wife for life, directed his executors, after his widow's death, out of the residue to pay "my widow's funeral and testamentary expenses and debts." The testator's wife survived him, and died, leaving what purported to be a will. B., one of the two next of kin of the widow, brought an action in the Probate Division for a grant of letters of administration of the widow's estate to him. The judge pronounced against the will, but made no order as to costs. Letters of administration were subsequently granted to Y., the other next of kin of the widow, with the assent of B. The widow's estate consisted entirely of personality. Upon

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summons to determine what costs and expenses ought to be allowed out of the testator's estate as testamentary expenses of the widow,

**HELD**—that costs and expenses properly incurred in the administration of the estate of the intestate widow were within the meaning of the term "testamentary expenses," and that there must be allowed as such testamentary expenses the costs of B of the probate action and also the estate duty payable on the death of the widow.

**IN RE CLEWOW, YEO v. CLEWOW, [1900] 2 Ch.**  
[182, 69 L. J. Q. B. 522, 48 W. R. 541; 82 L. T. 550—Kekewich, J.]

**191. Interpretation—Estate Duty in Respect of Real Estate—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, s. 8, sub-s. 3, s. 9, sub-s. 1—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.]**—A testator, who died in 1900, in effect directed payment of his just debts and funeral and "testamentary expenses" out of the residue of his personal estate. The real estate was given to trustees upon trusts differing from those declared of the residue.

**HELD**—that the expression "testamentary expenses" did not include the estate duty in respect of the real estate.

*In re Palmer*, [1900] 9 (W. N.) followed.

**IN RE SHARMAN, WRIGHT v. SHARMAN, [1901] 2**  
[Ch. 280; 70 L. J. Ch. 671; 49 W. R. 555, 84 L. T. 859—Kekewich, J.]

## V. POWERS AND LIABILITIES.

### (a) Carrying on Business.

**192. Creditor of Executors.]**—Administration of testator's estate order in an action by a creditor of the executors who had continued to carry on the testator's business, although there are no creditors of the estate other than those for debts incurred subsequently to the testator's death.

**IN RE SHOREY, SMITH v. SHOREY, [1899] 47**  
[W. R. 188; 79 L. T. 349—Byrne, J.]

**193. Deceased's Business Unsaleable—No Power in the Court to Authorise Widow to Carry it on—But Sureties Dispensed With**—There is no power in the Court to give directions as to how an estate is to be administered; its duty is simply to grant letters of administration; but it need not insist upon the administrator finding sureties. An intestate had carried on a small business as a structural engineer, and it was proved to the satisfaction of the Court that, while the business yielded a weekly profit of 50s., it could not be realised except at a nominal value, and that it was clearly advantageous that the widow, who had no means, should try to carry it on for herself and her children; accordingly the Court made a grant to her without sureties.

**IN THE GOODS OF WILLIAM JOHN COBY, [1903]**  
[P. 62; 72 L. J. P. 24; 88 L. T. 566—  
Jeune, P.]

**Powers and Liabilities—Continued.**

194. *Indemnity—Costs, Charges, and Expenses—Deficient Estate—Priority*—An executor trustee, who has been authorised to carry on the testator's business both by the will and by the Court, and who has properly incurred liabilities to trade creditors, is entitled to an indemnity in respect of such liabilities. If the assets are deficient, the amount of such indemnity takes priority on allocation over the costs awarded by the Court, on further consideration, to a plaintiff legatee. The trade creditors of the business stand in the shoes of the executor, and are subrogated to his rights of indemnity and priority.

MOORE v. M'GLYNN, [1904] 1 Ir. R. 334—C. A.

195. *Indemnity—Rights of Creditors of Testator and subsequent Creditors of Executors*.—A testator's business was carried on for about two years after his death by his executors in accordance with a power in his will, and afterwards, by leave of the Court in an administration proceeding brought by the executors for their own protection, until the business was sold by order of the Court. Considerable liabilities were incurred by the executors in carrying on the business, and the assets were insufficient to pay both the creditors of the testator and the creditors of the executors. The creditors of the testator, who were chiefly members of his family, were aware that the business was being carried on, not for the purpose of selling it as a going concern, but in the hope of realising a fund sufficient to pay them in full, and did not interfere.

HELD—that the testator's creditors must be taken to have assented to the carrying on of the business, and that the executors were entitled, in priority to the testator's creditors, to be indemnified out of the assets in hand against the liabilities incurred by them in carrying on the business.

*Dowse v. Gorton* ([1891] A. C. 190; 60 L. J. Ch. 745; 40 W. R. 17, 64 L. T. 809—H. L. (E.)) and *Brooke v. Brooke*, *In re Brooke* ([1894] 2 Ch. 600, 64 L. J. Ch. 21; 71 L. T. 398; 8 R. 444) followed.

*IN RE HODGES (DECEASED)*; *HODGES v. HODGES*, [1899] 1 Ir. R. 480—M. R.

196 *Will—Trustees—Debts Incurred by Trustee—One of the Trustees a Defaulter—Right of Creditors of the Business—Ranking by Subrogation—Priority*.—The trustees of a trader's will carried on his business and employed part of his estate therein under the provision in the will. The accounts were taken, and it appeared that two of the three trustees were clear, subject to certain payments to be set off against their costs; but the third trustee did not show a clear account. He was found to be a defaulter, and a sum of £921 9s. 9d., together with certain further sums for costs, was due from him to the estate. In the course of carry-

ing on the testator's trade the trustees incurred debts

HELD—that, notwithstanding one of the three trustees was a defaulter, the creditors of the testator's business were entitled to be paid in priority to the creditors of the testator, because they might sue the two trustees who were clear and claim the benefit of the indemnity to which each of the two trustees were entitled out of the estate.

*IN RE FRITH; NEWTON v. ROLFE*, [1902] 1 Ch. 342; 71 L. J. Ch. 199; 86 L. T. 212—Kekewich, J.

**(b) Liabilities**

197. *Attachment—Trustee—Executor—Debtor Appointed Executor—Debtor able to pay Debt—Debtors Act, 1869* (32 & 33 Vict. c. 62), s. 4, sub-s. 3.—A testator advanced a sum of money to the defendant, and this debt was unpaid when the testator died. The testator appointed the defendant one of the executors of his will. His co-executor and the residuary legatee brought an action against him in the Chancery Division and recovered judgment declaring that the defendant was accountable for the sum as assets in his hands belonging to the estate of the testator, and ordering him to pay the money into Court within fourteen days. Since he became executor the defendant had money wherewith to pay the debt, but he refused to pay it, and disposed of the money so as to avoid payment of the debt, and after the judgment he filed his petition in bankruptcy. The plaintiffs applied to commit him for contempt in not paying the money into Court pursuant to the order.

HELD—that in equity the defendant was deemed to have paid the debt to himself as executor, and to be in possession of the money as such, that therefore the money was in his possession as a "trustee or person acting in a fiduciary capacity," within the exception contained in sect. 4, sub-sect. 3 of the Debtors Act, 1869, and that he was liable to attachment.

Per Romer, L.J.—The Court, in exercising its discretion whether it would commit in such a case, ought to inquire, not only whether in law the executor was to be deemed to have had the money in his possession, but also whether in substance and in fact he had it in his possession.

*Dictum* of Malins, V.-C., in "*Metcalf's Case*" ((1880) 13 Ch. D. 815; 49 L. J. Ch. 347; 28 W. R. 435; 42 L. T. 178) not followed.

*IN RE BOURNE; DAVEY v. BOURNE*, [1906] 1 Ch. 697; 75 L. J. Ch. 474; 94 L. T. 750; 22 T. L. R. 417—C. A.

198. *Breach of Trust—Reliance on and Misappropriation by Solicitors—Relief of Executors from Liability—Judicial Trustee Act, 1896* (59 & 60 Vict. c. 35), s. 3, sub-s. 1.—An estate was being administered by the Court, and the executors, who resided in Norfolk and Derbyshire respectively, were practically bound to employ solicitors and

**Powers and Liabilities—Continued.**

to repose a considerable amount of confidence in them for the purpose of the administration. They employed a firm of high repute, and placed full confidence in them. A fact material as to *bona fides* was that one of the executors employed the firm as his own solicitors, trusted his money to them, and lost largely by their failure. From time to time large sums were received by the firm from or on behalf of the executors, and duly applied by them in payment of debts, duties and other proper disbursements. In the result a balance of £529 15s. 5d. remained in the hands of the solicitors at the time of their failure.

**HELD**—that under the circumstances and having regard to the magnitude of the estate, the executors were not guilty of unreasonable or foolish conduct in handing over these amounts to the firm on the statement that they were required for purposes of administration, and when in fact part thereof was so applied. The executors were therefore entitled to be relieved from personal liability for the loss under sect. 3 subsect. 1, of the Judicial Trustee Act, 1896.

*Bacon v. Bacon* ((1800), 5 Ves. 331; 5 R. R. 52) followed.

**IN RE LORD DE CLIFFORD'S ESTATE; LORD DE CLIFFORD v. QUILTER**, [1900] 2 Ch. 707; 69 L. J. Ch. 328, 83 L. T. 160, 16 T. L. R. 517—*Farwell, J.*

**199. Default of Co-executor — Putting Assets into sole Control of Co-executor.**—A testator died on February 3rd, 1897, having appointed J. and M. executors. Both of them proved the will. They realised the assets, and at the end of 1897 or commencement of 1898, three sums of money (a) a sum of £1,330 standing on deposit receipt in the Hibernian Bank; (b) £1,500 on deposit with the Antrim Iron Ore Company, and (c) £886 Consols, were called in and paid over to M., who was proprietor of a bank which received money on deposit, paying interest thereon. But these moneys were not deposited in M.'s bank; they were lodged to the credit of M.'s account with the Bank of Ireland, which at the time was overdrawn. A delay of some months occurred in the administration consequent upon a claim against the testator's assets, which on investigation turned out to be unfounded. In January, 1899, M.'s bank stopped payment. It appeared that the testator had several dealings with M.'s bank.

**HELD** (reversing the decision of the Vice-Chancellor)—that the action of J. in placing these sums of money in the sole control of his co-executor was not what an ordinary prudent man would have done with his own money, that handing the money over to M. was not lodging the money with a banker, and that J. was jointly and severally liable with M. for the loss.

*LOWE v. SHIELDS*, [1902] 1 Ir. R. 320—*C. A.*

**200. Leascholds — Administrator ad colligenda bona—Liability for Rent of Premises—Vesting of Lease.**—A person who died intestate held a lease of certain premises at a rent. The defendant was appointed administrator *ad colligenda bona*, with power to sell the lease. The defendant entered upon the premises and endeavoured unsuccessfully to sell the lease. A quarter's rent became due after the death of the tenant, and, the amount being unpaid, the lessor brought an action against the defendant to recover possession of the premises under a forfeiture clause in the lease, together with the quarter's rent in arrear and mesne profits. The defendant did not give up possession until after judgment for possession was pronounced under Order 14.

**HELD**—that the defendant having been given power to sell, the lease vested in him; that, as he had entered, he was liable to pay rent and mesne profits, the amount thereof being limited to the value of the premises if the rent exceeded that sum.

*WHITEHEAD v. PALMER*, (1907) 24 T. L. R. 41—*[Channell, J.]*

**201. Statute of Limitations—Executor not Express Trustee for Next of Kin or Heir-at-law—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57)—Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40)—Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13**—In the absence of special circumstances an executor is not regarded as an express trustee of residue undistributed by the will.

A testator who died in 1873 gave real and impure personal property to the trustees of the Royal General Theatrical Fund, charged with certain annuities, and appointed an executor, who entered into possession and received the income of the property on behalf of the trustees of the fund for nearly twenty years.

**HELD**—that the claims of the heir and next of kin were barred.

*Patrick v. Simpson* ((1889), 24 Q. B. D. 128; 59 L. J. Q. B. 7; 61 L. T. 686) and *Salter v. Cavanagh* ((1888), 1 D. & W. 668) distinguished.

**IN RE LACY; ROYAL GENERAL THEATRICAL FUND [ASSOCIATION v. KYDD]**, [1899] 2 Ch. 149; 68 L. J. Ch. 438; 47 W. R. 664; 80 L. T. 706—*Stirling, J.*

**(c) Powers**

**202. Appointment of New Trustees — Executor of Last Surviving Trustee—Appointment by Executor Proving the Will, other Executors not having proved not Joining—"Acting Executor"—"Personal Representatives"—Executor Dying without having taken Probate—Statute—Repeal—Will—"Implied Incorporation of Statute"—Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145), s. 27—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 71—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10—Court of Probate Act, 1858 (21 & 40—2**

**Powers and Liabilities—Continued**

22 Vict. c. 95), s. 16.]—A testator, by his will dated 1875, made provisions in the event of a new trustee or trustees of his will being appointed for the increase or reduction of the number of trustees. He died in 1877. In 1894 one of three executors of his last surviving trustee appointed new trustees of the will, the executor appointing had proved, his co-executors were alive but had not proved or renounced.

HELD—that the effect of the words in the will and the saving clause of sect. 71 of the Conveyancing Act was to incorporate Lord Cranworth's Act, 1860, in the will, and that the appointment, having been made by the acting executor, was good.

HELD—further, that, by virtue of sect. 16 of the Court of Probate Act, 1858, the two co-executors having died without taking probate, the representation to the testator had gone and devolved as if these persons had never been appointed executors.

IN RE BOUCHERET; BARNE V. ERSKINE, (1907) 52 [Sol. Jo. 77—Joyce, J.

203. *Compromise—Action to Establish Will—Paying Sum out of Assets to buy off Opposition—Abortive Proceedings—Assets insufficient to pay Legatees in Full.*—A testator died in 1894, leaving assets, which were supposed to be worth over £15,000. He made his will the night before he died, appointing the defendants executors and trustees, and left legacies of £4,000 to each of two nieces, both of whom were minors, and a large number of other legacies, amounting in pecuniary value to £13,000. A brother of the testator, who was supposed to be their heir-at-law, but to whom nothing had been left, entered a caveat against probate being granted. The executors brought an action in the Probate Court to establish the will, which was tried in January, 1895, when the executors compromised the suit by paying the caveator £2,000 and £300 for his costs.

In 1896 an elder brother of the testator, who had emigrated to Australia over twenty years before, and had not been heard of for many years, returned to Ireland, and brought an action to have the probate recalled and the will set aside. The action was tried in April, 1897, when the jury disagreed. The action was tried a second time in 1898, when a verdict was found in favour of the will, omitting certain clauses. In an action to administer the estate of the testator the assets were found insufficient to pay the legacies.

HELD (affirming the decision of the Vice-Chancellor)—that the executors were not entitled to credit for the sums of money spent in compromising the first probate suit; but

HELD (varying the order of the Vice-Chancellor)—that the executors were entitled to their costs in the first probate suit.

GRAHAM V. M'CASHIN, [1901] 1 Ir. R. 404—A. C.

204. *Compromise—Claim by Co-executor—Power of One Executor to Compromise—Trustee Act, 1893 (36 & 37 Vict. c. 53), s. 21.*—An executor has power to compromise the claim of his co-executor against the testator's estate. It is advisable, however, for an executor to obtain the leave of the Court in such a case

IN RE HOUGHTON; HAWLEY V. BLAKE, [1904] 1 [Ch. 622; 73 L. J. Ch. 317; 52 W. R. 505; 90 L. T. 252, 20 T. L. R. 276—Kekewich, J.

205. *Disclaimer—Administration of Estate of Deceased Debtor—Onerous Property—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 55, 125.*—Sect. 55 of the Bankruptcy Act, 1883, applies to the administration in bankruptcy of the estate of a deceased insolvent under sect. 125, and empowers the trustee to disclaim onerous property.

IN RE MELLINSON, EX PARTE DAY, [1906] 1 K. B. [68, 75 L. J. K. B. 595; 54 W. R. 444, 94 L. T. 679, 13 Manson, 201—Div. Ct.

206. *Duty of Administrator—Duty of Lawful Attorney of Widow—Receipt by Widow for Assets—Distribution.*—Letters of administration to the estate of a domiciled Englishman were granted to W. as lawful attorney of R., who was resident in the United States. R. was not the legal personal representative of the deceased either in the United States or elsewhere. Her position as a widow of the deceased was that there was no portion of the property of the deceased in England or elsewhere for which she could give a receipt

HELD—that it was not the duty of the administrator to hand the assets over to R., and that R. could not give a good receipt if he handed over the assets to her, and that his duty was to administer according to law all the estate of the deceased, as if he had obtained administration in his own right

IN RE RENDELL, WOOD V. RENDELL, [1901] 1 Ch. [230, 70 L. J. Ch. 265, 49 W. R. 131, 83 L. T. 625—Cozens-Hardy, J.

207. *Easement—Power to Grant—Easement—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7.*—A clause in a private Act authorised the granting of easements to a corporation by persons empowered under sect. 7 of the Lands Clauses Act, 1845, to sell, and convey or release lands.

HELD—that this did not authorise an executor having merely a power to sell land under sect. 16 of Lord St Leonards' Act (22 & 23 Vict. c. 18), but having no estate or interest in it, to grant to the corporation an easement.

IN RE BARROW-IN-FURNESS CORPORATION AND [RAWLINSON'S CONTRACT, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 51 W. R. 248; 87 L. T. 724—Kekewich, J.

And see No 212, *infra*.

208. *Investment—Testator's Shares in Co-*



**Powers and Liabilities—Continued.**

*partnership Business—Sale of Business to Limited Company after a Partner's Death—Power of Executors to hold Shares and Debentures in Limited Company—Unauthorised Investment—Power of Court to sanction Same*—The Court has no power in the administration of an estate to do that which, if done by the trustees, would be a breach of trust.

The Court has no power to authorise trustees to take, on the ground that it is expedient and beneficial, an investment which their testator has not authorised.

A testator owned a fourth share in an ironmaster's business, and shortly before his death arrangements had been made between his partners and himself for the sale of the assets and business to a limited company to be incorporated for that purpose, and an agreement of sale had been prepared but had not been actually executed by the testator. The executors asked that a like agreement might be approved by the Court as a proper agreement for them to enter into, and that they might be authorised to hold shares and debentures under the agreement for so long as they should think fit, as if the same had formed part of the testator's estate.

**HELD**—that the Court had not jurisdiction to approve the agreement, as in substance it amounted to either a sale and an investment of the proceeds in unauthorised securities, or it was an exchange of property of the testator for other property which the trustees were not authorised to hold.

*In re Crawshaw* ((1888) 60 L. T. 357, 4 T. L. R. 782)—followed.

*IN RE MORRISON, MORRISON v MORRISON*, [1901] 1 Ch. 701, 70 L. J. Ch. 399; 49 W. R. 441; 84 L. T. 383; 17 T. L. R. 330, 8 Manson, 210—Buckley, J.

**209. Maintenance of Child—Trustee—Property Held by Administrator—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43**—An administrator, holding property which belongs to an infant, holds it as "trustee" within the meaning of sect. 43 of the Conveyancing Act, 1881, and therefore may apply the income thereof for the infant's maintenance.

*IN RE ADAMS, VERRIER v. HASKINS*, (1907) 51 Sol. Jo. 113—Kekewich, J.

**210. Residue Undisposed of—Next-of-Kin—Equal Legacies to All Executors—Rights of Executors to Residue**—A testator by his will appointed three executors and gave them each a legacy of £1,000, and in addition he gave to one executor his foreign decorations, to another his diamond ring and his gold watch. The residuary personal estate was not disposed of by the will, and the testator died without leaving any next-of-kin.

**HELD**—that the specific bequests to two of the three executors did not prevent the application of the rule that, where pecuniary

legacies of equal amount are given to the executors, the presumption is that they are not intended to take the residue beneficially; and that therefore the Crown was entitled.

*IN RE GLICKMAN, ATTORNEY-GENERAL v. JEFFERIS*, [1907] 1 Ch. 171, 76 L. J. Ch. 82, 96 L. T. 225; 23 T. L. R. 212—Eady, J.

**211. Sale—Devise of Real Estate upon Trust to Trustees, their Heirs and Assigns—Power of Sale to the "Trustees for the time being" under a Will—Executors of Surviving Trustee—Conveyancing Act, 1881, s. 30**—A testator devised his real estate to certain trustees, their heirs and assigns, upon certain trusts, and the will contained a power of sale of real estate exercisable "by the trustees for the time being" under the will.

**HELD**—that the power of sale was exercisable by the executors of the last surviving trustee.

*IN RE PIXTON AND TONG'S CONTRACT*, (1898) 16 [W. R. 187—Byrne, J.

**212. Sale—Charge of Debts and Legacies—Devise to Son on Attaining Twenty-five—Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35) (Lord St Leonards' Act), ss. 14, 16, 18**—A testator charged his real estate in aid of his personal estate with the payment of debts and legacies by his executor, and devised his real estate to his first son who should attain the age of twenty-five. A son attained the age of twenty-five some years after the testator's death, and then died himself, having devised his real estate.

**HELD**—that a surviving executor of the father's will could sell the real estate under the power conferred by sect. 16 of Lord St. Leonards' Act, for (1) the devise to the son in fee on attaining twenty-five was not a devise "to any person in fee or in tail" within the meaning of the restrictive proviso in sect. 18; and (2) the executor's power was not destroyed by the son attaining the specified age.

*In re Wilson* ((1886) 34 W. R. 512; 54 L. T. 600)—applied.

*IN RE BARROW-IN-FURNESS CORPORATION AND [RAWLINSON'S CONTRACT]*, [1903] 1 Ch. 339, 51 W. R. 248; 87 L. T. 724—Kekewich, J.

And see No. 207, *supra*

**213. Sale—Intention—Real Estate—Implied Power of Sale**—After bequeathing a pecuniary legacy, and directing its investment, a testator provided as follows: "I will and bequeath all the remainder of my property in lands . . . together with chattels, stock, shares, furniture and personal effects, to my brothers and sisters, or their representatives in equal shares." The testator, after naming the beneficiaries and indicating their shares, appointed two persons who were not beneficiaries under his

**Powers and Liabilities—Continued.**

will "to be my executors, to carry out the intention of this my last will and testament."

HELD—that the executors were given by the will an implied power of sale over the real estate.

CARLISLE *v.* COOKE, [1905] 1 Ir. R. 269—M. R.

214. *Solicitor-trustee—Power under Will to Make Professional Charges—Creditor's Action—Insolvent Estate.*—A testator appointed three persons executors and trustees of this will, one of whom was a solicitor. The solicitor proved the will, the other two renouncing probate and disclaiming the trusts of the will. The will empowered the solicitor, notwithstanding his executorship, to make professional charges. A creditors' action was brought, which was defended by the solicitor in person, the estate being quite insolvent.

HELD—that, having regard to the decisions, and to the principles upon which they were based, the solicitor was not entitled to any profit costs in competition with the creditors of the testator.

Decision of Kekewich, J. ([1898] 1 Ch 297; 67 L. J. Ch. 139; 77 L. T. 793, 46 W. R. 247) affirmed

IN RE WHITE, PENNELL *v.* FRANKLIN, [1898] 2 Ch [217; 67 L. J. Ch. 502, 78 L. T. 770, 14 T. L. R. 503, 46 W. R. 676—C. A.]

**VI. ACTION FOR ADMINISTRATION.**

215. *Accounts—Neglect of Trustees to Furnish—Costs—Costs of taking and Vouching Accounts.*—Where the indefensible neglect of trustees to furnish accounts has rendered administration proceedings necessary, the trustees may be ordered to pay all the costs, including the costs of taking and vouching the accounts.

Herrett *v.* Foster ((1844) 7 Beav. 348, 61 R. T. 98—Lord Langdale) not followed.

IN RE SKINNER; COOPER AND SKINNER, [1904] 1 Ch. 289; 73 L. J. Ch. 94; 52 W. R. 346 89 L. T. 663—Farwell, J.

216. *Concurrent Actions—Conduct of Proceedings*—As a general rule, where there are concurrent administration actions, the conduct of proceedings under an order made in any one of them will be given to the plaintiff in the earliest action. But this rule does not apply where such plaintiff is a creditor whose debt is *bona fide* disputed

IN RE ROSS; WINGFIELD *v.* BLAIR, [1907] 1 Ch. [482, 76 L. J. Ch. 302; 96 L. T. 814—Eady, J.]

217. *Costs—Order to Pay Costs of all Parties out of Fund in Court—Fund Proving Insufficient—Priority of Administrator's Costs*—An order was made upon the further consideration of an administration action that the costs of all parties should be

paid out of a fund in Court. The fund proved insufficient.

HELD—that the costs of the administrators must be paid in priority to those of other parties.

Gaunt *v.* Taylor ((1843) 2 Hare, 413; 62 R. R. 164—Wigram, V.-C.) followed; Swale *v.* Milner ((1834) 6 Sim. 572—Wigram, V.-C.) not followed.

IN RE GRIFFITH; JONES *v.* OWEN, [1904] 1 Ch. [807; 90 L. T. 639—Farwell, J.]

218. *Costs of Administrator—Administrator Owing Money to Estate—Default in Paying such Money when Ordered.*—When a personal representative has been ordered, in an administration suit, to bring in money due by him to the estate, he will not be allowed any costs in the suit until he has complied with the order.

His solicitor is not in any better position, and will not be allowed credit for such costs, in accounting for moneys received by him as such solicitor, until his client has brought in the balance due by him.

IN RE O'KEAN; FERRIS *v.* O'KEAN, [1907] 1 Ir. R. [223—C. A.]

219. *Creditor Not a Party—Leave to Such Creditor to Attend Proceedings—Right to Have Copies of Affidavits and List of Claims—Rules of the Supreme Court Ord. XVI., rr. 41, 77; LV., r. 42; LXV., r. 27 (23).*—In a creditor's action an order was made for the administration of a deceased's estate; the estate was said to be about £50,000, and the debts at least £100,000.

Upon an application by W., an admitted creditor for £10,000,

HELD—that the administrators ought to supply him at his cost with copies of the various affidavits and list of claims. But that he could not be given general leave to attend the proceedings at his own expense; he might, however, make subsequent application for leave to contest any particular claim.

IN RE SCHWABACHER; STERN *v.* SCHWABACHER, [1907] 1 Ch. 719; 76 L. J. Ch. 399; 96 L. T. 564—Parker, J.

220. *Object of Fund Carried to Separate Accounts—Dealings by Owners—Claims against other Sharers—New South Wales.*—In an administration suit an order was made in the presence of all parties interested; and its intention was to treat a fund as so far separated from the estate that it could be dealt with by the separate donees without notice to the others. The fund could not be actually paid out, because nobody had acquired an absolute and indefeasible interest in it; for the absolute interests acquired by the children were liable to variation in amount by the birth of more children.

HELD—that the object of separate accounts was to relieve the subjects of each account from entanglement with the others,

**Action for Administration—Continued**

and to make the persons specified in each heading the owners of the fund carried to its credit, so far as was consistent with the necessity for retaining those funds in Court, that the retention of the fund was not meant to prevent adult owners of interests in it from dealing with those interests, that the division into separate accounts was intended to facilitate such dealings; that, so long as any fund remained in Court, claims against its owner could practically be enforced against it which could not practically be enforced if it were paid out, that it was open to the other parties to the suit to show that they had claims enforceable against a separate fund which were not known or not existent when the fund was separated, and by proper proceedings to enforce them notwithstanding the order for separating the fund; that until some step was taken for that purpose the separation was commonly and rightly looked upon as showing that the separated funds were free from claims by the other sharers in the estate; that persons honestly dealing with those whom the Court declares to be the owners of such funds are justified in trusting to that declaration; and that it would be unjust to subject them to claims by the other sharers arising out of matters subsequent to the separation or latent at the time.

ENGAR v. PLOMLEY, [1900] A. C. 431; 69 [L. J. P. C. 95; 49 W. R. 142; 82 L. T. 573, 16 T. L. R. 395—P. C.]

**221. Insolvent Estate—Manager appointed by the Court—Unsuccessful Action brought by the Manager with the Sanction of the Court—Practice—Costs—Priority—Solicitor—Realisation of Assets.**—A manager, appointed by the Court in an administration suit, obtained leave to proceed with an action commenced at common law by the executors to recover a balance of £668 claimed to be due in respect of a contract with the testator. The defendants in that action filed a counter-claim, and in the result a larger amount was found due on the counter-claim than for the plaintiff in the original action, and judgment was entered for the defendants for the difference, with costs. The fund in court, which represented the available assets of the testator, was insufficient to pay the costs in the common law action of the defendants in the said action, and those of the manager. It appeared that no sum out of the assets would be payable to the manager personally in respect of a considerable balance certified to be due to him, and that the costs in question were due and payable to his solicitor.

HELD (reversing the decision of the Vice-Chancellor)—that the manager's solicitor was entitled to be paid his costs in the common law action, in priority to the costs of the defendants therein, out of the fund in court.

RAMSAY v. SIMPSON (No 2), [1899] 1 Ir. R. [194—C. A.]

**222 Issue to try Validity of Claim—Insolvent Estate—Costs of Issue—Payment in Full.**—In an action for the administration of an insolvent estate where an issue was directed to ascertain whether a claim against the estate for commission was well founded, the claimant was successful.

HELD—following the analogy of the practice in bankruptcy that the costs of the issue were payable in full out of the assets.

IN RE DUNN, BRINKLOW v. SINGLETON, [1902] [W. N. 76—Byrne, J.]

**223. Receiver—Right of Specific Devisee—Occupation—Rent for House Occupied by Receiver—Completion of Building Contracts entered into by Testator.**—D. by will devised certain real estate to S. for life, with remainders over, and bequeathed his household furniture and farming stock to her absolutely. Before his death the testator had entered into contracts, binding on him at his death, for the erection of cottages on the land given to S. for life, and on certain other land which he had bought in his lifetime, and which had by his directions been conveyed as a gift to the use of S. for life, with remainder to her daughter. His executors stopped the completion of the contracts, making terms with the builders.

An action having been brought for the administration of D.'s estate, a receiver and manager of his estate and farm was appointed, and he resided for some time in the house devised to S. for life, and used the furniture given to her, and also used the farming stock in carrying on the testator's farm.

HELD—that S. was entitled to an inquiry what compensation ought to be paid her for the use and occupation of the house, and the injury done by user to the furniture and stock.

HELD—also, that S. was entitled to have the cottages contracted to be built on the estate devised to her for life completed at the cost of the testator's estate, but had no claim in respect of the contracts to build on the land conveyed to her before the testator's death.

Cooper v. Jarman (L. R. 3 Eq. 98) followed. RE DAY; SPRAKE v. DAY, [1898] 2 Ch. 510; 67 [L. J. Ch. 619; 77 L. T. 436, 47 W. R. 238—North, J.]

**224. Receiver of Real Estate—Creditors' Action—Parties—No Personal Estate Undistributed—Absence of Personal Representative.**—Where all the personality of an intestate, who died before 1897, had been completely administered and proved insufficient to satisfy her debts,

HELD—that a creditor was entitled as of right to the appointment of a receiver of the rents and profits of her real estate, although no legal personal representative was before the Court.

IN RE DAWSON, CLARK v. DAWSON, (1906) 75

**Action for Administration—Continued**

[L. J. Ch. 201; 94 L. T. 230—Kekewich, J.]

**225 Secured Creditor proving against Real Estate—Lapse of Time—Fund still in Court—Real Estate depreciating in Value—Right of the Creditor to prove against the Personal Estate.**—Although the language of the decree in an administration action, requiring all claims to be made within a certain time, is peremptory, yet the practice is to allow a creditor (upon his paying the costs) to prove his debt subsequently, so long as there is still a residuary fund in Court, or in the executors' hands.

*Gillespie v. Alexander* ((1827) 3 Russ. 130; 27 R. R. 35—judgment of Lord Eldon) approved.

In 1888 an action was brought for the administration of a testator's estate, the plaintiff, a mortgagee, verified his claim against the realty, but made no claim against the personality, believing his security to be ample. In 1902 there was still a fund in Court, and the plaintiff, finding his security to be in fact insufficient, claimed to prove against such fund.

**HELD**—that he was entitled to do so, and to be paid his principal and interest out of the residue of the real and personal estate after payment of all debts and costs already proved or admitted.

Decision of the C A (Ir) *sub nom. Beattie v. Cordner* ([1903] 1 Ir 1) affirmed.

*HARRISON v. KIRK*, [1904] A. C. 1, 73 L. J. P. C. [35, 80 L. T. 566—H. L. (Ir)]

**226. Subsequent Action by same Plaintiff charging Wilful Default—Common Order for Administration against Executor—No Evidence of fresh Information—Leave of Court.**—A creditor of a testator's estate, himself a bankrupt, obtained a common order for administration against the executor. He now asked leave to bring a fresh action charging the executor with wilful default and fraud, but did not allege that he had acquired his information too late to utilise it in the first action.

**HELD**—that he might nevertheless proceed upon giving security for the executor's costs.

*Laming v. Gee* ((1879) 10 Ch. D. 715; 48 L. J. Ch. 196, 27 W. R. 227, 40 L. T. 33) not followed.

*RE KURTZ; EMERSON v. HENDERSON*, (1904) 90 [L. T. 12—Eady, J.]

**227. Trusts of a Will—Testator Domiciled in Jersey—One Trustee Confined in an English Asylum—The Other Desirous of Retiring—New Trustees Appointed by Jersey Court—Securities in England—Petitions by Trustees and Beneficiaries—R. S. C., Ord., 55, r. 10.]**—The Court need not put the parties to the expense of an administration order, unless it sees some necessity for making it.

*Re Braithwaite* ((1882) 21 Ch. D. 121—Hall, V.-C.) followed.

A testator, domiciled in Jersey, created a trust fund, of which the plaintiff was one trustee and also tenant for life; but he was confined in an English lunatic asylum, and the other surviving trustee desired to retire. Thereupon the Court in Jersey appointed new trustees; and difficulties arose which led to the present proceedings, in which the plaintiff, by his next friend, asked for administration of the trusts of the will by the English Court; the rest of the beneficiaries objected to the cost of an unnecessary administration, and petitioned the English Court to appoint new trustees; while the new trustees appointed by the Jersey Court petitioned the English Court to vest in them the trust securities, which had been kept at an English bank, but were now deposited in Court.

Upon the action coming on for trial, Joyce, J., refused to make an administration order, on the ground that it was unnecessary.

The appeal from Joyce, J., and the two petitions were heard together. The Court made an administration order, but stayed all inquiries thereunder. At the same time they confirmed the appointment of the Jersey trustees, and vested the property in them, directing the receiver, already appointed, to act under the trustees' orders, but not to remove any of the funds out of the jurisdiction.

*DE QUETTEVILLE v. DE QUETTEVILLE, IN RE DE QUETTEVILLE*, (1903) 19 T. L. R. 109, 383—C. A.

**EXECUTORY DEVISE.**

*See TRUSTS; WILLS.*

**EXHUMATION OF HUMAN REMAINS.**

*See BURIAL AND CREMATION.*

**EXPLOSIVES.**

**1. Petroleum—Composition containing 33 per cent. of Petroleum—Licence from Local Authority—Petroleum Act, 1871 (34 & 35 Vict. c. 105), ss. 3, 7—Petroleum Act, 1879 (42 & 43 Vict. c. 47), s. 2, Sched. I.]**—A composition containing 33 per cent. of petroleum which gives off an inflammable vapour under the test prescribed by the Petroleum Act, 1879, Sched. I., is "petroleum" within the meaning of the Petroleum Act, 1871, sect. 3, and a licence must be obtained from the local authority in order to store it.

*LONDON COUNTY COUNCIL v. HOLZAPFELS COMPOSITIONS Co.*, (1899) 68 L. J. Q. B. 886; 63

**Explosives—Continued.**

J. P. 615, 47 W. R. 622, 15 T. L. 417—  
Div. Ct.

**2 Petroleum—Licence for Keeping and Use—Light Locomotives—Local Authority—Regulations of Secretary of State—Petroleum kept by Manufacturer of Motor-cars—Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 7—Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 5.]**—The respondent was charged, at the instance of the London County Council, with having kept at his premises a quantity of petroleum, to which the Petroleum Acts, 1871 and 1879, applied, otherwise than in pursuance of a licence given by such local authority as is mentioned in the Acts. The magistrate found that the petroleum so found was kept and used by the respondent for the purpose of testing motor-cars manufactured by him, which were light locomotives within the meaning of the Locomotives on Highways Act, 1896, and that the respondent had not committed any offence against the Petroleum Acts.

**HELD**—that under the Locomotives on Highways Act, 1896, petroleum for light locomotives might be kept on conditions to be fixed by the Secretary of State, and not by the County Council, and the County Council could not impose different conditions from those imposed by the Secretary of State, and that judgment must be given in the respondent's favour.

GODFREY v. NAPIER, (1902) 18 T. L. R. 31—  
[Div. Ct.]

**EXPULSION ORDER.**

See ALIENS.

**EXTORTION.**

See CRIMINAL LAW.

**EXTRADITION AND FUGITIVE OFFENDERS.**

See also CRIMINAL LAW AND PROCEDURE (Larceny)

**1. Acts of Prisoner a Criminal Offence in both Countries and within the Treaty—Offence called by Different Names in both Countries—Manager of Bank—Discounting Worthless Bills with Bank—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 81—Extradition Act, 1870 (33 & 34 Vict. c. 52), Sched. I.]**—A prisoner was committed to custody by a metropolitan police magistrate with a view to his extradition to the United States. One of the charges was a charge of "embezzle-

ment." It was admitted that the depositions made out a *prima facie* case of "larceny by embezzlement" within the definition of that offence in the Washington Statutes. There was evidence that the prisoner had committed an offence within sect 81 of the Larceny Act, 1861.

**HELD**—that the evidence showed *prima facie* that the prisoner had done what was a crime in both countries within the provisions of Article X. of the Extradition Treaty of 1842 and the Treaty of 1889, that it was not essential that the offence should be called by the same name in both countries; and that the prisoner must be re-mitted into custody.

*In re Acton* ([1896] 1 Q. B. 509; 65 L. J. M. C. 50, 60 J. P. 132, 44 W. R. 351, 74 L. T. 249, 18 Cox, C. C. 277—Div. Ct.) followed.

REX v. DIX, (1902) 18 T. L. R. 231—Div. Ct.

(See also *Req. v. Governor of Holloway Prison* (1900), 16 T. L. R. 247—Div. Ct., No. 6 *infra*).

**2. Arrest and Remand of Accused—Habeas corpus — Jurisdiction]**—Persons charged with having committed in Georgia an extraditable offence were arrested in Montreal, and brought before the Extradition Commissioner. He remanded them to enable the prosecution to prove the case.

Whilst they were under remand, a Judge granted writs of *habeas corpus*, and discharged the prisoners on the ground that no extradition offence had been disclosed in the proceedings before him.

**HELD**—that he was wrong in treating the remand warrant as a nullity, and in taking upon himself to adjudicate upon the case upon part only of the evidence, when the proper person had in regular course remanded the prisoners for the whole of the evidence to be brought before him.

UNITED STATES OF AMERICA v. GAYNOR, [1905] [A. C. 128, 74 L. J. P. C. 44; 92 L. T. 276; 21 T. L. R. 254—P. C.]

**3 Committal—Other Charges after Detention for Two Months—Treaty with Germany, Arts. 9, 12.]**—Article 12 of the extradition treaty with Germany was intended to protect the prisoner, against whom a case for committal was not made out, from being detained for a longer period than two months upon suspicion, and it gave him a right to be set at liberty if within that time a case was not made out against him. If that article does not apply, and if the prisoner has no right to be set at liberty, the procedure to be followed is the same as the procedure upon a similar charge in this country.

Where there was in fact on the depositions on the 14th February sufficient evidence to justify the committal for trial of a prisoner—a fugitive criminal—arrested on the preceding 15th December, if the offence had been committed in England, there was sufficient evidence to justify a magistrate in

**Extradition and Fugitive Offenders—Continued**

making an order for his extradition and also in receiving evidence on other charges, and then making an order of committal on them and the original charge

IN RE BLUM, [1901] 1 K. B. 764, 70 L. J. K. B. 472; 49 W. R. 464, 17 T. L. R. 358—

Div. Ct.

4. *Conviction abroad — Temporary Discharge on Ground of Ill-health—Sentence to be Completed on Recovery—Escape to England—Expiration of Original Sentence—Exemption from Punishment*—An applicant for a writ of *habeas corpus* who was detained in custody under an extradition order in respect of a conviction in Germany had been temporarily discharged from prison in that country owing to ill-health, but on his recovery a competent German Court had ordered his re-arrest in order that he might serve the remainder of his sentence. Meanwhile the applicant had removed to England, and his extradition was applied for by the German Government at a date subsequent to the time when his period of imprisonment, if it had been continuous, would have expired through lapse of time.

HELD—that no exemption from punishment had been acquired by lapse of time according to the meaning of the treaty of 1872 between England and Germany and that the *habeas corpus* must therefore be refused

REX v. BRINGTON PRISON GOVERNOR, EX PARTE [CALBERLA, [1907] 2 K. B. 861, 76 L. J. K. B. 1117; 71 J. P. 509, 23 T. L. R. 737—Div. Ct.]

5. *Conviction en contumace—Belgian Law—Prescription—Surrender after Expiry of Prescriptive Period—Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 3 (3), 10, 11.*—The prisoner was convicted in Belgium, in his absence *en contumace*, in June, 1901, of the crime of larceny. In August, 1903, a warrant for his arrest was issued in England at the request of the Belgian Government, and in February, 1906, he was arrested, and was further charged with obtaining money by false pretences in England. In March, 1906, an order of committal for extradition was made, but was not put in force till February, 1907, on the expiry of his sentence for obtaining money by false pretences in this country, when, immediately after his release, he was re-arrested and detained for extradition.

HELD—that, assuming that the prescriptive period of five years fixed by the law of Belgium expired in July, 1906, so as to make the offence no longer punishable there, the Court would not by means of a writ of *habeas corpus* interfere with the surrender of the prisoner to the Belgian authorities by a Secretary of State under the extradition proceedings, as they were effectively commenced before the expiry of the period of prescription.

REX v. GOVERNOR OF BRINGTON PRISON, EX PARTE [AUWERA, [1907] 2 K. B. 157; 76 L. J. K. B. 661; 71 J. P. 226, 96 L. T. 821; 23 T. L. R. 415—Div. Ct.]

6. *Crime by Bankrupt against Bankruptcy Law—Petitioning Creditor's Debt less than £50—Jurisdiction of Magistrate to Inquire into Merits of Adjudication.*—Upon an application, under the treaty with Belgium, for the extradition of a person charged with having committed a crime against the Belgian bankruptcy law, it is no answer to show that the adjudication in bankruptcy in Belgium was founded upon a petitioning creditor's debt for less than £50. The magistrate in this country ought not to inquire into the merits of the adjudication.

REX v. GOVERNOR OF HOLLOWAY PRISON, (1902) [18 T. L. R. 475, 67 J. P. 67, 51 W. R. 191—Div. Ct.]

7. *Evidence — Foreign Depositions — Evidence for the Defence—Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 9, 10, 14.*—In extradition cases it is the recognised practice for the magistrate to hear and consider evidence for the defence before deciding whether or no to commit.

Foreign depositions ought to be carefully scrutinised, but, if they establish the facts, the magistrate ought not to ignore them because certain formalities, necessary in England, may have been omitted in taking them.

REX v. ZOSSENHEIM, (1904) 20 T. L. R. 121—[Div. Ct.]

8. *Fugitive Criminal—Bankruptcy Pending Extradition—Property Found on Bankrupt at his Arrest—Retention of such Property by Police—Committing Magistrate to Decide what Portions of Property Required for Purposes of Foreign Trial—Concurrence of Secretary of State—"Competent Authority"—Belgian Extradition Treaty, 1872 art. 12—Extradition Act, 1870 (33 & 34 Vict. c. 52), sub-ss. 9, 10.*—The debtor Borovsky was a Russian subject domiciled in England, and the debtor Weinbaum was a naturalised British subject, and they carried on business in partnership in London and Antwerp in Belgium. The debtors were arrested in England on an extradition granted at the instance of the Belgian Government in respect of offences committed at Antwerp against the laws of Belgium. When arrested considerable property was found upon them, consisting of cash, precious stones, and bills of exchange for goods sold to customers; also the keys of a safe at the Chancery Lane Safe Deposit Company, where property of a like nature was found by the police. The debtors were adjudicated bankrupt in England and in Belgium.

HELD—that the police were right to retain the property found on the prisoners; that the magistrate who made the order for the committal of the bankrupts was the "competent authority" to decide what parts of

**Extradition and Fugitive Offenders—Continued.**

the property were material for the purpose of the trial in Belgium, that the magistrate should have the concurrence of the Secretary of State in handing it over, and the latter should be asked to request the foreign State that there might be an undertaking to re-deliver the articles after the foreign criminal proceedings were terminated with an *arrêté* on which the Court would give any Belgian claimant full opportunity of re-establishing his title before any final distribution of it was made.

IN RE BOROVSKI and WEINBAUM, EX PARTE SALAMAN, [1902] 2 K. B. 312, 71 L. J. K. B. 992, 51 W. R. 48, 87 L. T. 184, 9 Manson, 346—Wright, J.

9 *Fugitive Criminal—Jurisdiction to Review Magistrate's Decision—Fresh Evidence—Extradition Act, 1870* (33 & 34 Vict. c. 52), ss. 10, 11]—The Court has no jurisdiction to review the decision on a question of fact of a magistrate committing a person to prison under sects 10 and 11 of the Extradition Act, 1870, where there is evidence to support that decision. The Court can only, on an application for a *habeas corpus*, entertain the question of the jurisdiction of the magistrate to commit, namely, whether the crime charged comes within the Extradition Act, or whether it is an offence of a political character, and the question whether there was any evidence upon which the magistrate could commit. The fact that there is fresh evidence which was not before the magistrate, and which might have affected his mind, is no ground for granting a *habeas corpus*.

REX v. GOVERNOR OF HOLLOWAY PRISON, EX PARTE SILETTI, (1902) 71 L. J. K. B. 935; 87 L. T. 332; 18 T. L. R. 771—Div. Ct.

10. *Fugitive Offender—Arrest and Surrender in Colony on one Charge—Committal in this Country on that Charge and Others—Trial on Charges for which Committed—Fugitive Offenders Act, 1881* (44 & 45 Vict. c. 69), s. 8.]—The prisoner was indicted in one indictment for obtaining goods by false pretences and for various offences under the Debtors Act, 1869. He was also indicted for a felony under the same Act. The prisoner had been arrested and returned from Cape Colony under the Fugitive Offenders Act, 1881, on the charges of obtaining goods by false pretences in this country. He was committed for trial in this country on all the charges. At the trial, counsel for the defence contended that the prisoner could only be tried on the counts for false pretences on which he was returned.

HELD—that the prisoner could be tried on all the charges.

Reg. v. Phillips, (1858) 1 F. & F. 105 followed.

REX v. COHEN, (1907) 71 J. P. 190—  
[Commissioner Rentoul, KC—C. C. Ct.]

11. *Fugitive Offender—Committal to Prison*

—Charge of Felony—Order made for Return of Fugitive—Bail—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 5.]—Where a magistrate had made an order, under section 5 of the Fugitive Offenders Act, 1881 committing to prison a person (charged with having committed an offence, to which Part I. of the Act applies, in some part of Her Majesty's dominions) to await his return to the place where the offence was alleged to have been committed, the Queen's Bench Division, without deciding whether it had jurisdiction to admit the accused to bail, decided that under the particular circumstances, even if it had the power, it would not exercise it.

REG v. HOIE, (1898) 62 J. P. 616; 14 T. L. R. [578—Div. Court.]

12. *Fugitive Offender—Misdemeanour—Committal by Magistrate to Prison to Await Return—Power of Court to Grant Bail—Onus—Habeas corpus—Power of Court to Order Fugitive to be Returned to Different Place—Fugitive Offenders Act, 1881* (44 & 45 Vict. c. 69), ss. 2, 5, and 6.]—The inherent power which the Court possesses to grant bail in the case of prisoners committed for trial in this country is not taken away by the Fugitive Offenders Act, 1881, in the case of fugitive offenders who have been committed under that Act on a charge of misdemeanour to be returned for trial to the place where the alleged offence was committed, and the Court has a discretion either to grant or to refuse bail.

In such cases the *onus* is not on the defendant to show that the inherent power of the Court to grant bail is not taken away by the statute, but it is for the Crown resisting the bail to show that such power of the Court is, either in express terms or by implication, taken away by the statute.

And the Court has power under the Act and a discretion to order that the fugitive offender be returned to a place other than the place where the alleged offence was committed.

REG. v. SPILSBURY, [1898] 2 Q. B. 615; 62 J. P. [600; 67 L. J. Q. B. 938; 79 L. T. 211; 14 T. L. R. 579; 19 Cox. C. C. 160—Div. Ct.]

13. *Fugitive Offender—Colonial Statute—Later Amending Statute—Proof of Colonial Law—Fugitive Offenders Act, 1881* (44 & 45 Vict. c. 69), ss. 5, 9, 10.]—The applicant was arrested in England as a fugitive offender from the British Colony of Victoria on a warrant charging him with larceny in that State. Three warrants for larceny had been previously issued against him in Victoria, and were put in evidence before the magistrate, together with the depositions taken there, which included evidence by a senior constable of police that by the Crimes Act, 1890, an Act then in force in the colony of Victoria, the crime of larceny was punishable by imprisonment with hard labour for any term not exceeding five years, but no further evidence of the law of Victoria was

**Extradition and Fugitive Offenders—Continued.**

given. The magistrate committed the applicant for return to the colony. On the argument of a rule *nisi* for a writ of *habeas corpus*, it was admitted that the facts did not amount to an offence within the Crimes Act, 1890 (Victorian statute), but it was contended that they were made an offence by the Crimes Act, 1890, Amendment Act, 1896 (Victorian statute), and that evidence of the principal Act having been given the Court was bound to take judicial notice of the amending Act.

**HELD**—that colonial law, like foreign law, must be proved by evidence, and in the circumstances of the case the Court declined either to send the case back to the magistrate so that the prosecution might give further evidence, or to adjourn the case for the ascertainment of the law of Victoria under the British Law Ascertainment Act, 1859, and the rule was accordingly made absolute, and the order of the magistrate discharged.

**REX v. BRIXTON PRISON GOVERNOR, EX PARTE PERCIVAL**, [1907] 1 K. B. 696; 76 L. J. K. B. 619, 71 J. P. 118, 96 L. T. 545, 23 T. L. R. 238—Div. Ct.

**14 Fugitive Offender — Order made by Magistrate at Bow Street—Habeas corpus—Grounds on which High Court can Proceed**—42 Geo. 3, c. 85, s. 1—*Fugitive Offenders Act*, 1881 (44 & 45 Vict. c. 69), ss. 5, 10.]—An order was made by a magistrate sitting at Bow Street, under sect. 5 of the *Fugitive Offenders Act*, 1881, committing the defendant to prison, before being sent out to South Africa, there to stand his trial on charges of fraud alleged against him. A rule *nisi* to show cause why a writ of *habeas corpus* should not issue was granted.

The Court, on cause being shown, expressly left open the question whether they were entitled to consider under sect. 10 of the *Fugitive Offenders Act*, or otherwise whether there was, on the evidence before the magistrate, a strong or probable presumption that the fugitive had committed the offence in question; but the rule was discharged on the ground that the facts did not bring the case within the provisions of sect. 10, the offence not being trivial and the proceedings not being oppressive.

**REX v. VYNER**, (1904) 68 J. P. 142—Div. Ct.

**15. Plea by Prisoner that he was Born of British Parents—Onus on Crown to Prove that Prisoner's Father had Lost his British Nationality—Habeas corpus**]—The applicant for a rule *nisi* for a *habeas corpus* had been sentenced by a French Court. He escaped to England. On an application by the French Government a magistrate ordered his extradition. The prisoner, in resisting the order for extradition, pleaded that he was the son of British parents, and obtained a rule *nisi* for *habeas corpus*.

**HELD**—that the onus was on the Crown to

show that the prisoner's father had abandoned or lost his nationality by residence abroad, and there being no satisfactory evidence to that effect, the prisoner's plea was a good defence, and he must be discharged.

**REX v. BRIXTON PRISON GOVERNOR, EX PARTE GUERIN**, (1907) 51 Sol. Jo. 571—Div. Ct.

**16 Postponement of Execution of Sentence—Treaty with the Netherlands** (June 19, 1873)]—Under the extradition treaty with the Netherlands, dated June 19, 1873, it is provided by Article 4 that "the extradition shall not take place if the person claimed on the part of the Government of the United Kingdom or the person claimed on the part of the Government of the Netherlands has already been tried and discharged or punished, or is still under trial in the Netherlands or in the United Kingdom respectively, for the crime for which his extradition is demanded." It is further provided by Article 5 "that the extradition shall not take place if, subsequently to the commission of the crime or the institution of the penal prosecution, or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to. When a person in Holland, has, as he may do, applied for a postponement of the execution of his sentence, he cannot when his extradition is sought in this country, be heard to say that he has served his sentence."

The words "acquired by lapse of time according to the laws of the State applied to" in Article 5, refer to such limitations as are imposed by various statutes.

**REG. v. HOLLOWAY PRISON (GOVERNOR OF), EX PARTE BUDDENBORG**, (1898) 14 T. L. R. 252—Div. Ct.

**17. Variation between German and English Law—Act the Same, but Description of Offence Different in the Two Countries—Committal under English Description**]—J. K. was arrested upon an extradition warrant, charging him with obtaining a thing by false pretences within the jurisdiction of the German Empire. At Bow Street he was committed to Holloway Prison, in order that he might be delivered over to the German police. The offence for which he was committed was described in the committal order as "fraud by an agent and larceny by a bailee."

**HELD**—that, according to German law, what the prisoner was said to have done was obtaining goods by false pretences, but it was not so according to English law, but was an offence of another kind. The act was the same, but it was called by a different name in each country. The magistrate simply changed the description of the offence charged into the description under which the act alleged was known in English law, and he was justified in so doing as there was evidence on which he could commit the prisoner.



**Extradition and Fugitive Offenders—Continued**

*In re Arton* ([1896] 1 Q. B. 509, 65 L. J. M. C. 50, 60 J. P. 132; 44 W. R. 351; 74 L. T. 249, 18 Cox, C. C. 277—Div. Ct.) followed

*REG. v. GOVERNOR OF HOLLOWAY PRISON*, (1900) [16 T. L. R. 247—Div. Ct.]

## EXTRAORDINARY TRAFFIC.

*See* HIGHWAYS

## FACTORS.

*See* AGENCY; BAILEMENTS

## FACTORIES AND WORKSHOPS.

I. DEFINITIONS . . . . .	1273
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*And see* LANDLORD AND TENANT, 75—77.  
MASTER AND SERVANT, NEGLIGENCE

### I DEFINITIONS.

1. *Factory—Bleaching and Dyeing Works*—*Hooking, Lapping, Packing—Factory and Workshop Act*, 1878 (41 Vict. c. 16), s. 93, *Fourth Schedule*, Part 1, s. 2]—By the *Factory and Workshop Act*, 1878, in the *Fourth Schedule*, Part 1, sect. 2, bleaching and dyeing works are defined as “any premises in which bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making-up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on.”

By sect. 93, the word “factory” means “textile factory” and “non-textile factory,” and “non-textile factory” includes any places named in Part I of the *Fourth Schedule*.

The respondents were engaged in hooking, lapping, making-up, and packing cloth for exportation, which they received in a finished state from the manufacturers. They were summoned by the appellant for employing a young woman contrary to the *Factory Acts*. It was contended on behalf of the respondents that their premises were not a factory within the meaning of the Act, as the hooking, lapping, making-up, and pack-

ing were not carried on incidentally to bleaching and dyeing.

The magistrate decided in favour of the respondents.

HELD—that the decision was wrong, as the premises came within “bleaching and dyeing works” as defined by the Act, though not within the ordinary sense.

*ROGERS v. MANCHESTER PACKING CO.*, [1898] 1 [Q. B. 344, 18 Cox, C. C. 698, 62 J. P. 166; 67 L. J. Q. B. 310; 78 L. T. 17; 14 T. L. R. 196, 46 W. R. 350—Div. Ct.]

2. *Factory—“Electrical Station”—Engine-house and Machinery—Supply of Electric Light to Workhouse—“Public Building”—Factory and Workshop Act*, 1901 (1 Edw. 7, c. 22), s. 149, sub-s. 1 (a), sched. 6, part 1 (20)]—An engine-house and machinery were situate within, and formed part of, a workhouse, and were used by the guardians for the purpose of supplying electric light and power for the workhouse.

HELD—that the workhouse was a “public building” within sched. 6, part 1 (20), of the *Factory and Workshop Act*, 1901, which includes “electrical stations, that is to say, any premises . . . in which electrical energy is generated . . . for the purpose of lighting . . . any public building,” and that, therefore, the engine-house was a “factory,” and the engines required to be fenced.

*MILE END GUARDIANS v. HOARE*, [1903] 2 K. B. [483, 72 L. J. K. B. 651; 67 J. P. 395, 89 L. T. 276, 19 T. L. R. 606, 20 Cox, C. C. 536—Div. Ct.]

3. *Factory—Premises used for Bottling Beer for Sale—“In or Incidental to the Adapting for Sale”—“In Aid of the Manufacturing Process”—Factory and Workshop Act*, 1878 (41 & 42 Vict. c. 16), s. 93.]—Premises were used by the respondents for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers. Before the bottles were filled with beer, which was done by manual labour, they were washed by manual labour with the aid of mechanical power.

HELD—that it was doubtful if it could be said that what was done was “in or incidental to the adapting for sale of any article” within clause (c) of sub-sect. 3 of sect. 93 of the *Factory and Workshop Act*, 1878; that having regard to the earlier part of sect. 93 and to the provisions with respect to manufacturing processes, and to the 4th schedule, the washing of the bottles by mechanical means could not be fairly called a process which was used “in aid of” the bottling of beer; and that the respondents’ premises were not a “factory” within the meaning of the definition of sect. 93.

*LAW v. GRAHAM*, [1901] 2 K. B. 327; 70 [L. J. K. B. 608, 65 J. P. 501; 49 W. R. 622, 84 L. T. 599; 17 L. R. 474; 19 Cox, C. C. 725—Div. Ct.]

4. *Factory—Premises used for Aërating*

## Definitions—Continued.

and Bottling Beer for Sale—"Curtilage"—  
 "In or Incidental to the Adapting for Sale"  
 —Mechanical Power used—"In aid of the  
 Manufacturing Process"—Factory and  
 Workshop Act, 1878 (41 & 42 Vict. c. 16),  
 s. 93.]—Bottling stores were used by the re-  
 spondents for the purpose of aerating and  
 bottling beer, and gas engines were used.  
 The beer was so aerated and bottled for  
 the purpose of adapting it for sale as  
 bottled beer. The beer was brought in  
 barrels, then forced out of the barrels into  
 a cooling-tank by means of an air-pump,  
 driven by mechanical power—to wit, a gas  
 engine. Thence it was forced by an air-  
 pump, driven by mechanical power, into a  
 cylinder, called the mixing cylinder,  
 situated in a room adjoining and commu-  
 nicating with that in which S. W., aged 15,  
 was employed to 9.30 p.m. The mixing  
 cylinder contained a mechanical mixer,  
 rotated or driven by mechanical power—to  
 wit, a gas engine. Attached to and com-  
 municating with the mixing cylinder were  
 high-pressure cylinders containing carbonic-  
 acid gas, which were brought already  
 charged with such gas into the bottling  
 stores. By the action of the mixer, the beer  
 and the carbonic-acid gas were mixed to-  
 gether and the beer was aerated. The duty  
 of S. W. was to place an empty bottle in  
 the bottling machine and to pull down by  
 hand into the neck of such bottle, by means  
 of a lever, the nozzle of a tap communi-  
 cating by a pipe with the mixing cylinder.  
 The beer flowed through the pipe from the  
 tap, owing to the pressure of the gas with  
 which it had been aerated, and filled such  
 bottle. The bottling machine was not  
 worked by mechanical power. The bottles  
 before being filled were drained and soaked  
 by hand and afterwards rinsed out by a  
 brush driven by a gas engine on another  
 floor of the premises.

HELD—that on these premises and within  
 the "curtilage" carbonic-acid gas and beer  
 were mixed together by mechanical power,  
 and then put into bottles, and the case,  
 therefore, came within clause (c) of sub-  
 sect. 3 of sect. 93 of the Factory and Work-  
 shop Act, 1878, of adapting an article for  
 sale; and that the premises were a non-tex-  
 tile factory within the meaning of sect. 93,  
 manual labour having been exercised on  
 the premises at the same time that  
 mechanical power was used in aid of the  
 process.

*Law v. Graham* ([1901] 2 K. B. 327; 70  
 L. J. K. B. 608; 65 J. P. 501; 49 W. R. 622;  
 84 L. T. 599; 17 T. L. R. 474—Div. Ct., No 3,  
*supra*), distinguished.

*HOARE v. TRUMAN, HANBURY, BUXTON & Co.*,  
 ([1902] 71 L. J. K. B. 380; 66 J. P. 342;  
 50 W. R. 396; 86 L. T. 417; 18 T. L. R.  
 349; 20 Cox, C. C. 174—Div. Ct.

5. Factory—Upper Floors Factories—Lower  
 Floors not Factories—Factory and Work-

shop Act, 1878 (41 & 42 Vict. c. 16), s. 93—  
 Factory and Workshop Act, 1891 (54 & 55  
 Vict. c. 75), s. 7.]—The upper part of a build-  
 ing was used as a factory, the lower storeys  
 were let to tenants who did not use the  
 same as a factory

HELD—that the whole building was not a  
 factory, but that each set of storeys used for  
 one business was, and that consequently  
 the owner could not be compelled to erect  
 a staircase through the lower storeys if  
 by so doing he would be committing a  
 trespass.

IN RE AN ARBITRATION BETWEEN THE LONDON  
 [COUNTY COUNCIL AND LEWIS, (1900) 69  
 L. J. Q. B. 277; 64 J. P. 39; 82 L. T. 195;  
 16 T. L. R. 137—Div. Ct.

6. Workshop—Manual Labour—Article—  
 Making and Adapting for Sale—Factory and  
 Workshop Act, 1901 (1 Edw. 7 c. 22), s. 149  
 (1).]—The respondents were occupiers of a  
 shop and of a room behind it where they  
 carried on business as retail florists, and  
 employed young women to serve in the shop,  
 and to make bouquets, wreaths and crosses  
 in the room behind, part of the work con-  
 sisting in fastening flowers to frames of  
 wood or wire.

HELD—that the work of the young women  
 was manual labour exercised by way of  
 trade in the making of articles and adapt-  
 ing them for sale, and that, therefore, the  
 room behind the shop was a "workshop"  
 within sect. 149 (1) of the Factory and  
 Workshop Act, 1901.

*HOARE v. ROBERT GREEN, LD.*, [1907] 2 K. B.  
 [315; 76 L. J. K. B. 730, 71 J. P. 341; 96  
 L. T. 724; 23 T. L. R. 483—Div. Ct.

7. "Place, situate within the Close, Cur-  
 tilage or Precincts forming a Factory or  
 Workshop, solely used for some Purpose  
 other than the Manufacturing Process or  
 Handicraft carried on in the Factory . . ."  
 Machinery—Fencing of—Factory and Work-  
 shop Act, 1901 (1 Edw. 7, c. 22), s. 149 (4).]—  
 An accident was caused by certain machinery  
 for crushing mortar, which was not securely  
 fenced. The machinery in question was  
 erected on a plot of ground situate within  
 the close, curtilage or precincts of the re-  
 spondents' factory, on which new sheet mills  
 were being erected.

HELD—that such plot was not a "factory,"  
 but was a "place within the close, curtilage  
 or precincts of a factory used for a pur-  
 pose other than the manufacturing process  
 or handicraft carried on in such factory",  
 and that, therefore, no fine could be imposed  
 for insecurely fencing the machinery.

*LEWIS v. GILBERTSON & Co.*, (1904) 68 J. P.  
 [328; 91 L. T. 377; 20 Cox, C. C. 677—  
 Div. Ct.

8. "Workshop"—Room for Mending Fish-  
 ing Nets—"Purposes of Gain"—Factory and  
 Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 128,

*Definitions—Continued*

149 (1) (b).]—A room which a fishing boat owner occupies, and in which he employs persons to mend his fishing nets for use in his calling as a fisherman, is not a "workshop" within the meaning of sect. 149, subsect. 1 (b) of the Factory and Workshop Act, 1901, the words "in which any manual labour is exercised for purposes of gain," meaning for purposes of direct gain to the employer by the sale at a profit of the article upon which the manual labour is bestowed.

*Nash v. Hollinshead* ([1901] 1 K. B. 700; 70 L. J. K. B. 571; 65 J. P. 357; 49 W. R. 424; 84 L. T. 483—C. A., see MASTER AND SERVANT, 214) applied.

*CURTIS v. SHINNER*, [1906] 70 J. P. 272; 95 [L. T. 31; 22 T. L. R. 448; 21 Cox, C. C. 210—Div. Ct.

**II. EMPLOYMENT.**

See EDUCATION. INFANTS; PUBLIC HEALTH.

9. *Employment before Statutory Hour—Factory Act, 1901* (1 Ed. 7, c. 22), ss. 23, 24.]-Two women, weavers in a linen factory, voluntarily dusted and otherwise regulated their spinning looms for their own satisfaction and comfort before the statutory hours for commencing work in accordance with a practice known to their employers. Adequate provision for the cleaning and regulation of the looms by other persons had been made by the employers. The latter were thereupon charged with a contravention of sects. 23 and 24 of the Factory and Workshop Act, 1901.

HELD—that the women had not been employed before the statutory hour.

*PATERSON v. DUKE*, [1905] 6 F. (J. C.) 53—[Ct. of Justiciary.

10. *Employment of Child during Mealtime—Cleaning Spindle of Loom—Mens rea—Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), s. 33.]-The appellant, an inspector of factories, found a child engaged in cleaning or wiping a spindle of a loom at 5.35 p.m., one of the times allowed for meals being between 5.30 and 6 p.m. The justices found that the respondents, the occupiers of the factory, had used every possible means to carry out the provisions of the Factory and Workshop Act, 1901, in the matter in question, and dismissed the information.

HELD—that the justices were wrong; that a breach of the Act had been committed, and that the case must be remitted to the justices to convict.

*ROGERS v. BARLOW & SONS*, [1906] 70 J. P. 214; [94 L. T. 519—Div. Ct.

11. *Employment of Girl under Sixteen—“Making and Finishing of Bricks”—Factory and Workshop Act, 1878* (41 & 42 Vict. c. 16), s. 38, Sched. I.]-Girls under sixteen were employed in carrying four or five or a less number of plain bricks from the dust kilns

to the dipping sheds, where they were stacked and glazed by the dippers, also in carrying the bricks after they had been glazed from the dippers in the sheds to another place in the same sheds, where they were knifed or scraped, in carrying them from the sheds to the ovens, where the glazed bricks were baked and polished, and occasionally, but not often, in carrying the baked and polished bricks to the final stacking sheds.

HELD—that what was done in the part of the factory where the girls were employed was "finishing of bricks," within the meaning of the first schedule to the Factory and Workshop Act, 1878.

*SQUIRE v. STANLEY BROTHERS*, (1901) 65 J. P. [467, 84 L. T. 535; 17 T. L. R. 438; 19 Cox, C.C. 695—Div. Ct.

12. *Hours of Employment—After the Legal Period—Retail Shop—"Workshop"—“Adapting for Sale”—Packing Sweetmeats in and Ornamenting Boxes—Factory and Workshop Act, 1878* (41 & 42 Vict. c. 16), s. 93.]-The appellants were convicted upon information charging that they, being the occupiers of a workshop within the meaning of the Factory and Workshop Acts, 1878 to 1895, did there unlawfully employ A. S. after the legal period of employment. The place at which the work of packing sweetmeats was being carried on, was for a great part of the day used as an ordinary shop in which sweetmeats and other articles were sold by retail, but up to a very late hour of the night, long after the ordinary shop hours had ceased, it was used for this particular work of packing.

HELD—that the operation of putting the sweetmeats in layers with ornamental papers between them and ornamenting the boxes afterwards, was an adapting of them for sale within the meaning of sect. 93 of the Factory and Workshop Act, 1878, and that the premises were a "workshop" within the Act.

*FULLERS, LD. v. SQUIRE*, [1901] 2 K. B. 209; 70 [L. J. K. B. 689, 65 J. P. 660; 49 W. R. 683; 85 L. T. 249—Div. Ct.

13. *Overtime—"Polishing, Cleaning, Wrapping or Packing-up Goods"—In what Places Allowable—Place "not used for any Manufacturing Process"—Construction—Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), s. 49, Sched. 2 (4).]-The words "not used for any manufacturing process" in sched. 2 (4) of the Factory Act, 1901, mean "which is not at any time used," and not "which is not at the particular hour used."

Therefore the overtime work of polishing, &c., allowed by that clause must not be carried on in any part of a factory which during ordinary working hours is used for a "manufacturing process or handicraft."

*SMITH v. SIBBAY HALL & Co.*, [1903] 2 K. B. 707; [72 L. J. K. B. 822; 67 J. P. 390; 89 L. T. 358, 20 Cox, C. C. 542; 52 W. R. 218—

Div. Ct.

**Employment—Continued.**

14. *Young Person—Working During Meal Hours—Deemed to be Employed—Factory and Workshop Act, 1878* (41 Vict. c. 16), ss. 17, 83, 86, 87, and 94]—When a young person employed in a factory works during meal-time at cleaning the machinery, even though he does so for his own amusement and contrary to the express orders of the occupier of the factory, he will be deemed to be employed by the occupier, and the occupier will be liable to a penalty under sect. 83 of the Factory and Workshop Act, 1878, unless he can show that some other person is liable under sects. 86 and 87.

PRIOR v. SLAUGHTER SPINNING CO., LD., [1898] 1 Q. B. 881, 62 J. P. 358; 67 L. J. Q. B. 615, 78 L. T. 532; 14 T. L. R. 379; 46 W. R. 488; 19 Cox, C. C. 54—Div. Ct.

**III. MACHINERY.**

See also SECT. I. DEFINITIONS, Nos. 2, 7  
—SECT. II. EMPLOYMENT, No. 2.

15. *Fencing Machinery—Breach of Statutory Duty—Statutory Penalties—Right of Action for Damage—Common Employment—Factory and Workshop Act, 1878* (41 & 42 Vict. c. 16), s. 5, sub-s. 4, ss. 81, 82, 86, 87—*Factory Act, 1891* (54 & 55 Vict. c. 75)]—Where a workman employed in a factory has been injured through a breach of the duty, imposed on the occupiers of the factory by sect. 5 of the Factory Act, 1878, of maintaining efficient fencing to the machinery in the factory, an action will lie to recover damages.

In such an action the defence of common employment is not available although the absence of the fencing at the time of the accident was due to the negligence of a fellow servant of the plaintiff.

GROVES v. WIMBORNE (LORD), [1898] 2 Q. B. [402; 67 L. J. Q. B. 862, 79 L. T. 284, 14 T. L. R. 493; 47 W. R. 87—C. A.

16. *Self-acting Machine—Space between Fixed and Traversing Portions—Person “shall not be Allowed to be in the Space”—Thinking Boy was Clear of Space—Starting Machine—Fatal Accident—Factory and Workshop Act, 1895* (58 & 59 Vict. c. 37), s. 9, sub-s. 2.]—Sect. 9, sub-sect. 2, of the Factory and Workshop Act, 1895, provides that “a person employed in a factory shall not be allowed to be in the space between the fixed and traversing portions of a self-acting machine unless the machine is stopped, with the traversing portion on the outward run. . . .” A boy, a “young person” within the meaning of the Factory and Workshop Act, 1878, was employed in a factory by a man who was in the employment of the respondents, the occupiers of the factory, and who was in charge of a self-acting machine. This man ordered the boy to clean a certain part of the machine, and in order to do so the boy was obliged to be in the space be-

tween the fixed and the traversing portions of the machine. At the time the order was given the traversing portion of the machine was stopped on the outward run. While the boy was still in the said space the man in charge, thinking the boy was clear of such space, re-started the machine, whereby the boy received injuries from which he died.

HELD—that, as the man when he re-started the machine, thought the boy was clear of the space, the boy was not at the time of the accident “allowed” to be within the space by the occupiers of the factory or by any person for whom they were responsible.

The Court could not interpret the words “shall not be allowed” in sub-sect. 2 of sect. 9 as meaning “shall be prevented.”

CRABTREE v. FERN SPINNING CO., LD., (1902) [66 J. P. 181; 50 W. R. 167; 85 L. T. 549, 18 T. L. R. 91—Div. Ct.

17. *Unfenced Machinery—Accident Through Carelessness and Disobedience of Workman—Liability of Employer—Factory and Workshop Act, 1878* (41 Vict. c. 16), s. 82]—The employer is not relieved of his liability under sect. 82 of the Factory and Workshop Act, 1878, by reason of the accident having occurred through the carelessness and disobedience of the workman.

BLENKINSOP v. OGDEN, [1898] 1 Q. B. 783; 67 [L. J. Q. B. 537, 78 L. T. 554; 14 T. L. R. 360; 46 W. R. 542—Div. Ct.

**IV. MEANS OF ESCAPE FROM FIRE.**

See also SECT. I. DEFINITIONS, No. 5.

18. *Adjacent Houses with Bridge Connection—User for one Process—Less than Forty Persons Employed in one House—Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), ss. 14 (2), 149 (1)]—Two adjacent houses were let by the same owner to the same tenant on separate leases. They were occupied by the tenant for the purposes specified in sect. 149 (1) (c) of the Factory and Workshop Act, 1901. The houses were only connected by an emergency exit from the window of one to the roof of the other and by a bridge from the first floor of one to the corresponding level of the other. Over this bridge a constant traffic passed in the course of business. In one of the houses more, and in the other less, than forty persons were employed. An umpire, appointed pursuant to sect. 14 (3) and the first schedule of the Act, found that the two houses together constituted a “factory” within sect. 14 (2) of the Act.

HELD—that the user, intercommunication, and process of manufacture on the premises as stated above were all facts bearing upon the question whether the two houses constituted a “factory and workshop” within sect. 14 (2) of the Act; that the umpire did not misdirect himself in taking them into consideration, and that there was substantial evidence in support of his decision.

## Means of Escape from Fire—Continued.

IN RE LONDON COUNTY COUNCIL AND TUBBS, (1904)  
[68 J. P. 29; 1 L. G. R. 746—Div. Ct.]

19. *Cost of Carrying Out Works—Apportionment—Consideration of Contract between Landlord and Tenant as to Liabilities—Jurisdiction of County Court Judge—Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7.*—The plaintiff was the statutory owner, within the meaning of the Factory and Workshop Act, 1891, of premises let to the defendant, to be used as a factory, for a term of fourteen years from December 27th, 1896. In 1899 the London County Council, acting as the sanitary authority for the district, gave notice to the plaintiff, under sect. 7, sub-sect. 2, of the Factory and Workshop Act, 1891, requiring him to carry out measures necessary for providing means of escape in case of fire. The plaintiff accordingly executed the necessary works and brought an action in the County Court to recover the whole cost from the defendant under a covenant in the lease to pay outgoings. The County Court judge considered it fair and equitable that the defendant should pay a part of the cost.

HELD — that the Factory and Workshop Act, 1891, had nothing to do with landlord and tenant, but the object of sect. 7 is to protect the employees at factories from fire, that the County Court judge was bound under sect. 7 to take into consideration the contract between the parties, but unless its terms were such as to make it unjust and inequitable that he should divide the amount between the plaintiff and defendant, he had jurisdiction to do so; and that the covenant in question did not impose a plain obligation on the defendant to bear the whole cost of complying with the requirements of the London County Council; and that the decision of the County Court judge was right.

MONK v. ARNOLD, [1902] 1 K. B. 761; 71 [L. J. K. B. 441; 50 W. R. 667, 86 L. T. 580—Div. Ct.]

20. *Landlord Compelled to Execute Works—Covenant by Tenant "to Pay all Rates, Assessments, and Impositions"—Liability of Tenant to Indemnify Landlord—Procedure—Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7 repealed, but re-enacted by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14*—A tenant of a factory who has covenanted to pay and discharge all Parliamentary, parochial, and other rates, assessments and impositions, which shall or may be imposed on, or payable in respect of, the demised premises must indemnify the landlord, if the latter is compelled by the local authority to expend money in providing the factory with means of escape in case of fire.

The landlord may sue upon such a covenant in the High Court, and is not restricted to the remedy in the County Court provided by the Factory and Workshop Act.

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SHEPARD v. BARBER, (1903) 67 J. P. 235; 1 [L. G. R. 157—Lawrance, J.]

QUERY—Whether this decision is now good law, see *Horner v. Franklin*, No 21, *infra*, and *Stuckey v. Hooke*, No 29 *infra*.

21. *Landlord and Tenant Charges to be Borne by Tenant—Factory—Covenant to pay "outgoings"—Expense of Providing means of Escape from Fire—Suit upon Covenant brought in High Court—Remedy in County Court—Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7 (2)*—Certain premises, which were a factory within the meaning of the Factory and Workshop Act, 1891, were leased for a term of years; the lease contained a covenant by the lessees to pay all "rates, assessments and outgoings in respect of the demised premises." Subsequently the landlord was required by the London County Council, under sect 7 (2) of that Act, to make certain alterations on the premises so as to provide means of escape in case of fire; the alterations included the re-opening of certain doorways which had been blocked up by the landlord in pursuance of a covenant in the lease. He sued in the High Court to recover the whole expenses of the alterations.

HELD—that, although these expenses might be "outgoings" (as held by *Darling, J.*), yet, even so, the landlord had no cause of action in the High Court, his only remedy being an application in the County Court under sect. 7 (2) of the Act.

MONK v. ARNOLD [1902] 1 K. B. 761; 71 [L. J. K. B. 441; 50 W. R. 667, 86 L. T. 580—Div. Ct., No. 19, *supra*] approved

Decision of *Darling, J.* ([1904] 2 K. B. 877; 73 L. J. K. B. 1019; 68 J. P. 579; 91 L. T. 564; 20 T. L. R. 791), affirmed.

HORNER v. FRANKLIN, [1905] 1 K. B. 479; 74 [L. J. K. B. 291; 69 J. P. 117; 92 L. T. 178; 21 T. L. R. 225; 3 L. G. R. 423—C. A.]

22. *Notice Specifying Works—Act of Trespass involved—Arbitration—Finality of Notice—Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7, sub-s. 2.*—Where the sanitary authority gave notice, under sect. 7, sub-sect. 2 of the Factory and Workshop Act, 1891, to the owner of a factory to provide certain works as a means of escape in case of fire, and the works specified would, if carried out, involve an act of trespass on other premises in the occupation of third persons as tenants to the owner of the factory, though the latter did not claim arbitration under the section.

HELD—that the magistrate was not bound to convict on the ground that the notice was a final and binding order on the owner of the property or on the ground that the owner had not taken the London County Council to arbitration

LONDON COUNTY COUNCIL v. BRASS, (1901) 17 [T. L. R. 504—Div. Ct.]

23. *One Building Containing Two Factories*

**Means of Escape from Fire—Continued.**

—*Proceedings in Respect of the Two Factories jointly*—"Tenement Factory"—*Right of Owner to enter and execute Works—Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), s. 14, sub-ss. 2, 7, s. 149, sub-s. 1]—A "tenement factory" within the meaning of sect. 149, sub-sect. 1, of the Factory and Workshop Act, 1901, means two or more factories in one building where mechanical power is supplied to the occupier of each factory either from an external source, by another person, or by one occupier to the others.

A building contained two separate factories occupied by different persons, one factory being on the floors above the other. Each occupier produced his own mechanical power by arrangements within his own factory. The local authority served notice upon the owner of the building to provide means of escape in case of fire by constructing a staircase communicating with each floor of the building, and thus passing through the two factories. The owner claimed the right to enter upon each of the factories in order to carry out the works.

**HELD**—that the building was not a "tenement factory" within the meaning of sect. 149, sub-sect. 1, of the Act, and that the local authority had no power to deal with the building as a whole, but should have dealt with each factory separately under sect. 14 (2); and that, therefore, the owner had no right to enter upon the factories against the will of the occupiers in order to carry out the works.

**TOLLER v. SPIERS AND POND, LD.** [1903] 1 Ch. 362; 72 L. J. Ch. 191, 67 J. P. 234, 51 W. R. 330, 87 L. T. 578, 19 T. L. R. 119, 1 L. G. R. 193—Div. Ct.

Approved in *Brass v London County Council*, *infra*.

**24 Premises Occupied by Different Persons as Separate Factories—Occupiers Producing Separate Mechanical Powers—"Tenement Factory"—Building "where Mechanical Power is Supplied to Different Parts"—Implication of Common Source of Power—Factory and Workshop Act, 1901** (1 Edw. 7, c. 22), ss. 14, 149]—Section 14 of the Factory and Workshop Act, 1901, deals with provision of means of escape from fire (*inter alia*) in a "tenement factory." By sect. 149 of that Act, the expression "tenement factory" is defined as meaning "a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft in such manner that those parts constitute in law separate factories . . ." Certain premises were occupied by three different persons in different parts, two of the parts constituting in law separate factories. The occupiers of these factories produced and used their own mechanical power in their respective factories.

**HELD**—that as the mechanical power was not supplied from a common source, the premises containing the two factories could not constitute a "tenement factory" within the terms of the definition in sect. 149 of the Act.

**Toller v. Spiers and Pond, Ltd.** ([1903] 1 Ch. 362, 72 L. J. Ch. 191; 67 J. P. 234, 51 W. R. 330, 87 L. T. 578, 19 T. L. R. 119—Buckley, J., *supra*) approved and followed.

**BRASS v. LONDON COUNTY COUNCIL** [1904] 2 [K. B. 336, 73 L. J. K. B. 841; 68 J. P. 365; 53 W. R. 27, 91 L. T. 344, 20 T. L. R. 464; 2 L. G. R. 809—Div. Ct.

**25 Part of Building used as Factory and rest not so used—Notice by Local Authority to Construct Staircase—Impossibility of complying therewith—Arbitration—Factory and Workshop Act, 1891** (54 & 55 Vict. c. 75), s. 7.]

—The London County Council, under sect. 7 of the Factory and Workshop Act, 1891, issued a sealed notice to the Consolidated Properties Company directing that a new staircase of fire-resisting material should be constructed in their premises, to be connected with all the floors and the roof. The ground floor and basement of the premises were occupied by tenants of the company, who were not using them for a factory. The provision of the new staircase necessitated interfering with the ground floor, and this could not be done because the company could not interfere with the tenants. It was therefore impossible to comply with the notice. On proceedings being instituted against them the company proposed to give evidence of those facts, but the magistrate refused to hear the evidence and fined the company.

**HELD**—that the company were entitled to ask for an arbitration, and that the conviction must be quashed.

**CONSOLIDATED PROPERTIES Co. v. CHILVERS** [1902] 18 T. L. R. 59—Div. Ct.

**V. SANITATION AND VENTILATION.**

**26. Factory—Sanitary Conveniences—Proceedings—Sanitary Authority—Sanitary Inspector—Reasonableness of Requirements of Sanitary Inspector—Jurisdiction of Justices—Appeal to Quarter Sessions—Public Health Act, 1875** (38 & 39 Vict. c. 55), s. 38—*Factory and Workshop Act, 1878* (41 & 42 Vict. c. 16), s. 4—*Factory and Workshop Act, 1891* (54 & 55 Vict. c. 75), s. 2—*Factory and Workshop Act, 1895* (58 & 59 Vict. c. 37), ss. 3, 35—*Public Health Acts Amendment Act, 1890* (53 & 54 Vict. c. 59), ss. 7, 22]—A factory inspector gave a notice prescribed by sect. 4 of the Factory and Workshop Act, 1878, to a sanitary authority of insufficient sanitary accommodation provided for women in a certain factory, specifying the alterations and additions required. Proceedings were not taken by the sanitary authority upon the notice against the owners or occupiers of the factory. The inspector, pursuant to sect. 4 of the said Act, sect. 2 of the Factory and

**Sanitation and Ventilation—Continued.**

Workshop Act, 1891, and sect. 3 of the Factory and Workshop Act, 1895, gave the factory owner notice under sect. 22, sub-sect 2 of the Public Health Acts Amendment Act, 1890, that the provisions of sect 22, sub-sect 1 of that Act were not complied with, and required him to provide sufficient and suitable accommodation in the way of sanitary conveniences, and if he neglected it proceedings would be taken in pursuance of the said sect. 22 to recover penalties for such default.

**HELD**—that the notice must specify the alterations and additions required to be made.

**HELD ALSO** (Phillimore, J., dissenting)—that the justices who heard the complaint had no jurisdiction to inquire into the necessity for, or reasonableness of, the requirements specified in such notice; that such a question must be raised, if at all, by appeal to quarter sessions under sect 7 of the Public Health Acts Amendment Act, 1890, and that there was no distinction in the case of a notice by the factory inspector in this respect.

**TRACEY v PRETTY & SONS**, [1901] 1 Q. B. 444, [70 L. J. Q. B. 234; 65 J. P. 196; 49 W. R. 282, 83 L. T. 767, 17 T. L. R. 200, 19 Cox, C. C. 593—Div. Ct.

**27 Factory—Ventilation—"Dust is Generated and Inhaled by the Workers to an Injurious Extent"—No Actual Injury to Worker—Injurious in the Long Run—Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 36.**—On an information laid under sect. 36 of the Factory and Workshop Act, 1878, that in a factory or workshop where any process is carried on by which "dust is generated and inhaled by the workers to an injurious extent," it is not necessary that it should be proved to be actually injurious to any of the workers, but it is enough that it is of such a character that it would in the long run be injurious to them.

**HOARE v. RITCHIE & SON**, [1901] 1 Q. B. 434, [70 L. J. Q. B. 279; 65 J. P. 261; 49 W. R. 351, 84 L. T. 54; 17 T. L. R. 212—Div. Ct.

**28 Workshop — "Reasonable Temperature"—"Adequate Measures for Securing and Maintaining"—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 6 (1)**—On an appeal against a conviction under sect. 6 (1) of the Factory Act, 1901, it was proved that the average temperature of certain workshops was 58 deg.; witnesses for the prosecution stated that 60 deg. to 65 deg. was a reasonable temperature, whilst witnesses for the defendants alleged that 56 deg. to 60 deg. was high enough. It was further proved that about three years ago the defendants spent £500 in putting in steam pipes, which they were advised was the best means of warming these workshops, and that full steam was generated every morning seventy-five minutes before the workers arrived.

Sessions held, on the evidence, that the defendants had taken adequate measures for securing and maintaining a reasonable temperature, and allowed the appeal.

**PETER ROBINSON v. FLOWDEN**, (1903) 67 [J. P. 152—London Qr. Sess., Loveland—Loveland, K.C.

**VI. UNDERGROUND BAKEHOUSES.**

**29 Expenses of Structural Alterations—Apportionment by Court of Summary Jurisdiction—Covenant by Tenant to Pay Outgoings and Impositions—Action on Covenant—Jurisdiction of High Court Ousted—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101.**—A lease of premises, which consisted of a baker's shop and underground bakehouse, contained a covenant by the lessee to pay and discharge all burdens, duties, assessments, outgoings, and impositions charged or imposed on the demised premises or upon the landlord or tenant in respect thereof. The borough council refused to grant a certificate under sect. 101 (2) of the Factory and Workshop Act, 1901, that the premises were suitable for use as an underground bakehouse unless certain structural alterations were made. The tenant thereupon applied to a police magistrate under sub-sect. (8) of that section to apportion the expenses of the alterations, and the magistrate made an order that the landlords should pay three-fourths and the tenant one-fourth. The landlords, having carried out the alterations, sued the tenant under the covenant in the lease to recover the total amount expended. The tenant paid into Court the proportion of the expenses payable by him under the magistrate's order.

**HELD**—that the action was not maintainable on the ground that by sect. 101 (8) of the Factory and Workshop Act, 1901, a court of summary jurisdiction was appointed the tribunal to determine by whom and in what proportions the expenses of structural alterations under that section should be borne, and that therefore the jurisdiction of the High Court to entertain an action in respect of such expenses was ousted.

**HORNER v. FRANKLIN** ([1905] 1 K. B. 479; 74 L. J. K. B. 291; 69 J. P. 117; 92 L. T. 178; 21 T. L. R. 225; 3 L. G. R. 423—C. A., No. 21, *supra*) followed.

**GOLDSTEIN v. HOLLINGSWORTH** ([1904] 2 K. B. 578, 73 L. J. K. B. 826, 68 J. P. 383, 91 L. T. 85; 20 T. L. R. 550—Div. Ct., *see* LANDLORD AND TENANT, 77), and **MORRIS v. BEAL** ([1904] 2 K. B. 585; 73 L. J. K. B. 830, 68 J. P. 542; 20 T. L. R. 682—Div. Ct., *see* LANDLORD AND TENANT, 76), discussed.

Decision of Warrington, J. (69 J. P. 119; 3 L. G. R. 633) reversed.

**STUCKEY AND OTHERS v. HOOKE**, [1906] 2 K. B. [1; 75 L. J. K. B. 504; 70 J. P. 293; 54 W. R. 509, 94 L. T. 723; 22 T. L. R. 508; 4 L. G. R. 815—C. A.

**30. Use at Commencement of Act—Factory**  
41—2

**Underground Bakehouses—Continued**

and Workshop Act, 1895 (58 & 59 Vict. c. 37), ss. 27 (3), 55.]—By sect. 27 (3) of the Factory and Workshop Act, 1895, "A place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act," and

By sect. 55, "This Act shall come into operation on the first day of January, 1896."

Certain premises were fitted up as an underground bakehouse in 1879. They were so occupied down to October, 1895. They were then repaired, and while such work was in progress they were advertised as to let. They were let to the appellant Schwerzerhof in February, 1896, who was summoned for keeping a bakehouse in contravention of the Act.

The magistrate held that the premises were not being used as a bakehouse at the date of the commencement of the Act, and convicted and fined the appellant.

Held (allowing the appeal)—that the bakehouse was in use at such date, and was entitled to the exemption.

SCHWERZERHOF v. WILKINS, [1898] 1 Q. B. 640, [62 J. P. 247; 67 L. J. Q. B. 476; 78 L. T. 229, 19 Cox, C. C. 22—Div. Ct.]

31. *So used at Time of Passing of Factory and Workshop Act, 1901—Certificate as to Structural Suitability—Necessity for—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (1), (2)]*—By sect. 101 of the Factory and Workshop Act, 1901, underground bakehouses used as bakehouses at the time of the passing of that Act can only continue, after January 1st, 1904, to be so used if certified by the district council to be suitable for that purpose.

EVANS v. GALLON, (1904) 68 J. P. 537; 2 L. G. R. [1904—Div. Ct.]

**FAIRS.**

See MARKETS AND FAIRS

**FALSE IMPRISONMENT.**

See TRESPASS

**FALSE PERSONATION.**

See CRIMINAL LAW AND PROCEDURE.

**FALSE PRETENCES.**

See CRIMINAL LAW AND PROCEDURE (Larceny).

**FALSE STATEMENT.**

See ELECTIONS, MISREPRESENTATION; MISTAKE.

**FALSE WARRANTY.**

See FOOD AND DRUGS.

**FALSIFICATION OF ACCOUNTS.**

See CRIMINAL LAW AND PROCEDURE.

**FAMILY ARRANGEMENT.**

1. *Advice of Family Solicitor—Mistake of Law or Fact—Whether Compromise Binding.*—An agreement by members of a family, made after consultation with their solicitor acting for all of them, compromising their respective claims under a will or other document, is in general binding, though not in accordance with their exact legal rights, provided that those rights have been properly explained to them by him.

But, if the solicitor has taken an erroneous view of the facts or of the law, or has not made a full explanation because he considered a compromise irrespective of legal rights to be advantageous to all parties, a party to the agreement may have it set aside.

IN RE ROBERTS, ROBERTS v. ROBERTS, [1905] 1 [Ch. 704, 74 L. J. Ch. 483; 93 L. T. 253—C. A.]

**FENCES.**

See BOUNDARIES AND FENCES.

**FERÆ NATURÆ.**

See ANIMALS, No. 22.

**FEROCIOUS ANIMAL.**

See ANIMALS; NEGLIGENCE.

**FERRIES.**

1. *Connecting Two Highways—Bridge Built near Ferry without Parliamentary Powers—Loss of Ferry Traffic—Disturbance of Ferry—Action by Owner of Franchise.*—The exclusive right of the owner of a franchise of a ferry only extends to carriage by boat. Therefore he cannot maintain an



**Ferries—Continued.**

action for loss of traffic caused by the erection and user of a bridge close to his line of ferry.

Dictum of Mellish, L. J., in *Hopkins v. G. N. Ry. Co.* ((1877) 2 Q. B. D. 224, 46 L. J. Q. B. 265, 36 L. T. 898—C. A.) followed Decision of Neville, J., ((1907) 1 Ch. 437; 76 L. J. Ch. 268; 71 J. P. 145; 96 L. T. 257; 23 T. L. R. 269; 5 L. G. R. 286) affirmed.

*DIBDEN v. SKIRROW AND OTHERS*, [1908] 1 Ch. [41; 77 L. J. Ch. 107; 97 L. T. 658; 6 L. G. R. 108; 71 J. P. 555; 24 T. L. R. 70—C. A.

2. *Extent of Right — Infringement — “Vills.”* — The plaintiffs were grantees from the Crown of an ancient ferry across the Medina River or estuary from a point in West Cowes to a point in East Cowes. The defendants were a company carrying passengers between West Cowes and the mainland, and also ran a service of launches between points in West and East Cowes, lower down the river or estuary than the points between which the plaintiffs' ferry plied, and respectively 875 yards and 230 yards distant therefrom. Upon these launches the defendants carried (1) their own passengers between East Cowes and the mainland; (2) the general public; (3) the royal mail. In an action for infringement of the plaintiffs' right of ferry,

**Held**—(1) that the grant did not confer upon the plaintiffs an exclusive right of ferry between any points on the opposite banks, and *semble* East and West Cowes are not “vills” in such a sense that exclusive rights of ferry between them could exist in law.

And (2) that in view of the recent growth of the traffic across the river, the defendants' service of launches was no infringement of the plaintiffs' rights.

*COWES URBAN DISTRICT COUNCIL AND EAST [COWES URBAN DISTRICT COUNCIL v. SOUTHAMPTON, &C., STEAM PACKET CO., [1905] 2 K. B. 287; 74 L. J. K. B. 665; 69 J. P. 298; 53 W. R. 602; 92 L. T. 658; 21 T. L. R. 506; 3 L. G. R. 807—Kennedy, J.*

3 *Servants of the Crown—Ferry—Right of Free Passage.*—Servants of the Crown, e.g., Post Office officials, are entitled to free passage over ferries properly so called; but this privilege does not extend to a ferry which a corporation is by statute merely empowered (not obliged) to establish and maintain.

*ATTORNEY-GENERAL FOR IRELAND v. LONDON—[DERRY BRIDGE COMMISSIONERS, [1903] 1 Ir. R. 389—M. R.*

## FERTILISERS AND FEEDING STUFFS.

*See* AGRICULTURE

**FIERI FACIAS.**

*See* PRACTICE AND PROCEDURE

**FINES.**

*See* COPYHOLDS REAL PROPERTY.

**FIRE, ESCAPE FROM.**

*See* FACTORIES AND WORKSHOPS.

**FIRE, LIABILITY FOR.**

*See* NEGLIGENCE, RAILWAYS.

**FIREARMS.**

*See* CRIMINAL LAW.

**FIRE BRIGADE.**

*See* PUBLIC HEALTH

**FIRE INSURANCE.**

*See* INSURANCE.

**FIRST FRUITS.**

*See* ECCLESIASTICAL LAW.

**FISHERIES.**

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**1. UNLAWFUL ANGLING.**

1. *Seizure of Tackle — Exemption from further Penalty — Meaning of word “Angling”*—*Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 25.*—Fishing by means of night-lines, consisting of two pegs driven into the ground with lines and hooks and a stone

**Unlawful Angling—Continued**

weight attached, does not constitute "angling" within the meaning of the proviso in sect. 25 of the Larceny Act, 1861, so as to exempt the person unlawfully fishing with the same from any penalty other than their seizure.

BARNARD v. ROBERTS, (1907) 71 J. P. 277; 96 [L. T. 648; 23 T. L. R. 439—Div. Ct.]

**II. FISHING RIGHTS.**

And see LANDLORD AND TENANT, Nos 24, 25.

2. *Adjoining Owners of Trout Stream—Right of one Owner to Erect a Weir so as to Prevent the Passage of Fish up, while it Permitted them to come down the Stream—Injunction.*—The plaintiff and defendant were adjoining owners of land through which a well-known trout stream flowed. The defendant erected upon his own property a weir with fenders and gratings with the avowed purpose of preventing fish going up to the plaintiff's property while it allowed them to pass from that property to the defendant's. The plaintiff alleged that he was thereby damaged. The defendant did not deny these allegations, but submitted that not interfering with the flow of water he was entitled to erect and maintain such weir. On the case being set down for argument on questions of law arising on the pleadings:

HELD—that the principle which was to be found in the authorities, that the erection in a salmon river of a weir whereby fish were prevented from reaching the upper portions of the river constituted an injury to the owners of the upper waters with respect to which they had a right of action, might possibly extend to other kinds of fish if damage were proved. That therefore on the present materials the case could not be disposed of, but that it must go to trial in order that all the materials necessary for arriving at a proper decision might be before the Court.

BARKER v. FAULKNER, (1898) 79 L. T. 24—[Stirling, J]

3. *Agricultural or Pastoral Holding—Stake-Net Weirs—Ejectment—Fisheries (Ireland) Act, 1842 (5 & 6 Vict. c. 106), s. 19—Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 21.*—Two stake-net weirs, under the Fishery Act, 1842, sect. 19, legally erected in the tidal waters of the River Suir by the lessee in occupation of adjoining lands. The lands, apart from the weirs, were admittedly agricultural or pastoral in their character; but, upon the expiration of the lease, on September 26th, 1899, the weirs were, and had been for many years, by far the more valuable portion of the holding. Ejectment proceedings having been instituted by the lessor upon the expiration of the lease, the lessee claimed to be entitled

to continue in possession as tenant under the Land Law (Ireland) Act, 1881, sect. 21.

HELD—that the right to erect the weirs under the section was given to the lessee as occupying tenant, that it only continued during such occupation, and that the lessor was entitled to resume possession of the entire holding, including the weirs.

GRANT v. LYNEBERG, [1902] 2 Ir. R. 97—[K. B. Div.]

4. *Freeholders of a Manor—Right to Take Fish for Sale.*—The freeholders within a manor may have by grant and therefore by prescription as appurtenant to their lands a right of fishing in a non-tidal river and of taking fish therefrom for the purposes of sale.

LORD CHESTERFIELD v. HARRIS, (1907) 24 [T. L. R. 105—Neville, J.]

5. *Several Fishery—Land Abutting on River—ad medium flum—Inclosure Act—Award—Presumption.*—The plaintiff derived title under a deed of conveyance, dated in May, 1890, from the lord of the manor of C. which conveyed to the plaintiff (*inter alia*) the several fishery in a certain part of the river E, but did not in express terms include the ownership of the bed of the river.

The defendants were L, a person who derived title to an estate adjoining the river under an award of Inclosure Commissioners dated in April, 1801, acting under the provisions of a private Inclosure Act passed in 1796, and her licensees.

The Act contained no reference to the river or its bed, and it expressly reserved the manorial rights of the lord.

The award described the piece of land belonging to the defendant L. as being bounded on the west by the river, and stated its area in acres, being the exact measure of the land if no part of the river bed was included in it.

Long before the Act was passed the lord of the manor, as owner of one half of the bed of that part of the river which abutted on L's estate, possessed rights of fishing therein, and had exercised those rights, and there was no evidence that the bed of the river was waste of the manor, or that the tenants of the manor had any right of fishing, or any commonable rights over the river.

The defendant L. contended that, according to the ordinary legal presumption arising on a conveyance of land abutting on a river, she was entitled to the bed of the river *ad medium flum* which was adjacent to her estate. The plaintiff contended that the bed of the river never was part of the waste of the manor, and was not affected by the Inclosure Act; and that, consequently, the ordinary legal presumption did not apply.

The plaintiff, therefore, claimed not only the right of fishing in that part of the river, but also the right of passing along the bank

**Fishing Rights—Continued**

of the river within the defendant L.'s estate for fishing purposes.

HELD—that, although the owner of land adjoining a river was *prima facie* the owner of half the bed of that part of the river, yet commoners having rights of turbary or other commonable rights over lands adjoining a river had no rights over the river, that the river was part of the demesne lands, and was not part of the waste for the purpose of the Inclosure Act; and that, therefore, the defendant L did not acquire any right of fishing in the river

HELD ALSO, on the authority of *The Duke of Devonshire v. O'Connor* (24 Q B 468)—that the Inclosure Act did not preserve any right of passing along the bank of the defendant L.'s estate for fishing purposes as claimed by the plaintiff.

Decision of North, J. affirmed

ECROYD v. COULTHARD, [1898] 2 Ch. 358; 67 [L. J. Ch. 458; 78 L. T. 702, 14 T. L. R. 462—C. A.

6. *Several Fishery—Crown Grant—Grant of "Weirs (Curgites)"—Right of Way appurtenant to Several Fishery—True Test.*—The right to a several fishery in part of a river claimed under a grant from the Crown, which purported to give the fishery in that part and a further part, is not disproved by showing that the Crown could not have granted the fishery in the further part of the river.

The grant of a fishery in certain waters may confer a several fishery without the use of the word "several." The grant of a "weir (gurges)" is a grant of the soil, not merely of the soil where the weir is situated, but in the absence of anything appearing to the contrary, of the soil over which the river runs and upon which there is the right to construct weirs for the purpose of taking fish.

A right of way along the banks of a non-tidal river for the purpose of fishing may be appendant or appurtenant to a right of several fishery in the river. The dictum of Lord Coke (Co Litt. 121 b), that an incorporeal hereditament cannot be appendant or appurtenant to an incorporeal hereditament not followed. The true test is whether the principal and adjunct so agree in nature and quality as to be capable of union without incongruity.

HANBURY v. JENKINS, [1901] 2 Ch. 401; 70 [L. J. Ch. 730, 65 J. P. 631, 49 W. R. 615; 17 T. L. R. 539—Buckley, J.

7. *Several Fishery—Right to Soil—Presumption.*—There is a presumption (even against the Crown) that the freehold of the soil of that part of the foreshore over which a several fishery is proved to exist is vested in the owner of such fishery. *A.-G. v. Emerson* ([1891] A. C. 649, 55 J. P. 709; 65 L. T. 564—H. L.); and in such a case the omission

in ancient documents of the word "several" makes no difference

*Hanbury v. Jenkins* ([1901] 1 Ch. 401, 70 L. J. Ch. 730, 65 J. P. 631, 49 W. R. 615—Buckley, J., *supra*) followed

HELD—that the plaintiff as owner of a fishery in a tidal part of the Wye was also owner of the bed of the river below high-water mark.

DUKE OF BEAUFORT v. JOHN AIRD & CO., (1904) [20 T. L. R. 602—Warrington, J.

**III SALMON FISHERY ACTS.****(a) Fishery Districts**

8. "All Waters within the limits of this Act frequented by Trout or Char"—*Storage Reservoir frequented by Trout or Char—Salmon Fishery Act, 1865* (28 & 29 Vict. c. 121), s. 35—*Freshwater Fisheries Act, 1878* (41 & 42 Vict. c. 39), ss. 6, 7.—The Freshwater Fisheries Act, 1878, merely extends the provisions of the Salmon Fishery Acts, 1865, 1873, with regard to the formation and alteration of fishery districts to "all waters within the limits of that Act frequented by the trout or char," and the Acts of 1865 and 1873 relate to salmon rivers and waters which are tributaries of the rivers or communicate with the rivers and not something separate from the rivers. A storage reservoir frequented by trout or char, is not included in the words "all waters within the limits of this Act" of sect. 6 of the Act of 1878.

STEAD v. NICHOLAS, [1901] 2 K B 163; 70 [L. J. K B. 653, 65 J. P. 484, 49 W. R. 522, 85 L. T. 23, 17 T. L. R. 454—Div. Ct.

9. "Tributary"—*Pond made by Damming Stream—Salmon Fishery Act, 1865* (28 & 29 Vict. c. 121), ss. 3, 5, 35.—The respondent was fishing without having a licence from the fishery board of the district in one of three ponds made by damming up at intervals a brook which flowed into one of the rivers named in the certificate of the Secretary of State, defining the fishery district. These ponds had not been made under any Act of Parliament or for commercial purposes.

HELD—that the pond was a tributary within the meaning of the Salmon Fishery Act, 1865, and that the respondent could be convicted of fishing without a licence.

COOK v. CLAREBOROUGH, (1903) 70 J. P. 252, 94 [L. T. 550 (n)—Div. Ct.

10. "Tributary" — *Mill-dam — Salmon Fishery Act, 1865* (28 & 29 Vict. c. 121), ss. 3, 5, 35—*Freshwater Fisheries Act, 1878* (41 & 42 Vict. c. 39), ss. 2, 7.—By a certificate a Secretary of State under sect. 5 of the Salmon Fishery Act, 1865, a fishery district was defined as comprising so much of certain named rivers and their tributaries as lay within a certain county. Within such district was a mill-dam built between a tributary of one of the named rivers and a race feeding a

**Salmon Fishery Acts—Continued.**

mill. The dam was fed by a race through an opening in the bank between them, in front of which was a grating. All the water passing through the mill-dam and race eventually returned to the river from which it originally issued. The respondent was summoned for fishing for trout in the mill-dam without a licence from the fishery board of the district.

**HELD**—that the mill-dam was a tributary of the river within the meaning of the certificate, and that the respondent ought to be convicted.

*Cook v. Clareborough* (No. 9, *supra*) followed

*Mosses v. Iggo*, [1906] 1 K. B. 516, 75 L. J. [K. B. 331; 70 J. P. 251, 94 L. T. 548; 21 Cox, C. C. 136—Div. Ct

**(b) Illegal Instruments.**

11. *Bye-law—Validity—Salmon Fishery—“Length, Size, and Description of Nets”*—*Salmon Fishery Act*, 1873 (36 & 37 Vict. c. 71), s. 39, sub-s. (3).—By sub-sect. (3) of sect. 39 of the *Salmon Fishery Act*, 1873, conservators were empowered to make bye-laws (*inter alia*) “to determine the length, size, and description of nets, and the manner of using the same . . . for taking salmon.” A bye-law was made by the conservators and duly confirmed allowing only “beating nets” in certain parts of a fishery district, and thus prohibiting other nets, such as draft nets.

**HELD**—that the bye-laws were *intra vires*, as the words in the section “description of nets” were not limited in meaning to the characteristics of different kinds of nets, such as the mesh, but included the different kinds of nets themselves.

*CLAYTON AND ANOTHER v. PEIRSE*, [1904] 1 K. B. [233; 73 L. J. K. B. 268; 68 J. P. 233, 52 W. R. 495; 90 L. T. 119; 20 Cox, C. C. 596—Div. Ct.

12. *Fixed Engine—“Owner”—Servants of Lessee of Fishery—Salmon Fishery Act*, 1861 (24 & 25 Vict. c. 109), s. 11.—Servants of a tenant of salmon fishings, who use a fixed engine in accordance with his instructions, are not “owners” of such engine within the meaning of sect. 11 of the *Salmon Fishery Act*, 1861.

*PHYN v. KENYON*, 7 F. 47—Ct. of Justiciary

13. *Fixed Net — Fishing for Salmon in weekly Close Time — Intention to Catch Salmon—Evidence — Salmon Fishery Act*, 1873 (36 & 37 Vict. c. 71), s. 3, sub-ss. 2, 4.—D, was the owner of a net in the estuary of the Towy, permanently fixed in position. The mesh was smaller than required by the law regulating the size of mesh for salmon nets, and the net was for many years kept up during the weekly close time (namely Sunday), fixed by the bye-laws. Large quantities of coarse fish were caught and salmon occasionally. D. held a salmon licence in

respect of the net. D. was charged with unlawfully fishing for salmon otherwise than by rod and line, and with attempting to take salmon with a net of less dimensions than that allowed by the bye-laws.

**HELD**—that the facts were sufficient to justify a conviction if the justices found an intention to catch salmon, and that it would be no answer for D. to say that he had no intention, the intention was to be gathered from D.’s conduct.

*DAVIES v. EVANS*, (1902) 66 J. P. 392; 86 L. T. [419; 18 T. L. R. 355, 20 Cox, C. C. 177—Div. Ct.

14. *Gaffs, Wires, Snares, or “other like instrument”—Whether Net is a “like instrument”—Salmon Fishery Act*, 1861 (24 & 25 Vict. c. 109), s. 8—*Salmon Fishery Act*, 1873 (36 & 37 Vict. c. 71), s. 18.—Sect. 8 of the *Salmon Fishery Act*, 1861—as extended by sect. 18 of the *Salmon Fishery Act*, 1873—provides that no person shall use any spear, gaff . . . wire, snare, or other “like instrument” for catching salmon, or have in his possession such instruments with the intention of catching salmon.

**HELD**—that a net—even though it be by reason of the smallness of its meshes an improper and illegal net—is not a “like instrument” to a wire, snare, or any of the other instruments mentioned in the section, and that a person, therefore, who is found in possession of such a net, with the intention of catching salmon therewith, cannot be convicted under the section.

*JONES AND PARRY v. DAVIES*, [1898] 1 Q. B. 405; [18 Cox, C. C. 706; 62 J. P. 182, 67 L. J. (Q. B.) 294, 73 L. T. 44; 14 T. L. R. 180—Div. Ct.

15. *Taking Dying Trout by means other than a Properly Licensed Instrument—Taking by Hand—Salmon Fishery Act*, 1873 (36 & 37 Vict. c. 71), s. 22—*Freshwater Fisheries Act*, 1878 (41 & 42 Vict. c. 39), s. 7.—Taking dying salmon, trout, or char from a river or stream by hand, or otherwise than by a properly licensed instrument, is an offence within sect. 22 of the *Salmon Fishery Act*, 1873.

*STEAD v. TILLOISON AND ANOTHER*, (1900) 69 [L. J. Q. B. 240, 64 J. P. 343; 48 W. R. 431; 16 T. L. R. 170—Div. Ct.

16. *Toot and Haul Net — Drift Net or Hang Net—Salmon Fishery Acts.*—The toot and haul net used in the estuary of the Tay is what is called in some parts of the country a fixed draft net. Instead of being drawn as soon as it is shot, the net is set across the stream, the staff at the far end being fastened to a rope attached to a windlass on shore. The net is held in position by a boat at anchor about twenty yards or so from the end of the net, which is turned back towards the shore so as to form a bend or hook. The man in the boat remains on the look out and in touch with the

**Salmon Fishery Acts—Continued**

net. When he becomes aware of the presence of fish within the bounds and grasp of the net, he signals to the men on shore and sets the net free for them to haul it in at once.

**HELD**—that as far as regards the paying out and hauling in the net was fair net and coble. But in the interval, and as long as it is set, the net is a fixed engine held in position for the very purpose of obstructing the run of the fish and barring their progress. The illegality was therefore none the less because the same net was used for a legal as well as for an illegal purpose.

The drift net or hang net used in the tidal portions of the River Tay is shot across the river when the water is slack at the turning of the tide. It is then cast adrift and left to move with the moving water, without dragging along the bottom, until the current swirling and eddying as it grows stronger and stronger, throws the net out of fishing order. Fish are caught in the net by being inclosed and drawn to land. The net is of very fine texture, and made of very light material so that it may not scare and turn the fish. It is scarcely perceptible in the water, and the fish swimming about with the tide strike against it and become either gilled or hung in the meshes, or rolled and entangled in the loose and yielding folds with which they come into contact. The net as it drifts is attended by a man in a boat; when the attendant judges from the motion of the corks that there is a fish in the net, he goes and either lifts up a bit of the net and tosses the fish into the boat or secures his catch by a gaff.

**HELD**—that apart from the use of the gaff, which is illegal when used as auxiliary to net fishing, this mode of fishing is not fair net and coble, and is illegal.

**WEDDERBURN v. DUKE OF ATHOLL; DUKE OF [ATHOLL v. GLOVER INCORPORATION OF PERTH, [1900] A. C. 403; 16 T. L. R. 413—H. L. (Sc.)**

**(c) Offences Generally.**

**17. Close Time—Keeping Weir Open—Performance of Duty delegated to Servant—Liability of Occupier—Fisheries (Ireland) Acts, 1842, 1863 (5 & 6 Vict. c. 106), s. 40, (26 & 27 Vict. c. 114), s. 20.]**—The occupier of a salmon weir is under a continuous obligation to keep his weir open for the free passage of fish throughout the weekly close time, and cannot, by delegating the performance of this duty to a servant, escape responsibility.

**Hosford v. Mackey ([1897] 2 I. R. 292)** distinguished.

**FITZGERALD, APPELLANT, HOSFORD, RESPONDENT, [1900] 2 Ir. R. 391—Q. B. Div.**

**18 Close Time—"Possession."]**—The word "possession," as used in sect. 21 of the Scotch Salmon Fisheries Act, 1868, is not restricted to actual physical possession.

**HELD** therefore—that five men could be convicted of being in possession of two fish.

**M'ATTEE v. HOGG, (1904) 5 F. (J. C.) 67—Ct. [of Justiciary.]**

**19 Close Time—Power of Conservators—Power to alter Close Season—Fixed Close Season for Fishing with Putts and Putchers—Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (1)—Salmon Fishery Law Amendment Act, 1879 (42 & 43 Vict. c. 26), s. 2.]**—The respondent fished for salmon with putchers in the Severn fishery district on August 22, 1905.

Section 39 (1) of the Salmon Fishing Act, 1873, enables the conservators of the Salmon Fishery Board "to alter the commencement and termination of the annual close season as to the whole or part of the district, so that such close season, when so altered," shall, "not be less than one hundred and fifty-four days for all the modes of salmon fishing, except with rod and line, and" shall "not commence later than the first day of November in each year."

No. 17 of the bye-laws duly made by the conservators in respect of the Severn Fishery District was: "The annual close time as to the whole of the Severn Fishery District for all modes of salmon fishing, except with rod and line, shall commence on the 16th day of August in each year, and terminate on the 1st day of February following."

By sect. 2 of the Salmon Fishery Law Amendment Act, 1879: "Notwithstanding anything in the Salmon Fishery Acts, 1861 to 1876, contained, the annual close season for putts and putchers shall commence on the first day of September in each year, and terminate on the first day of May in the ensuing year, both inclusive. None of the provisions of the said Acts as to weekly close season shall apply to putts and putchers."

**HELD**—that justices were right in dismissing an information against the respondent for contravening bye-law 17, since sect. 2 of the Act of 1879 rendered the bye-laws inapplicable to putchers.

**PROSSER v. CADOGAN, [1906] 70 J. P. 511; 94 [L. T. 777; 21 Cox, C. C. 190—Div. Ct.]**

**20. Effect of Certificate of Special Commissioners—Weir—Free Gap—Jurisdiction of Justices—Judgment in rem—Salmon Fishery (Ireland) Act, 1863 (26 & 27 Vict. c. 114), ss. 9, 12.]**—D. was prosecuted in 1898, before justices (under 26 & 27 Vict. c. 114, s. 12), for (a) not making a free gap in his weir at Lismore in accordance with the four regulations of sect. 9 of that Act; and (b) for not maintaining a free gap therein in accordance with those regulations. D. set up as a defence an order dated 15th February, 1866, of the Special Commissioners, certifying that a free gap had been made therein (in compliance with an undertaking by D.), and deciding the said weir to be legal; and D. further proved that the free gap had been constructed in accordance with plans ap-

**Salmon Fishery Act—Continued.**

proved of by the Commissioners, and had not been in any way altered since 1866. The justices convicted upon the complaint for not making their order being silent as to the second complaint (non-maintenance), but stated that they adopted the defendant's view, that if there was a conviction for not making (sect. 12, sub-sect. 1), there could not be a conviction for not maintaining (sect. 12, sub-sect. 2), "but should the Court be of opinion that we were wrong in so doing, then, in our opinion, a free gap has not been maintained in the following particulars"—1, The gap not being situate in the deepest part of the stream; 2, the sides of the gap not being in a line with and parallel to the direction of the stream at the weir; 3, the bottom of the gap not being at the time of its construction, or since, level with the natural bed of the stream.

On case stated on the question, 1, whether the justices were entitled, on the facts found, to convict for not making a free gap; and, 2, whether upon the facts found, and having regard to the conviction for not making, they were debarred from convicting for not maintaining the free gap.

HELD (by Palles, C.B., and Andrews, J., O'Brien, J., dissenting, and Murphy, J., expressing no opinion)—that the determination of the Special Commissioners upon the legality or illegality of the weir was a judgment *in rem*, and conclusive against the world; and that, therefore, the conviction for not making a legal free gap was wrong in law.

BUT HELD PER CURIAM—that (the conviction for not making being reversed as erroneous) the justices should have convicted the defendants on the complaint for non-maintenance, not upon any finding that the level of the floor of the gap, or its width, were not in accordance with the regulations of sect. 9 (these having remained unchanged since 1866), but upon the finding of the fact that (by reason of the action of the defendant in closing up three hatches on the south wall of the weir) the flow of the stream had been altered, and the sides of the gap, therefore, had not been maintained in a line with and parallel to the direction of the stream at the weir.

DEVONSHIRE (DUKE OF) APPELLANT; DROHAN, [RESPONDENT, [1900] 2 Ir. R. 161—Q. B. Div.

21. *Malicious Damage—Poisoning Water with Intent to Kill or Destroy Fish—Salmon River—Effect of Amending Section where it Cannot be Strictly Applied—Manifest Intention of Act—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 32—Salmon Fishing Act, 1873 (36 & 37 Vict. c. 71), s. 13.*—As sect. 32 of the Malicious Damage Act, 1861, cannot be read grammatically as amended by sect. 13 of the Salmon Fishery Act, 1873, and as, if it were read as altered in the strict way as directed by the amending section, its manifest intention and object would be com-

pletely defeated, the amending section must be modified so as to give effect to its intention—namely, to extend to salmon rivers the provisions of sect. 32 so far as they relate to poisoning any water with intent to kill or destroy the fish therein.

RFX v. VASEY AND ANOTHER, [1905] 2 K. B. 748; [69 J. P. 455, 22 T. J. R. 1, 75 L. J. K. B. 19; 54 W. R. 218; 93 L. T. 671; 21 Cox, C. C. 49—Div. Ct.

22. *Penalty—Proceedings for Recovery of—Limitation of Time—Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 62—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11*—Section 62 of the Salmon Fishery Act, 1873, enacts that all penalties imposed by the Salmon Fisheries Acts "may be recovered within six months after the commission of the offence before two justices" in manner directed by the Summary Jurisdiction Act, 1848 (Jervis's Act).

Section 11 of the latter Act provides that, where no time is specially limited for making a complaint or laying an information on the Act relating to each particular case, the complaint shall be made and the information laid within six months from when the matter arose.

HELD—that sect. 11 of Jervis's Act applied to proceedings for the recovery of a penalty under sect. 62 of the Salmon Fishery Act, 1873, *i.e.*, the complaint may be made within six months from the commission of the offence.

MORRIS v. DUNCAN, [1899] 1 Q. B. 4; 68 L. J. Q. B. 49; 62 J. P. 323, 47 W. R. 96; 79 L. T. 379; 15 T. L. R. 8; 19 Cox, C. C. 186—Div. Ct.

23. *Salmon Roe in Possession—Salmon Fisheries (Scotland) Act, 1868 (31 & 32 Vict. c. 123), s. 18.*—Any person found in any part of Scotland possessing salmon roe is liable to conviction under the Salmon Fisheries Act, 1869, s. 18, unless he can prove that he had the roe for the purpose of artificial propagation or scientific research.

CROOK v. DUNCAN, [1899] (J); 1 F. 50; 36 [S. L. R. 322.

**IV. OYSTER BEDS.**

24. *"Damage Done by any Ship"—Jurisdiction of Admiralty Court—Action in Rem—Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), ss. 7, 35—Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 51, 53.*—An Admiralty action *in rem* was brought against the owners of the brigantine "Swift" for damage to oyster-beds and to oysters, the property of the Whitstable Oyster Fishery Company. From general knowledge and from special warning received at the time, the captain knew, or ought to have known, that in entering that particular part of the water he was going upon what was an oyster-bed.

HELD—that the action would lie, as the

**Oyster Beds—Continued.**

damage was "damage done by a ship" within the meaning of sect 7 of the Admiralty Court Act, 1861, and the damage was not done in the ordinary course of navigation, that the oysters were property, and by sect 51 of the Fisheries Act, 1868, the Whitstable Oyster Fishery Company were persons owning property, whose property had been damaged, and that the defendants were liable for the negligence of the captain.

THE SWIFT, [1901] P. 168; 70 L. J. P. 47, 85 [L. T. 346, 17 T. L. R. 400—Jeune, P.

25 *Pollution—Discharge into Sea—Urban Sanitary Authority—Continuance of Damage—Public Health Act, 1848* (11 & 12 Vict. c. 63), s. 49—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 23, 27—*Sea Fisheries Act, 1868* (31 & 32 Vict. c. 45), ss. 51, 53—*Sea Fisheries Regulation Act, 1888* (51 & 52 Vict. c. 54), s. 2—*Southend Local Board Act, 1887* (50 & 51 Vict. c. v), s. 5.]—A local authority, being the urban sanitary authority for the borough of S, discharged sewage in a crude state without any treatment into the estuary of the Thames. The plaintiff was a fish merchant and fish salesman, and was the lessee in occupation of an ancient several fishery, being oyster beds which he used for the purposes of his trade. The Fishmongers' Company forbade the sale in London of oysters coming from the plaintiff's layings, because the layings were badly polluted.

Sect 23 of the Public Health Act, 1875, in reproducing the substance of sect. 49 of the Public Health Act, 1848, omits all provision as to drainage into the sea, while sect. 27 provides that for the purpose of disposing of sewage the local authority may do certain things, but with this proviso, that no nuisance be created in the exercise of any of those powers.

In an action by the plaintiff claiming (1) damages against the local authority for wrongfully and illegally polluting and causing to be polluted with sewage his oyster and shell-fish beds, and (2) an injunction,

HELD—that the defendants must keep their noxious matter from trespassing upon their neighbour's land, and that the plaintiff was entitled to damages and an injunction.

*Fletcher v. Rylands* (1868) L. R. 3 H. L. 330; 37 L. J. Ex. 161; 14 W. R. 799, 19 L. T. 220—*H. L. and Tenant v. Goldwin* (1882) 1 Salk. 21; 2 Ld. Raym. 1089 followed.

*Earl of Harrington v. Derby Corporation* ([1905] 1 Ch. 205; 74 L. J. Ch. 219; 69 J. P. 62; 92 L. T. 153; 21 T. L. R. 98; 3 L. G. R. 324 *See* WATERS, 20) distinguished.

HOBART v. SOUTHEND-ON-SEA CORPORATION, (1906) [75 L. J. K. B. 305; 70 J. P. 192, 54 W. R. 451, 94 L. T. 337; 22 T. L. R. 307; 4 L. G. R. 757—Buckley, J.

On appeal the case was settled; 22 T. L. R. 530.

26. *Pollution — Foreshore — Occupation — Right of Local Authority to Discharge*

*Sewage into the Sea—Prescription*—The plaintiff and his vendor had for fifty years occupied oyster ponds or layings on the foreshore at E. There was some evidence that such foreshore was part of the waste of a manor, the lord of which had a several fishery thereon.

The defendants discharged sewage from the town of E in their district through a sewer made in 1874 by their predecessors; the outfall was in a tidal estuary below low-water mark. Since 1892 there had been an increase in the volume and changes in the quality, as well as in the method of discharge, of the sewage.

In an action commenced by the plaintiff in 1902 to recover damages against the defendants, for the pollution of his oyster beds,

HELD—first, that the plaintiff as occupier of the ponds had a right to maintain the action, irrespective of any question as to his title to soil or fishery; secondly, that the defendants had no prescriptive right to discharge sewage so as to contaminate the oyster beds, they having by their own acts of commission since 1892 brought about such contamination; thirdly, that the defendants, as a local authority, had no common law right to discharge sewage into the sea, so as to contaminate the oyster beds; and that, therefore, the plaintiff was entitled to damages.

*Semble*, the plaintiff could make a title to the ownership of the ponds.

*Quære*, whether the defendants would have been liable for a nuisance due only to their nonfeasance.

Decision of Walton, J. (62 J. P. 42; 21 T. L. R. 214; 3 L. G. R. 605) affirmed.

FOSTER v. WARBLINGTON URBAN DISTRICT [COUNCIL, [1906] 1 K. B. 648, 75 L. J. K. B. 514; 70 J. P. 233; 54 W. R. 575, 94 L. T. 876; 22 T. L. R. 421; 4 L. G. R. 735—C. A.

27. *Powers over Foreshore—Passing Over, Using, and Storing Oysters on Foreshore—Municipal Corporation—Power to Acquire Lease of Foreshore—Sea Fisheries Act, 1868* (31 & 32 Vict. c. 45), s. 41—*Municipal Corporations Act, 1882* (45 & 46 Vict. c. 50), s. 250.]

—The plaintiffs brought this action to recover damages for wrongfully entering a portion of the foreshore of the port of Truro, the property of the plaintiffs, and laying down and carrying away oysters. The plaintiffs had taken a lease of the foreshore from the lord of the manor. The defendant, as a member of the public, had rights of fishing over the foreshore covered with water. The defendant dredged oysters in deep waters and deposited them in a particular section of the foreshore indicated by sufficient boundary marks, partly for cleaning, partly for fattening, and partly to be ready for distant markets.

HELD—that the defendant, in common with the rest of His Majesty's subjects, was entitled to enter on the hereditaments demised and on every part thereof, for the

## Oyster Beds—Continued.

purpose of fishing for and taking and carrying away oysters and other shell-fish, and also for the purpose of depositing oysters and other shell-fish thereon, but was not entitled to the exclusive occupation of any part of the hereditaments, and was not entitled to any such oysters or other shell-fish so long as the same should continue so deposited.

Judgment of Wills, J. ([1901] 2 K. B. 870, 70 L. J. K. B. 1026; 65 J. P. 806; 50 W. R. 151; 85 L. T. 422, 17 T. L. R. 773), varied.

TRURO CORPORATION v. ROWE, [1902] 2 K. B. [709, 71 L. J. K. B. 794; 51 W. R. 68; 87 L. T. 386; 18 T. L. R. 820; 66 J. P. 821—C. A.

## V. SEA FISHERIES.

And see SHIPPING, Nos 261, 262.

28. *Bye-law — Trawl-net with Beam — "Otter" Trawl-net—Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54)—Fishery Act, 1897 (54 & 55 Vict. c. 37).*—By bye-law 1 of the North-Eastern Sea Fisheries District Bye-laws, made under the Sea Fisheries Regulation Acts, 1888 and 1889, and confirmed by order of the Board of Trade, dated the 17th of July, 1894, it is provided that "... a person shall not use in fishing for sea fish any trawl or trawl-net or any net having a beam which is pulled or pushed or otherwise propelled along or over the bottom of the sea ..."

HELD—that an "otter" trawl, which is a trawl not having any beam across from side to side, but which has two "otter" boards so fixed that the motion through the water keeps them apart, thus stretching a line across the net in the place of a beam, comes within the meaning of bye-law 1.

COLBECK v. ASHFIELD, (1898) 62 J. P. 214, 67 [L. J. Q. B. 333; 14 T. L. R. 230; 46 W. R. 302—Div. Ct.

29. *Bye-law — Territorial Waters — Ultra Vires—Steam Trawling (Ireland) Act, 1899 (52 & 53 Vict. c. 74).*—The Inspectors of Irish Fisheries, in pursuance of the Steam Trawling (Ireland) Act, 1899, sect. 3, made a bye-law (duly approved of) prohibiting steam trawling within an area, defined by them, which extended more than three miles seaward of low-water mark. The defendant was convicted under this bye-law for illegal fishing with an "otter trawl" at a point some five miles distant from the coast.

HELD (Gibson, J., diss.)—that the bye-law was *intra vires*, and binding, at least, upon all subjects of the British Crown.

Quære, whether the bye-law in question was valid in the case of foreigners?

REX v. PETTIT, [1902] 2 Ir. R. 1—K. B. Div.

30. *Fog Signals by Trawlers—Collision—Regulations of 1884 as to Fishing Vessels,*

Art. 10 (g)—Regulations of 1897, Art. 15 (a).]—A British steam trawler when trawling off the coast of Europe north of Cape Finisterre must not in a fog make whistle signals in accordance with Art. 15 (a) of the Regulations of 1897 for Preventing Collisions at Sea, those Regulations do not override the special provisions of the Regulations of 1884 as to fishing vessels, which require in such a case foghorn and bell signals

THE LONDON, [1904] P. 355; 73 L. J. P. 125; [91 L. T. 327—Jeune, P.

31. *Foreign Trawler—Right to Land Fish.*—Opinion (per Lord Kyllachy) that the Herring Fishery (Scotland) Act, 1889, sect. 8, forbids the landing of fish caught in contravention of the Act, whether by British subjects or by foreigners.

POLL v. LORD ADVOCATE, (1897) 35 Sc. L. R. 637 [—Court of Sess.

32. *Local Fisheries Committee — Several County and Borough Councils—Expenditure—Restrictions and Conditions — Vessel—Fishery Officer—Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 6, sub-s. 1.*—Where a sea fisheries district has been created by an order of the Board of Trade under the Sea Fisheries Regulation Act, 1888, and a joint committee has been constituted consisting of the representatives of several county councils and borough councils as well as other bodies, any one of the paying councils is not exempt from contributing to the expenses incurred by the committee in the purchase of a vessel for the use of their fishery officer unless the restrictions and conditions as to expenditure referred to in sect. 6 of the said Act are made, if not at the time of the original constitution of the committee, at least before any appointment by the committee of its fishery officer; and such restrictions and conditions cannot be imposed by one only of the contributing bodies, but must be agreed to by all.

Reg. v. Mayor, &c., of Plymouth ([1896] 1 Q. B. 158; 65 L. J. Q. B. 258, 44 W. R. 620—Div. Ct.) considered.

REG. v. NORTH RIDING OF YORKSHIRE COUNTY [COUNCIL, EX PARTE NORTH-EASTERN SEA FISHERIES DISTRICT COMMITTEE, [1899] 1 Q. B. 201; 68 L. J. Q. B. 93; 63 J. P. 68; 47 W. R. 205; 79 L. T. 521; 15 T. L. R. 31—Div. Ct.

## FIXTURES.

See AGRICULTURE, BILLS OF SALE; LANDLORD AND TENANT, MORTGAGES; REAL PROPERTY AND CHATELS REAL.

## FLOTSAM AND JETSAM.

See SHIPPING AND NAVIGATION.



## FOOD AND DRUGS.

### I. SALE OF FOOD AND DRUGS ACTS.

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### I. SALE OF FOOD AND DRUGS ACTS.

*And see under* METROPOLIS, PUBLIC HEALTH, Nos 8, 9.

#### (a) Administration and Procedure.

1. *Appeal to Quarter Sessions—Right of—Implication—Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), ss. 1, 25.]-There is no right of appeal to Quarter Sessions against a conviction under sect. 1 of the Sale of Food and Drugs Act, 1899, for importing margarine in a package not properly marked.

So held by Darling and Ridley, JJ., Bray, J. dissenting.

REX v. OTTO MONSTED, LD., [1906] 2 K. B. 456, [75 L. J. K. B. 629; 70 J. P. 435; 95 L. T. 526, 4 L. G. R. 942—Div. Ct.

2. *Information preferred by Inspector of Nuisances on behalf of Borough Council not authorised to Appoint an Analyst—“Local Authority”—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), ss. 10, 12, 13, 21—*Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), ss. 3 (1), 25.]-An inspector of nuisances for a borough which had neither a separate court of quarter sessions nor a separate police establishment, and was therefore not a “local authority” authorised to appoint an analyst for the purposes of the Sale of Food and Drugs Acts, having obtained a sample and had it analysed by the county council analyst, preferred an information under sect. 6 of the Food and Drugs Act, 1875. The inspector, in so doing, acted under the direction and at the cost of the borough council. The justices refused to hear and determine the summons on the ground that the council was not a “local authority” within the meaning of sect. 25 of the Food and Drugs Act, 1899.

HELD—that the justices must hear and determine the summons.

WORTHINGTON v. KYME, (1905) 69 J. P. 390; 93 [L. T. 546; 3 L. G. R. 1098; 54 W. R. 185; 21 Cox, C. C. 37—Div. Ct.

3. *Justices acting on their own Knowledge—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63, s. 6)]—Upon the hearing of a charge of selling adulterated food, the jus-

tices are entitled to take into consideration facts within their own knowledge as to whether the food has been adulterated.

*Reg. v. Field* ((1895) 64 L. J. M. C. 159) followed.

SHORTT v. ROBINSON, (1899) 68 L. J. Q. B. 352; [63 J. P. 295; 80 L. T. 261, 19 Cox, C. C. 243—Div. Ct.

4. *Limitation of Time—Article Purchased for Test Purposes—Time within which Prosecution to be Instituted—Time to Run from Laying of Information—Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), s. 19 (1).]-On July 18th, 1903, an information was laid and a summons issued against the respondent charging that on June 23rd, 1903, he did unlawfully sell to the appellant, and to his prejudice, a certain article of food, viz, milk not of the nature, substance and quality demanded by the purchaser. The summons was not served until July 22nd, 1903.

HELD—that the prosecution was instituted on the 18th, and therefore within the twenty-eight days limited by the Sale of Food and Drugs Act, 1899, s. 19 (1).

BEARDSLEY v. GIDDINGS, [1904] 1 K. B. 847; 73 [L. J. K. B. 378; 68 J. P. 222, 53 W. R. 78, 90 L. T. 651, 20 T. L. R. 315; 20 Cox C. C. 645—Div. Ct.

5. *Limitation of Time—Articles Purchased for Test Purposes—Time within which Prosecution to be Instituted—Laying of Information—Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), s. 19 (1).]-A prosecution under the Sale of Food and Drugs Act, 1899, is “instituted” within twenty-eight days of the time of purchase if an information be laid within the twenty-eight days, although the summons be not issued till later.

*Ex parte Fielding* ((1861) 25 J. P. 759) followed.

BROOKS v. BAGSHAW, [1904] 2 K. B. 798; 73 [L. J. K. B. 839, 68 J. P. 514; 53 W. R. 13; 20 T. L. R. 655, 91 L. T. 535; 20 Cox C. C. 727—Div. Ct.

6. *Prosecutor—“Person”—Body Corporate—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 33 (1)—*Interpretation Act, 1889* (52 & 53 Vict. c. 69), s. 2 (1).]-The word “person” as used in sect. 33 (1) of the Sale of Food and Drugs Act, 1875, does not include the Corporation of a Borough, and such a corporate body cannot institute a prosecution for a contravention of the Act.

COLQUHOUN v. DUMBARTON MAGISTRATES, [1907] [S. C. (J.) 57—Ct. of Justiciary.

7. *Prosecution—Right of Local Inspector to Prosecute for Penalties in his own Name—Food and Drugs Acts, 1875, 1899* (38 & 39 Vict. c. 63, 62 & 63 Vict. c. 51).]-Where, under sect. 2 of the Food and Drugs Act, 1899, the Local Government Board, or Board of Agriculture, through their officer, procure samples of an article of food (e.g., margarine) for analysis, and communicate the

**Sale of Food and Drugs Acts—Continued.**

certified result of the analysis, when made, to the secretary of the local authority, the secretary of the local authority may, without any special resolution, transmit such certificate to the inspector appointed under the Food and Drugs Act of 1875; and he without antecedent authorisation may proceed in his own name to prosecute for any penalties to which the vendor may be liable.

CONNOR v. BUTLER, [1902] 2 Ir. R. 569—K. B. [Div.]

8 *Service of Summons—Fourteen Clear Days—Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), s. 19 (2).—By sect. 19 (2) of the Sale of Food and Drugs Act, 1899, in any prosecution under that, or any other Sale of Food and Drugs Act, the summons "shall not be made returnable in less time than fourteen days from the day on which it is served."

HELD—that fourteen clear days must elapse between the date of service and date of return. Therefore, when a summons was served on November 26th, and made returnable on December 10th, the justices rightly dismissed the charge

MCQUEEN v. JACKSON, [1903] 2 K. B. 163; 72 [L. J. K. B. 606, 67 J. P. 353, 88 L. T. 871, 20 Cox C. C. 499—Div. Ct.]

9 *Service of Summons on Limited Company—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 62.—A summons calling upon a limited company, to appear to answer an information preferred against them under sect. 3 of the Sale of Food and Drugs Act, 1875, must be served in the manner prescribed by sect. 62 of the Companies Act, 1862. The appearance of a solicitor solely to raise a point of substance as to the invalidity of the proceedings and who takes no further part in the case does not operate in any way as a waiver of the objection to the service, so as to give the magistrates jurisdiction to proceed.

PEAKES, GUNSTON AND TEE, LD. v. RICHARDSON, [1902] 1 K. B. 91, 71 L. J. K. B. 18; 66 J. P. 119; 50 W. R. 286; 85 L. T. 616, 18 L. R. 78; 20 Cox, C. C. 96—Div. Ct.]

**(b) Analysis.**

See also (c) OFFENCES, No. 14, Col. 1309.

10 *Certificate of Analyst—Sufficiency—Brandy—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 18, and 1879 (42 & 43 Vict. c. 80), s. 6].—A certificate given by an analyst with reference to a sample of brandy, stated: "I am of opinion that the said sample contained parts as under, or the percentages of foreign ingredients as under: it has been reduced from 25 degrees under proof to 27.6 degrees under proof."

HELD—that this certificate was sufficient to support a summons for selling adulterated

brandy, and that it was not necessary to set out all the proportions; it is only when the spirit is not reduced more than 25 degrees under proof that sect. 6 of the Act of 1879 applies, and makes it a good defence to prove that there is no adulteration otherwise than with water.

FINDLEY v. HAAS, (1903) 67 J. P. 193; 88 L. T. [465; 19 T. L. R. 353; 20 Cox C. C. 399—Div. Ct.]

11 *Certificate of Analyst—Sufficiency—Milk—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 13—*Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), s. 4—*Sale of Milk Regulations, 1901, r. 1.*—The respondent was summoned for selling milk not of the nature, substance and quality demanded by the purchaser, it being deficient in milk fat to the extent of fifty-three per cent. The certificate of the analyst stated: "I am of opinion that the said sample contained the parts as under, and the percentages of foreign ingredients as under: Milk fat, 1.4 per cent.; milk solids other than milk fat, 5.6; specific gravity at 60 deg. F., 1020.6. Observations: This milk is deficient in milk solids other than milk fat to the extent of 2.9 per cent., which is equivalent to the addition of 34.2 per cent. of water. It is also deficient in milk fat to the extent of 53.4 per cent. of the milk fat."

HELD—that the certificate was sufficient, since, although it did not in terms refer to the standard laid down by the Sale of Milk Regulations, r. 1, a consideration of it showed that the analyst had in his mind the prescribed three per cent. standard.

BAXLEY v. COOR, (1905) 69 J. P. 139; 53 W. R. [410; 92 L. T. 170; 21 T. L. R. 235; 3 L. G. R. 304; 20 Cox, C. C. 779—Div. Ct.]

12. *Certificate of Analyst—Weight of Sample not Specified—Article Liable to Decomposition—Statement as to Change in Constitution—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), ss. 18, 21, Sch.]—On a charge of selling butter adulterated with foreign ingredients it is not a valid objection to the analyst's certificate that it neither states the weight of the sample nor states that it could not conveniently be weighed.

It is, however, a valid objection that the certificate omits to state whether any change had taken place in the article which would interfere with analysis, and this is so even if the article sent for analysis as "butter" proves in fact to be margarine.

HUNTER v. WINTRUP, (1906) 7 F. 22—[Ct. of Justiciary.]

13. *Certificate of Analysis—"Which then Weighed"—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 18.]—The words "which then weighed" in the form of the analyst's certificate given in the schedule to the Sale of Food and Drugs Act, 1875, are not obligatory except where the weight of the sample is material. Where it is not shown

**Sale of Food and Drugs Acts—Continued.**

to the justices that the weight of the sample is in any way material, it is not necessary to fill in the words.

**SNEATH v. TAYLOR**, [1901] 2 K. B. 376, 70 [L. J. K. B. 872, 65 J. P. 548, 49 W. R. 719—Div. Ct.]

**(c) Offences**

**14. Beer—“Nature, Substance, and Quality of the Article demanded” — Dangerous Foreign Body Injurious to Health—Sufficiency of Certificate of Analyst—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 6.]**—The question under sect. 6 of the Sale of Food and Drugs Act, 1875, is whether or not a person has sold, even innocently, an article of food or drug which is not of the nature, substance, and quality of the article demanded by a purchaser. There is no need to consider how that which makes the article otherwise than of the nature, substance, and quality of the article demanded has got into it, but the question is whether in fact it is there to such an extent that the article is different in nature, substance, and quality. Where the magistrate has before him a case in which a dangerous foreign body—arsenious acid—was present in beer to the extent of one-eighth of a grain per gallon, which is injurious to health, and has drawn the conclusion that the beer sold was not of the nature, substance, and quality of the beer demanded, it is not possible for the Court to say that the magistrate was wrong.

A certificate of the analyst ought to contain in it sufficient materials to enable the magistrate to form a judgment on those materials whether the offence has been committed. A certificate stating that a sample of beer contained arsenic, or a certificate stating that a sample of beer contained a serious quantity of arsenic, is insufficient.

**GOULDER v. ROOK, BENT v. ORMEROD; LEE v. [BENT; BARLOW v. NOBLETT]**, [1901] 2 K. B. 290, 70 L. J. K. B. 747; 65 J. P. 646; 49 W. R. 684, 701, 84 L. T. 719; 17 T. L. R. 503; 19 Cox, C. C. 725—Div. Ct.]

**15. Brandy—Standard—Liquid not of the Nature of Brandy—Deficiency of Grape Spirit or Wine Spirit—No Statutory Standard of Genuineness—Standard Established by Evidence—Notice to Customer of Real Nature of Liquid Sold—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 16—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), ss. 2, 6.] —Per Curiam.** In a prosecution for selling as brandy liquid not of the nature of brandy, as there is no statutory standard for the genuineness of brandy, the Court must fix for itself a standard based upon the evidence before it.

An inspector entered a shop and asked what kinds of brandy were sold there; he was told “Tricoche’s brandy,” but did not catch the words, and left the premises. He returned in ten minutes, and asked for a

bottle of brandy. He was supplied with a bottle of liquid labelled “Old Brandy, Tricoche & Co., Cognac, xxx,” which proved upon analysis to be inferior to the standard accepted by the sheriff-substitute.

**HELD** (the Lord Justice Clerk dissenting)—that the purchaser had not such notice of the nature of the liquid supplied to him as to render invalid a conviction for selling it to his “prejudice.”

**WILSON and M’PHEE v. WILSON**, (1904) 68 J. P. 175; 41 Sc. L. R. 195—Ct. of Justiciary.

**16. Butter—Butter Blended with Milk—A Greater Proportion of Water and Increase in Weight—Spurious Compound—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.]**—The appellants for the purpose of increasing its weight by an ingenious process added milk to their butter with the object that the added milk should not become butter, so that a greater proportion of water, which in the ordinary process of making butter would be eliminated, should still be in the butter. This compound they sold as butter.

**HELD**—that by reason of the presence of the added milk the article was a spurious compound, and it did not matter what the motive was, as if the act were ever so honest that would be no answer under the first part of sect. 6 of the Sale of Food and Drugs Act, 1875, and that the appellants had been rightly convicted under that section.

**PEARKS, GUNSTON, AND TEE, LD. v. KNIGHT; [THE SAME v. VAN TROMP]**, [1901] 2 K. B. 825; 70 L. J. K. B. 1002; 65 J. P. 822; 50 W. R. 104; 85 L. T. 379—Div. Ct.]

**17. Butter—Butter Blended with Milk—Notice to that Effect on Wall of Shop—Similar Notice on Inside Wrapper—Sale “to the Prejudice of the Purchaser”—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 8.]**—The respondent—an inspector under the Sale of Food and Drugs Act—purchased for analysis at the appellant’s shop half a pound of 1s. butter. The appellants sold only one sort of butter—namely, blended butter—and there was a notice on the wall behind the counter in the shop, visible to anyone entering, and underneath a statement that the butter was blended with pure English full-cream milk by new and improved machinery, whereby it retained about 20 to 24 per cent. of moisture. The respondent did not observe this notice, nor was his attention called to it. The butter was delivered in two pieces of paper, the notice above set out being printed on the inside wrapper. The butter contained 7.8 per cent. of water, which had been added to it by the milk-blending process, in excess of the extreme limit of 16 per cent. natural to butter. On an information charging the appellants with having sold the butter to the prejudice of the purchaser, the justices convicted them.

*Sale of Food and Drugs Acts—Continued.*

HELD—that at the time of the sale it was by the notice on the wall brought to the knowledge of the purchaser that the article sold was blended and mixed; and that there was no evidence upon which the justices could properly come to the conclusion that the sale was to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act, 1875.

PEARKS, GUNSTON AND TEE, LD. *v.* HOUGHTON, [1902] 1 K. B. 889; 71 L. J. K. B. 385; 66 J. P. 422; 50 W. R. 605; 86 L. T. 325; 18 T. L. R. 362—Div. Ct.

18. *Butter—Butter Blended with Milk—Notice to that Effect on Wall of Shop—Similar Notice on Wrapper—Sale “to the Prejudice of the Purchaser”*—*Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 8*—[The respondent sold to a customer, who demanded a pound of best fresh butter, an article which was in fact milk-blended butter containing an excess of moisture over ordinary butter. There was a notice hanging up in a conspicuous place in the shop that all butters sold there were milk-blended butters, and the butter itself was sold in a wrapper on which was printed a notice to the like effect. The justices held that, though the sale was one to the prejudice of the purchaser, the vendor was under sect. 8 of the Sale of Food and Drugs Act, 1875, protected by the fact of the notice hanging up in the shop and printed on the wrapper.]

HELD—that the justices were right in dismissing the information.

HAYES *v.* RULE, (1902) 66 J. P. 661; 87 L. T. [132; 18 T. L. R. 535; 20 Cox, C. C. 328—Div. Ct.

19. *Butter—Butter Blended with Milk—“Margarine”*—*Containing more than 10 per cent. of Butter-fat—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 8*—[Butter and milk mixed together may be sold otherwise than as “margarine,” e.g., as “milk-blended butter,” and can be so sold though it contains more than 10 per cent. of butter-fat, and it is not “margarine” within the meaning of sect. 8 of the Sale of Food and Drugs Act, 1899.]

BAXLEY *v.* PEARKS, GUNSTON AND TEE, LD., [(1902) 66 J. P. 790; 87 L. T. 67; 18 T. L. R. 567; 20 Cox, C. C. 285—Div. Ct.

20. *“Chewing Gum”*—*Paraffin Wax—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 6*—[Chewing gum expressly and admittedly sold as an article to be chewed only and not to be eaten nor to be used medicinally is not an article of food nor a drug within the meaning of the Sale of Food and Drugs Act, 1875, ss. 2, 3 and 6.]

BENNETT *v.* TYLER, (1900) 64 J. P. 119; 81 L. T. [787—Div. Ct.

21. *Compounded Drug—Camphorated Oil*

—*Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 7*—[Section 7 of the Sale of Food and Drugs Act, 1875, enacts that “No person shall sell any . . . compounded drug which is not composed of ingredients in accordance with the demands of the purchaser, under a penalty not exceeding twenty pounds.”]

HELD—that nothing is an offence under sect. 6 of the Sale of Food and Drugs Act, 1875, so far as it relates to compounded drugs, unless it is also an offence under sect. 7, and that camphorated oil which the justices had found was a compounded drug was within sect. 6, not being excluded from its operation by sub-sect. 3 of sect. 6.

BEARDSLEY *v.* WALTON & CO., [1900] 2 Q. B. 1; [69 L. J. Q. B. 344; 64 J. P. 436, 82 L. T. 119; 16 T. L. R. 185—Div. Ct.

22. *Compounded Drug—“Compounded as in this Act mentioned”*—*Mercury Ointment—British Pharmacopœia Standard—Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 7*—[A chemist was charged under sect. 6 of the Sale of Food and Drugs Act, 1875, with having sold to the prejudice of the purchaser, mercury ointment which was asked for and which on analysis was found to be deficient in mercury according to the British Pharmacopœia.]

HELD—that as mercury ointment is to be found in the Pharmacopœia, and that drug was asked for, that drug must be supplied, and that the chemist sold to the prejudice of the purchaser a drug which was not of the quality of the article demanded by the purchaser, and so contravened the provisions of the earlier part of sect. 6.

*White v. Bywater* (1887) 19 Q. B. D. 582; 51 J. P. 821; 36 W. R. 280—Div. Ct.) followed.

HELD ALSO—that as the drug was not “compounded as in this Act mentioned,” the sale did not fall within the exception in sect. 6, sub-sect. 3, and that the sale probably constituted an offence under sect. 7.

DICKINS *v.* RANDERSON, [1901] 1 Q. B. 437; 70 [L. J. K. B. 344; 65 J. P. 262; 84 L. T. 204; 17 T. L. R. 224, 19 Cox, C. C. 643—Div. Ct.

And see No. 41, *infra*.

23. *Injurious Ingredient—Food Rendered Injurious to Health by Mixture with Ingredient—Sufficiency of finding that Ingredient Injurious to Health—Certificate—Contents of—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 18, 20, and Sch.*—[To support a conviction under the latter part of sect. 3 of the Sale of Food and Drugs Act, 1875, the Court must find that the defendant has sold an article of food rendered injurious to health by being mixed, coloured, &c., with some ingredient or material. It is not sufficient that the Court should find that the ingredient is itself injurious to health.]

The certificate of a public analyst made under sect. 18 of the Sale of Food and Drugs Act, 1875, in the form set out in the Schedule

**Sale of Food and Drugs Acts—Continued.**

thereto, is not rendered insufficient to support a conviction under the latter part of sect. 3 of that Act, by reason of the fact that it is not expressly stated therein that the article of food analysed has been rendered injurious to health by being mixed, coloured, &c., with any ingredient or material.

HULL v. HORNSSELL, (1905) 69 J. P. 591, 92 [L. T. 81; 21 T. L. R. 32; 2 L. G. R. 1280; 20 Cox, C. C. 759—Div. Ct.]

24. *Innocent Vendor — Adulteration on Transit—Vendor's Liability—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3*—A vendor of milk, a milk salesman, under a contract to supply pure milk, consigned pure milk to a railway company for carriage to Paddington station, where it was to be delivered to purchasers. On arrival at that station the milk was found to be adulterated by the addition of 9 per cent. of water. The adulteration took place without the knowledge of the vendor during the railway transit.

HELD—that the vendor was liable to be convicted, under sect. 6 of the Sale of Food and Drugs Act, 1875, for selling, to the prejudice of the purchaser, milk which was not of the nature, substance and quality demanded; but that the vendor's personal innocence of the adulteration was a fact to be taken into account in mitigation of punishment.

PARKER v. ALDER, [1899] 1 Q. B. 20; 68 L. J. [Q. B. 7; 62 J. P. 772; 47 W. R. 142; 79 L. T. 381; 15 T. L. R. 3; 19 Cox, C. C. 191—Div. Ct.]

25. *Marmalade—Addition of Glucose—Sale "to Prejudice of Purchaser"—No Evidence of Inferior Quality—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.*—The appellant, a grocer, was convicted for selling a pot of marmalade containing 13 per cent. of glucose, an ingredient frequently used, not injurious to health, and not added to the marmalade to increase its bulk or weight, or conceal its inferior quality, but to prevent fermentation and crystallisation, to the prejudice of the purchaser under sect. 6 of the Sale of Food and Drugs Act, 1875. There was no legal standard for the making of marmalade.

HELD—that if the purchaser knew anything about it—and for this purpose it must be taken that he did not, because it was not the case of a person who knew any particular recipe—he got an article given to him which, if it was different at all, was different in the sense that it was rather better; and that on the ground that there was no evidence of any inferior quality, or of any adulteration in the ordinary sense of the word, the conviction must be quashed.

SMITH v. WISDEN, (1902) 66 J. P. 150; 85 L. T. B.D.—VOL. I.

[760; 18 T. L. R. 92; 20 Cox, C. C. 135—Div. Ct.]

26. *Milk—Deficiency in Fat—Not of the Nature, Substance, and Quality Demanded by the Purchaser—Natural Proportion of Fat in Ordinary Milk—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Milk Regulations, 1901.*—The respondent, a dairyman, sold milk to an inspector which, on analysis, was found to contain only 2.81 per cent. of fat. The Sale of Milk Regulations, 1901, provide that "where a sample of milk (not being milk sold as skimmed, separated, or condensed milk) contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water." The respondent was convicted under sect. 6 of the Sale of Food and Drugs Act, 1875, for selling to the customer milk not of the nature, substance and quality demanded by the purchaser, although the justices found as a fact that the milk was in the same condition as when it came from the cow, the deficiency in fat being caused by the cow not having been milked previously for at least fourteen hours, in consequence of which a portion of milk fat was absorbed by the cow, and that the hours of milking were those customary in the district.

HELD—that, as there was no evidence that the milk was otherwise than of the nature, substance and quality demanded by the purchaser, there was no evidence upon which the conviction could be supported.

Smithies v. Bridge ([1902] 2 K. B. 13; 71 L. J. K. B. 555; 66 J. P. 740; 50 W. R. 686; 87 L. T. 167; 18 T. L. R. 575—Div. Ct., No. 29, *infra*) distinguished and explained.

WOLFENDEN v. M'CULLOCH, (1905) 69 J. P. 228; [92 L. T. 857; 21 T. L. R. 411; 3 L. G. R. 561; 20 Cox, C. C. 864—Div. Ct.]

27. *Milk—"In Course of Delivery"—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3.*—A servant of S., a wholesale milk dealer, in pursuance of a contract between S. & B., a retailer, took milk in cans belonging to S. out of S.'s cart into B.'s shop. He there poured it into empty cans belonging to B. An inspector was present at the time, and immediately took a sample of the milk from B.'s cans.

HELD—that the milk was still "in course of delivery" when the sample was taken.

SEMPLE v. DUNBAR, (1905) 6 F. (Just. Cas.) [65—Ct. of Justiciary.]

28. *Milk—Knowledge of Purchaser—Costs against Magistrates—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.*—W. was charged before justices with selling for new milk an article not of the nature, substance, and quality demanded, contrary to sect. 6

**Sale of Food and Drugs Acts—Continued.**

of the Food and Drugs Act, 1875. A sergeant of police, acting under H.'s orders, who was an inspector under the Act, purchased the milk from W., who, when he was asked for new milk, sold skimmed, and charged a penny a pint, the usual price for skimmed. The justices differed, one being of the opinion that only a penny a pint being asked, the purchaser must have been aware it was skimmed milk he was buying.

**HELD**—that the knowledge of the purchaser was immaterial, and case remitted to the bench to convict.

The respondent W. did not appear, but the magistrates did.

**HELD**—that costs in such a case could be given against them.

**HEYWOOD v. WHITEHEAD**, [1897] 18 Cox, C. C. [615; 76 L. T. 781; 13 T. L. R. 503—Div. Ct.]

**29. Milk—"Nature, Substance and Quality of the Article Demanded"—Deficiency in Fat from unusual Treatment of the Cow—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.]**—The respondent demanded from the appellant—a milk-seller—a pint of new milk, and the milk supplied was found on analysis to contain only 2.09 per cent. of fat. The milk was in the same condition as when it came from the cow. The small percentage of fat was caused by a long interval of sixteen hours between the morning milking, at which the milk in question was drawn from the cow, and the previous milking, thus increasing the quantity of milk at the morning milking, but causing the milk to be deficient in fat owing to the fat being absorbed by the cow, and the owner of the cows was informed of this. Upon an information charging the appellant under sect. 6 of the Sale of Food and Drugs Act, 1875, with having sold milk not of the nature, substance, and quality demanded by the purchaser, the justices found that the substance could not be properly described as milk at all, and convicted the appellant.

**HELD** (Darling, J., dissenting)—that as the deficiency in fat was caused by the unusual treatment of the cow, there was evidence upon which the justices could find that the article was not of the nature, substance, and quality demanded.

**SMITHIES v. BRIDGE**, [1902] 2 K. B. 13; 71 L. J. [K. B. 555; 66 J. P. 740; 50 W. R. 686; 87 L. T. 167; 13 T. L. R. 575; 20 Cox, C. C. 332—Div. Ct.]

See No. 26, *supra*.

**30. Milk—Notice to Purchaser—Bona fides of Seller—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63)—Sale of Food and Drugs Act, 1879 (42 & 43 Vict. c. 30).]**—A dairyman started on his usual round with an ample supply of his own milk, but on running short he bought two gallons from another dairyman to eke out his own supply. When the inspector came he told him he could not

guarantee the quality of the milk in the particular can containing the purchased milk owing to the circumstances mentioned. He sold two pence worth of milk from this can after informing the inspector that the milk was not the produce of his own cows, and warning him that it might or might not prove to be sweet milk.

**HELD**—that there was a *bona fide* sale of an article, the quality of which was not, and could not be, guaranteed, and that the dairyman was not chargeable with a contravention of the Sale of Food and Drugs Acts, 1875 and 1879.

**FREW v. GUNNING**, (1901) 3 F. 51—[Ct. of Justice.]

**31. Milk—Notice to Purchaser—"Sweet Milk" asked for—Milk labelled "Not guaranteed 3 per cent."—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, and (62 & 63 Vict. c. 51), s. 4.]**—A purchaser asked for "sweet milk" was served from a can labelled "Not guaranteed 3 per cent." He understood this to mean "not 3 per cent. of milk fat." He, in fact, received sweet milk with an admixture of skimmed milk.

**HELD**—that the dairyman was rightly convicted of selling to the purchaser's prejudice for the label did not amount to a notice that the latter was buying a mixture of sweet and skimmed milk.

**SOUTER v. LEAN**, (1905) 6 F. (Just. Ct.) [20—Ct. of Justice.]

**32. Milk—Sale in Highway from Vehicle or Can—Name and Address on Vehicle or Can—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 9.]**—The true meaning of sect. 9 of the Sale of Food and Drugs Act, 1899, is that the person selling milk or cream must have his name and address upon the cart when the sale is from a cart, or upon the can when the sale is from a can.

**CRABTREE v. SKELTON**, (1901) 70 L. J. K. B. 360—[Div. Ct.]

**33. Milk—Sample Supplied from Churn to Inspector—Sale to Prejudice of Purchaser—No Request by Inspector to be Supplied with Milk—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 13—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3.]**—An information was preferred against the respondent for selling milk to the prejudice of the purchaser under sect. 6 of the Sale of Food and Drugs Act, 1875. It appeared that an inspector asked the respondent for a sample from the churns; on analysis it was found the milk was adulterated. The justices found as a fact that the inspector asked for a sample from the churn, but that there was no request to be supplied with milk as a purchaser.

**HELD**—that on these findings (which were evidence to support) the respondent could not be convicted of a sale to the prejudice of the purchaser under sect. 6 of the Act.

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SANDYS v. JACKSON, (1905) 69 J. P. 171; 92 L. T. [646; 3 L. G. R. 285—Div. Ct.

34. *Milk—"Skimmed" Milk—"Separated" Milk—Disclosure of Injurious Alteration—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9*—Sect. 9 of the Sale of Food and Drugs Act, 1875, enacts that "No person shall, with intent that the same may be sold in its altered state, without notice abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case not exceeding twenty pounds."

HELD—that the question whether or not the alteration has been sufficiently disclosed is a question of fact.

Milk from which 97 per cent. of the fat had been abstracted was sold as skimmed milk. The magistrate held, on the evidence, that this was not a sufficient disclosure under sect. 9.

HELD—that there was no appeal from his decision.

*Jones v. Davies* (69 L. T. 492) and *Platt v. Tyler* (58 J. P. 91) commented on and explained.

PETCHEY v. TAYLOR, (1898) 62 J. P. 360; 78 [L. T. 501; 19 Cox, C. C. 38—Div. Ct.

35. *Milk—Ten per cent. added Water—Milk exceptionally good—Trifling Offence—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6*—On a charge of selling milk contrary to sect. 6 of the Sale of Food and Drugs Act, 1875, the certificate of the analyst stated that 10 per cent. of water was exceptionally good, the butter fat being above normal. The justices, therefore, having regard to all the circumstances, thought that though the charge was proved, the offence was of so trifling a nature that it was inexpedient to inflict any punishment and dismissed the summons.

HELD—that if the milk was exceptionally good after the adulteration they need not convict; but if it was only exceptionally good before, the respondent should be convicted.

BANKS v. WOOLER, (1900) 64 J. P. 245; 81 L. T. [785—Div. Ct.

36. *Preserved Peas—Sale to Prejudice of Customer—Sulphate of Copper used to Colour Preserved Peas—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6*—The respondent was summoned for selling preserved peas the colour of which had been retained by the addition of sulphate of copper, but in such small quantities as not to be injurious to health, and evidence was given that preserved peas are habitually sold with such addition. The justices dismissed the summons, holding that there was no sale to the prejudice of the customer.

HELD—that the Court could not interfere

with their finding, as there was some evidence to support it.

FRIEND v. MAPF, (1905) 68 J. P. 589; 2 L. G. R. [1317—Div. Ct.

37. *Sago—Tapioca Sold as Sago—Sale to the Prejudice of the Purchaser—Custom of Trade—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6*—The respondent being asked to sell sago, delivered to the appellant as purchaser pearl tapioca of a quality and description which, by the custom of the trade, was sold as sago. There was no appreciable difference in the value of the two articles, but the pearl tapioca being whiter looking, the public, as a rule, had for a considerable number of years demanded it in preference to the darker coloured sago, by the name of sago. The respondent was summoned under sect. 6 of the Sale of Food and Drugs Act, 1875.

HELD—that the justices might find that such sale was not to the prejudice of the purchaser, and might, on that ground, dismiss the information.

SANDYS v. RHODES, (1903) 67 J. P. 352—Div. Ct.

38. *Sale by Body Corporate—"Person"—Mens rea—Sale "to the Prejudice of the Purchaser"—Knowledge of Purchaser—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 2, sub-s. 1*—By sect. 6 of the Sale of Food and Drugs Act, 1875, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20," and by sect. 2, sub-sect. 1, of the Interpretation Act, 1889, "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction . . . the expression 'person' shall, unless the contrary intention appears, include a body corporate."

HELD—that there was no intention in the Sale of Food and Drugs Act, 1875, that the word "person" in sect. 6 should not include a body corporate, and it followed that a limited company might be made liable to a penalty under that section, that on a sale to the prejudice of the purchaser, the question is not what is the actual knowledge of the particular purchaser, except in so far as that knowledge is derived from information given by the seller, either by notice, by the nature of the article itself, or by what passed at the time of the purchase, but what would be the position, not of a skilled purchaser like an inspector, but of an ordinary person purchasing the article without any special knowledge, and that the admission by a purchaser that she knew that the company's butter was moist did not mean that she knew that the butter had more water in it than pure butter would have had, nor was it evidence on which the justices were bound

**Sale of Food and Drugs Acts—Continued**

to find that there had been no sale to the prejudice of the purchaser.

**PIARKS, GUNSTON AND TEE, LD. v. WARD, HENSIN & SOUTHERN COUNTIES DAIRIES CO., LD.**, [1902] 2 K. B. 1, 71 L. J. K. B. 656, 66 J. P. 771, 57 L. T. 51, 18 T. L. R. 538, 20 Cox, C. C. 279—Div. Ct.

**39 Sale—Procedure under Repealed Section—Offence previous to New Statute coming in Force—Power of Amendment—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 10—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (2)—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1.]—On information laid against the appellant on the 8th of January, 1900, for an offence under the Sale of Food and Drugs Act, 1875, the procedure prescribed by the Sale of Food and Drugs Act, 1899, which came into force on the 1st of January, 1900, and repealed the section as to procedure contained in the Sale of Food and Drugs Act, 1875, was not complied with.**

**HELD**—that although the offence was committed before the later Act came into force, yet, as proceedings were not taken till after the later Act came into force, the procedure required by the later Act must be complied with, and that the non-fulfilment of such requirements was not a matter for amendment under the Summary Jurisdiction Act, 1848.

**BYT v. MATINSON**, (1900) 61 J. P. 615; 82 [L. T. 800, 16 T. L. R. 398—Div. Ct.

**40 Sale by Manager of a Business Purchased, but not Transferred—Liability of Purchasing Company—Mens rea—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.]—A company, incorporated in April, agreed in June to purchase a business. The purchasing company were to take over the lease, stock-in-trade, goodwill, and all book debts subsequent in date to the preceding January, and for the purpose of adjusting accounts was to be deemed to have taken over and commenced to carry on the business as from the preceding January. In August, before the actual assignment of the lease, the manager, who was still paid by the vendors, sold a drug alleged to be adulterated.**

**HELD**—that as *mens rea* was not an essential ingredient of the offence, the purchasing company were under the circumstances liable for his acts.

**BOOTS' CASH CHEMISTS, LD. v. COWLING**, (1903) [67 J. P. 195; 88 L. T. 539; 19 T. L. R. 370; 1 L. G. R. 884, 20 Cox, C. C. 420—

Div. Ct.

*See next case.*

**41 Soap Liniment—Standard of British Pharmacopœia—Commercial Standard—Ad-**

**missibility of Evidence—Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.]—The Court has never laid down a rule that, if an article asked for by a purchaser appears in the British Pharmacopœia, the standard there given must be accepted as conclusive. On the other hand, if the pharmacopœia does lay down a standard for a drug, and a purchaser, in asking for what he needs, uses the special name found in the pharmacopœia, that work is very strong *prima facie* evidence of what that drug should contain, still, the vendor may give evidence of a commercial standard for an article called by the same name, but differently compounded.**

**Dickins v. Randerson** ([1901] 1 K. B. 437, 70 L. J. K. B. 344, 65 J. P. 262; 84 L. T. 204, 17 T. L. R. 224; 19 Cox, C. C. 643—Div. Ct., No 22, *supra*) explained.

**BOOTS' CASH CHEMISTS, LD. v. COWLING**, (1903) [67 J. P. 195; 88 L. T. 539; 19 T. L. R. 370; 1 L. G. R. 884; 20 Cox, C. C. 420—Div. Ct.

**42 Spirits—Rum—Notice that Strength not Guaranteed—Sufficiency of—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 6.]—The appellant, a publican, hung up in his public-house the following notice: "Notice.—All spirits sold in this establishment are of the same quality and strength as heretofore; but, in order to comply with the Food and Drugs Act, will not be of any guaranteed strength." The respondent purchased at the appellant's public-house a quarter of rum, which on analysis was found to consist of 96.3 parts of rum (25 degrees under proof) and 3.7 parts of added water.**

**HELD** (Darling, J., dissenting)—that the above notice was not sufficient to protect the appellant from conviction for selling to the prejudice of the purchaser an article not of the nature, substance, and quality demanded, as the notice did not bring home to the mind of the purchaser that the rum had been reduced below the limit of 25 deg. under proof fixed by sect. 6 of the Sale of Food and Drugs Act Amendment Act, 1879.

**DAWES v. WILKINSON**, [1907] 1 K. B. 278, 76 [L. J. K. B. 182; 71 J. P. 23, 96 L. T. 26, 23 T. L. R. 34, 5 L. G. R. 1—Div. Ct.

**43. Vinegar of Squills—Drug Liable to Decomposition—Analyst's Certificate not referring to Decomposition—Standard—British Pharmacopœia—Prescriptions only, not Standard of Compounded Drug—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 18, 21.]—The appellant, a chemist, was summoned and convicted for selling to the respondent a drug, known as vinegar of squills, not of the nature, substance and quality demanded, contrary to sect. 6 of the Sale of Food and Drugs Act, 1875. The analyst gave a certificate as follows:—"I,**



**Sale of Food and Drugs Acts—Continued.**

the undersigned public analyst, do hereby certify that I received on January 7th, 1902, a sample of vinegar of squills for analysis (which then weighed about 3 ozs), and have analysed the same and declare the result to be as follows: I am of opinion that it is deficient in acetic acid to the extent of 40 per cent. This opinion is based upon the fact that the sample contained only 2.5 per cent. of acetic acid, whereas it should have contained at least 4.2 per cent. of acetic acid." Nothing was said in the certificate under the head of "observations," and the analyst did not report whether any change had taken place in the constitution of the article that would interfere with the analysis. The British Pharmacopœia does not prescribe the quantity of acetic acid which should be present in the compounded drug; it defines the constituents used in making the same, the result being that 4.2 of acetic acid is originally brought in as an ingredient. A small and varying portion of this is lost during process of manufacture, and a further gradual diminution takes place, more or less rapid, according to the care used in storage; but the disappearance of the acetic acid does not affect the quality of the drug.

**HELD**—(1) that the certificate of the analyst was bad, inasmuch as the drug was admittedly liable to decomposition, and yet he had not reported on the point as required by the statute; and *semble*, oral evidence would not have been admissible to cure this defect; and (2) that, there being no standard quantity of acetic acid for the compounded drug, the justices were wrong in assuming that the sale was to the prejudice of the purchaser merely because the percentage of acetic acid was considerably under 4.2, without considering what proportion of acetic acid he expected to get when he asked for vinegar of squills.

**HUDSON v BRIDGE**, (1903) 67 J. P. 186, 88 L. T. 550; 19 T. L. R. 369; 20 Cox, C. C. 425—Div Ct.

**(d) Taking samples.**

**44. Accidental Loss of Sample.**—Upon a charge under sect. 6 of the Sale of Food and Drugs Act, 1875, the prosecutor must be prepared to produce (if called upon to do so) the sample of the article in question directed to be retained and sent, on the motion of either party, to Somerset House for analysis. If he is unable to produce it, the defendant is entitled to be acquitted; and the accidental loss of the sample will not relieve the prosecutor from compliance with this condition.

**HUTCHISON v. STEVENSON**, (1903) 4 F. 69—[Ct. of Justiciary.  
See No. 51, *infra*.

**45. Demand by Inspector—Refusal—Obstructing Inspector—Sale of Food and Drugs Acts**, 1875 (38 & 39 Vict. c. 63), s. 17,

and 1899 (62 & 63 Vict. c. 51), s. 16.—An inspector asking for a sample of milk under sect. 17 of the Sale of Food and Drugs Act, 1875, is entitled to be supplied in the same manner as the public are being supplied. If a dairyman retailing milk from cans refuses to supply an inspector except from the top of the can instead of from its rim, from which the public are being supplied, he is guilty of an offence against the section; he has not, however, willfully obstructed and impeded the inspector within the meaning of sect. 16 of the Sale of Food and Drugs Act, 1899.

**SOUTAR v. KERR**, [1907] S. C. (J.) 49—[Ct of Justiciary.

**46. Division of Sample—Purchase of Six Bottles of Camphorated Oil—Division of "Article" into Three Parts—Bottles not Opened—Sale of Food and Drugs Act**, 1875 (38 & 39 Vict. c. 63), s. 14.—The appellant, an inspector under the Sale of Food and Drugs Act, 1875, went into the respondent's shop and purchased six bottles of camphorated oil; he divided them into three lots of two bottles, sealing each lot in a separate bag, and handing one of the bags to the respondent, and taking away the others, one for the public analyst and one for retention by himself. He did not open any of the bottles or mix or divide their contents.

**HELD**—that such a manner of dealing with the bottles purchased was not a compliance with the requirements of sect. 14 of the Act, as not one of the bottles was divided into three parts.

**MASON v. COWDARY**, [1900] 2 Q. B. 419; 69 L. J. Q. B. 667; 64 J. P. 662; 49 W. R. 28; 82 L. T. 802; 16 T. L. R. 434—Div. Ct.

**47. Division of Sample—Four Packets of Article Bought—The Contents of the Four Packets Mixed Together and Divided for Analysis—One Purchase—Sale of Food and Drugs Act**, 1875 (38 & 39 Vict. c. 63), s. 14.—An inspector under the Sale of Food and Drugs Acts went to the respondent's shop and asked for cream of tartar. The respondent produced a box labelled "finest cream of tartar, 98 per cent. bicarbonate of potassium, B. P., 1898." The inspector asked for four packets, which were all similar in size, outward appearance, and label, and were taken from the same box. The appellant then mixed the contents of the four packets together, and divided the result into three parts for analysis.

**HELD**—that as the cream of tartar was divided into packets for the purpose of measurement, the mixing together of the contents of such packets, and the division into three parts, was a sufficient compliance with sect. 14 of the Sale of Food and Drugs Act, 1875.

**Mason v. Cowdary** ([1900] 2 Q. B. 419; 69 L. J. Q. B. 667; 64 J. P. 662; 49 W. R. 28; 82 L. T. 802—Div. Ct., *supra*) distinguished.

**SMITH v. SAVAGE**, [1905] 2 K. B. 88; 74

**Sale of Food and Drugs Acts—Continued.**

[L. J. K. B. 576; 69 J. P. 245; 53 W. R. 477; 92 L. T. 775; 21 T. L. R. 424; 3 L. G. R. 582; 20 Cox, C. C. 847—Div. Ct.]

**48. Division of Sample—Sufficiency of each Part for Analysis—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 14, 22.]—**Where an article of food is purchased for analysis each of the three parts into which it must be divided in compliance with the statute, though they need not be exactly equal, must be sufficient to afford an independent analysis.

An inspector purchased  $\frac{1}{2}$  pint of brandy from the appellant, which was divided into three parts. The part sent to the public analyst weighed 5 oz., the part retained by the buyer and subsequently sent to the Government analyst weighed 3 oz. or thereabouts, and the part given to the appellant weighed between  $2\frac{1}{2}$  oz. and 2 oz. The public analyst gave evidence that he could not make an analysis with less than 5 oz., and evidence was given by an analytical chemist on behalf of the appellant that he refused to analyse the part left with the appellant, as it contained less than 3 oz.

**HELD**—that a conviction of the vendor must be quashed.

**LOWERY v. HALLARD**, [1906] 1 K. B. 398; 75 [L. J. K. B. 249; 70 J. P. 57; 54 W. R. 520; 93 L. T. 844; 22 T. L. R. 186; 4 L. G. R. 189, 21 Cox, C. C. 75—Div. Ct.]

**49. Inspector—Sample taken by Inspector at a Place Outside his District—Inspector Acting beyond his Powers—Sale of Food and Drugs Acts, 1875 (38 & 39 Vict. c. 63), ss. 6, 12, 13, 21; and 1879 (42 & 43 Vict. c. 30), s. 3.]—**By the provisions of the Sale of Food and Drugs Act, 1875, it was necessary that there should have been a sale or a contemplated sale of the milk of which samples were taken by an inspector under the Act within his district, and he was only authorised to take samples at the place of sale.

By sect. 3 of the subsequent Act of 1879 an inspector was authorised "to procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk."

**HELD**—that the magistrate was right in refusing to convict the respondent of selling milk found on analysis to contain 21 per cent. of added water, on the ground that the sample had been taken compulsorily by the inspector at a place outside his district, and that in doing so he had acted beyond his powers.

**McNAIR v. CAVE**, (1902) 51 W. R. 112; 19 [T. L. R. 6; [1903] 1 K. B. 11; 72 L. J. K. B. 26; 67 J. P. 50; 87 L. T. 680; 20 Cox C. C. 364—Div. Ct.]

**50. Milk in Course of Delivery—Fair Sample.]—**A farmer, who was under contract

to supply a dairyman with forty gallons of milk daily, in part fulfilment of his contract for a particular day supplied twenty-two gallons of sweet milk contained in three cans, two containing eight gallons each and the third six gallons. The dairyman provided two vessels for the reception of the milk. Into one of these vessels the whole contents of the two eight-gallon cans and four gallons from the six-gallon can—twenty gallons in all—were poured. Into the second vessel the remaining two gallons from the six-gallon can were poured. The vessels having been thus filled an inspector took a sample from each vessel for analysis. When analysed, the sample from the twenty-gallon vessel was found to contain 3.05 per cent. of milk fat, and the sample from the two-gallon vessel 2.8 per cent. of milk fat. By the Board of Trade Regulations, when sweet milk does not contain 3 per cent. of milk fat the presumption is that the milk is not genuine until the contrary is proved. The dairy farmer having been convicted of a contravention of sect. 3 of the Sale of Food and Drugs Act, 1879, in respect of the sample taken from the two-gallon vessel, appealed.

**HELD**—that the sample from the two-gallon vessel was not a fair sample of the original contents of the six-gallon can

**CRAWFORD v. HARDING**, [1907] S. C. (J.) 11— [Court of Justiciary.]

**51. Division of Sample — Production of Sample Retained by Inspector—Condition such that no Analysis Possible—"Sealed and fastened up"—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 14, 21, 22.]—**The respondent, an inspector under the Sale of Food and Drugs Acts, having employed a person to purchase a pint of milk from the appellant, informed the appellant that the milk had been purchased for analysis, and divided the milk into three parts, each of which he poured into a separate bottle. He put a cork in each of the bottles, and upon each cork he placed a seal and on each bottle he also placed a mark. One bottle was given to the appellant, one was sent for analysis to the public analyst, and the third was retained by the respondent. At the hearing of the complaint the certificate of the public analyst was produced, which showed the sample to be deficient in butter fat to the extent of 12 per cent. The appellant did not require that the analyst should be called as a witness. The appellant's solicitor called for the production of the third sample, which, on being produced, showed that the cork had been partly forced out of the bottle owing to the fermentation of the milk, and part of the contents had escaped. The Commissioners of Inland Revenue reported that a satisfactory analysis of the contents was not possible.

**HELD**—that, the sample having been produced in accordance with the Act, if the magistrate found as a fact that it had been properly sealed or fastened up in such man-

**Sale of Food and Drugs Acts—Continued.**

ner as its nature permitted, it was not a condition precedent to a conviction that it must be in such a condition as to be capable of analysis, and it was not incumbent that the sample sent for analysis by the justices under sect. 21 must necessarily be the sample retained by the inspector.

*Hutchison v. Stevenson* (1902) 1 F. (J. C.) 69 Ct. of Sess., No 44, *supra* not followed.

*SUCKLING v. PARKER*, [1906] 1 K. B. 527; 75 [L. J. K. B. 302, 70 J. P. 209, 54 W. R. 438, 94 L. T. 552, 22 T. L. R. 357; 4 L. G. R. 531, 21 Cox, C. C. 145—Div. Ct.

**(e) Warranties**

52. *Adulteration in Transit—Place of Delivery—Warranty given “at the time when the warrantor had reason to believe the statements or descriptions therein were true”—Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), s. 20 (6).]—The respondent, a farmer in the country, supplied milk, with a warranty, to be delivered to the servants of the purchaser in London. The purchaser was summoned for selling adulterated milk, and relied on the warranty. Proceedings were then taken against the respondent under the Sale of Food and Drugs Act, 1899, s. 20, for giving a false warranty. The respondent proved to the satisfaction of the magistrate that at the time when he gave the warranty, when the milk was delivered for transit to the railway company in the country, he had reason to believe that the statements or descriptions contained therein were true, and that the milk had been tampered with in the course of transit.

**HELD**—that the respondent had brought himself within the protection of sect. 20 (6) of the Sale of Food and Drugs Act, 1899.

*OATLEY v. LEMON*, (1905) 69 J. P. 163, 92 L. T. [200; 3 L. G. R. 315; 20 Cox, C. C. 791—Div. Ct.

53. *Adulteration in Transit—Place of Delivery—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), ss. 6, 25.]—The respondent, a milk salesman at West Ham, agreed to buy from a country dairyman “about 16 gallons of pure new milk with all its cream, delivery daily, carriage paid to Wanstead Park Station, properly cooled and in good condition.”

On a certain date covered by the contract, four churns of milk arrived at Wanstead Park Station, consigned to the respondent from a station in Derbyshire, the churns having a label attached stating that the milk was warranted pure new milk with all its cream pursuant to the contract. The churns remained on the platform for about forty-five minutes before they were handed to the respondent's man by the railway company's servant, the latter not having tampered with them in any way. The respondent subsequently sold some of the milk, which upon analysis was found to be deficient in fat. Upon an information

charging the respondent with an offence under sect. 6 of the Sale of Food and Drugs Act, 1875, the justices dismissed the summons.

**HELD**—that the place of delivery was Wanstead Park Station, that there was sufficient evidence that the milk was not tampered with after its arrival at that station, and that the respondent was protected by the warranty.

*SANDERS v. SADLER*, (1907) 71 J. P. 3, 95 L. T. [872, 23 T. L. R. 11, 5 L. G. R. 240—Div. Ct.

54. *Article Purchased under Written Warranty—Terms of Warranty or Agreement—Additional Words—Surplusage—Validity—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 25.]—Sect. 25 of the Sale of Food and Drugs Act, 1875, makes it a good defence for the purchaser to prove that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe, at the time when he sold it, that the article was otherwise, and that he sold it in the same state as when he purchased it.

The addition of the words, “but without accepting any responsibility after delivery” to a warranty, or agreement, otherwise good, do not invalidate it as a ground of defence.

*WILSON v. PLAYLE*, (1903) 67 J. P. 263, 88 L. T. [554; 20 Cox, C. C. 433—Div. Ct.

55. *Evidence in Writing to Connect Particular Consignment with Warranty—General Agreement to supply Milk—Purchase with Reference to such Agreement—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 25.]—Harris, the respondent, sold milk which was not pure milk, and he was summoned for that. He sought to show that he was excused by virtue of sect. 25 of the Sale of Food and Drugs Act, 1875. Long before the sale of this particular milk, he had entered into a contract for the supply of milk for a considerable period in the following terms:—“I, S. S., agree to sell to William Harris 1,000 gallons of milk weekly in such quantities as arranged, the milk to be pure new milk.”

**HELD**—that if the general contract was a warranty the respondent did not purchase the milk sold to the prosecutor with a warranty to the effect that it was the same in nature, substance, and quality as that demanded of him by the prosecutor, and it was not sufficient merely to show that a general agreement had been arrived at, unless it could be shown further that the particular article in question had been bought with and in reference to such an agreement, but there must be some written evidence to show that the particular article was bought under and with the warranty contained in the general contract.

**Sale of Food and Drugs Acts—Continued.**

ROBERTSON v. HARRIS, [1900] 2 Q. B. 117, 69 [L. J. Q. B. 526; 64 J. P. 565; 48 W. R. 571; 82 L. T. 536; 16 T. L. R. 343—Div. Ct.]

See No 56, *infra*.

56. *General Agreement to Supply Milk—Purchase with Reference to such Agreement—Connection by Evidence—Future Successive Deliveries—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 9, 25*—The respondent obtained from his vendors a written warranty in the following terms: "We hereby warrant that each and every supply of milk sent by us to you shall be new milk, unadulterated, and with all its cream." The milk actually sold by the respondent to the appellant was milk delivered to him by his vendors under the contract to which the warranty applied. The question arose whether the respondent had brought himself within the protection of sect. 25 of the Sale of Food and Drugs Act, 1875.

HELD—that it sect. 25 of the Sale of Food and Drugs Act, 1875, applied to the case, there was a warranty in writing which brought the respondent within its protection, that the warranty applied to the milk sold by the vendors to the respondent, that it was not necessary to show on the face of the warranty that it applied to the particular milk sold, and that it was enough to show the connection by evidence, that the statute requires no specific warranty with each delivery of milk, but merely that it be sold with a warranty, and that the warranty once given applies to successive deliveries of milk after the date of its being given and need not be repeated with each delivery, i.e., it applies equally to milk to be delivered under it as to milk already delivered under it.

Harris v. May ([1883] 12 Q. B. D. 97, 53 L. J. M. C. 39, 48 J. P. 261—Div. Ct.) dissented from.

Laidlaw v. Wilson ([1894] 1 Q. B. 74, 63 L. J. M. C. 35; 58 J. P. 58, 42 W. R. 78, 10 T. L. R. 18, 10 R. G.—Div. Ct.) followed.

Robertson v. Harris ([1900] 2 Q. B. 117; 69 L. J. Q. B. 526, 64 J. P. 565, 48 W. R. 571, 82 L. T. 536; 16 T. L. R. 343—Div. Ct., *supra*) not followed.

ELLIOT v. PILCHER, [1901] 2 K. B. 817; 70 [L. J. K. B. 795; 65 J. P. 743; 85 L. T. 50, 17 T. L. R. 579—Div. Ct.]

See No 57, *infra*.

57. *Written Warranty in General Terms—Application of Warranty to Subsequent Deliveries, not Specifically Connected with Warranty—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25*—On December 28th, 1905, S sold to W. one pint of new milk, which contained 16 per cent. of added water. This milk had been supplied to S. by M. under a contract of sale, made in or about August, 1905. On August 5th, 1905, after the making of the contract, but before the delivery of any milk thereunder, M. gave S. the

following letter: "I guarantee that the milk supplied by me to Mr. S. is perfectly pure, and with all its cream as the cow gives it." Both M. and S. intended this to be a continuing warranty.

HELD (Ridley, J., dissenting)—that the warranty of August 5th, 1905, was not a warranty of the milk sold on December 28th within the meaning of sect. 25 of the Sale of Food and Drugs Act, 1875, as there was no evidence in writing to connect the consignment of milk, which contained the milk retailed, with the warranty given in August.

Harris v. May ([1883] 12 Q. B. D. 97, 53 L. J. M. C. 35, 48 J. P. 261—Div. Ct.) followed.

Elliot v. Pilcher ([1901] 2 K. B. 817, 70 L. J. K. B. 795, 65 J. P. 743, 85 L. T. 50—Div. Ct., *supra*) not followed.

WATTS v. STEVENS, [1906] 2 K. B. 323; 75 [L. J. K. B. 828, 70 J. P. 418; 95 L. T. 200, 22 T. L. R. 622, 4 L. G. R. 821, 21 Cox, C. C. 230—Div. Ct.]

58. *Evidence in writing to Connect Particular Consignment with Warranty—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 9, 25*—In October, 1905, the appellant, a dairyman, contracted with a dairy company to purchase from them the whole of the milk required for his dairy for twelve months, all the milk being warranted pure with all its cream as received from the cow. In June, 1906, a consignment of milk was delivered to the appellant by the dairy company under the contract with a delivery note giving the date and the name of the dairy company as consignors. A portion of the consignment was sold to the respondent, and on analysis was found to be deficient in milk fat to the extent of 28 per cent. On a prosecution of the appellant under sect. 9 of the Sale of Food and Drugs Act, 1875, for selling the milk in its altered state, the appellant relied on the contract of October, 1905, as a warranty within sect. 25.

HELD—that as by the terms of the contract the appellant was to take all his milk from the dairy company in question, there was a sufficient connection in writing between the particular consignment and the warranty to constitute the warranty a defence.

Watts v. Stevens ([1906] 2 K. B. 323; 75 L. J. K. B. 828, 70 J. P. 418, 95 L. T. 200, 22 T. L. R. 622, 4 L. G. R. 821—Div. Ct., *supra*) discussed.

EVANS v. WEATHERITT, [1907] 2 K. B. 80; 76 [L. J. K. B. 628, 71 J. P. 228, 96 L. T. 641, 23 T. L. R. 424, 5 L. G. R. 608—Div. Ct.]

59. *False Warranty—Prosecution for Giving—Guilty Intent—Necessity of Showing—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 27*—To constitute the offence under sect. 27 of the Sale of Food and Drugs Act, 1875, of giving a false warranty in writing to a purchaser in respect of an article of food, guilty knowledge is necessary, and to convict a person under the section it is neces-

**Sale of Food and Drugs Acts—Continued.**

sary to show that such person when he gave the warranty knew that the warranty was false.

**DERBYSHIRE v. HOULISTON**, [1897], 1 Q. B. 772; [18 Cox C. C. 609; 61 J. P. 374; 66 L. J. Q. B. 569; 76 L. T. 624; 13 T. L. R. 377; 45 W. R. 527—Div. Ct.]

**60. False Warranty—Original Vendor—Sub-Purchaser—Time Within which Complaint against Original Vendor must be Made—Six Calendar Months from Date of Selling Goods upon the False Warranty—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20—Sale of Food and Drugs Act, 1879 (42 & 43 Vict. c. 30), s. 10—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19, s. 20, sub-s. 6—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11]**—On November 20th, 1900, the respondents, wholesale grocers, sold to a retail dealer certain pepper, with a written warranty that it was genuine white pepper. On May 16th, 1901, the retail dealer sold some of the pepper to a sergeant of police, who submitted it for analysis, when it was found to contain 10 per cent. of bleached pepper-husks. On July 6th, 1901, an information was laid against the respondents, charging them, under sect. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, with having given, on May 16th, to the purchaser a false warranty in writing, stating the pepper to be genuine white pepper.

**HELD**—that the proceedings, having been taken more than six months after the written warranty was given, were too late.

**WHITAKER v. POMFRET BROTHERS**, [1902] 1 K. B. [661; 71 L. J. K. B. 353, 66 J. P. 408, 50 W. R. 393, 86 L. T. 420; 18 T. L. R. 355, 20 Cox, C. C. 180—Div. Ct.]

**61. False Warranty—"Reason to Believe that the Statements and Descriptions Contained Therein were True"—Offence Outside Jurisdiction—Purchase not for Analysis—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 25, 27—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, sub-ss. 5, 6]**—The appellant, a farmer in Wiltshire, sent a churn of milk to London consigned to the G. W. & M. Dairies Company at Paddington Station, where it was received by them. The churn had a label attached containing the words "warranted pure with all its cream," which was removed by the Dairies Company at the station. The churn was delivered by the Dairies Company, unopened, and in the same state as when they received it, to one D., a milk-seller at Shepherd's Bush, in the county of London. D.'s servant was summoned by the respondent—an inspector—before the justices at Brentford for selling adulterated milk, and gave notice to the respondent under sect. 25 of the Sale of Food and Drugs Act, 1875, as amended by sect. 20, sub-sect. 4, of the Sale of Food and Drugs

Act, 1899, and also to the Dairies Company, that he intended to rely on the written warranty of the Dairies Company, but no such notice was given to the appellant. The summons against D.'s servant was dismissed upon the ground that he was entitled to the protection of sect. 25 of the Act of 1875, as amended by sect. 20, sub-sect. 4, of the Act of 1899. The Dairies Company were then summoned before the justices of Brentford under sect. 27 of the Act of 1875, as amended by sect. 20, sub-sect. 6, of the Act of 1899, for having given a false warranty to D., and the Dairies Company thereupon gave notice to the respondent and to the appellant that they intended to rely on the warranty given by the appellant. The summons was dismissed upon the same ground as the summons against D.'s servant was dismissed. The appellant was then summoned before the justices of Brentford under sect. 27 of the Act of 1875, as amended by sect. 20, sub-sect. 6, of the Act of 1899, for having given a false warranty to the Dairies Company in respect of the milk sold by him to the company.

**HELD**—That sect. 20, sub-sect. 5, of the Act of 1899 did not apply, as the Dairies Company did not purchase for analysis, and sect. 25 of the Act of 1875 dealt with the special individual who sold the milk to the prosecutor; that the defence of the Dairies Company really was that they "had reason to believe that the statements and descriptions contained therein were true," and not that the article in question was purchased with a written authority, that the warranty was given and the milk was sold to the Dairies Company outside the jurisdiction of the Court, and that the Brentford justices had no jurisdiction to entertain the proceedings against the appellant.

**MANNERS v. TYLER**, [1902] 1 K. B. 901; 71 [L. J. K. B. 585; 66 J. P. 806, 40 W. R. 604; 86 L. T. 716, 20 Cox, C. C. 222—Div. Ct.]

**62. Importation of Adulterated Butter not so Marked—Defence of Warranty—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), ss. 1, 20 (3), 25, 28.]**—Where a defendant is charged under sect. 1 (1) of the Sale of Food and Drugs Act, 1899, with importing adulterated butter in packages not conspicuously marked with a name or description indicating that the butter has been so treated, he cannot rely upon a warranty of purity received by him from the foreign vendor.

The defence of warranty is only open to a person charged with selling adulterated goods in the United Kingdom.

**KELLY v. LONSDALE**, [1906] 2 K. B. 486, 75 [L. J. K. 822; 70 J. P. 441, 95 L. T. 427; 22 T. L. R. 685; 4 L. G. R. 949—Div. Ct.]

**63. Preservative Added—"Sold in the Same State as when Purchased"—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.]**—The respondent was summoned for

**Sale of Food and Drugs Acts—Continued.**

selling milk which was deficient in fat to the extent of at least 3 per cent., and contained added water to the amount of 5.2 per cent. He relied on a warranty under which he bought the milk by virtue of sect. 25 of the Sale of Food and Drugs Act, 1875, but admitted that he had added one ounce of milk preservative to each ten gallons of milk.

HELD—that the respondent could not rely on the warranty as a defence, as he had not sold the milk “in the same state as when purchased.”

HENNEN *v.* LONG, (1904) 68 J. P. 237; 90 L. T. 387; 20 Cox, C. C. 608—Div. Ct.

64. *Prior Correspondence as to or Verbal Agreement to give—Labels on Churns—“Pure New Milk with all its Cream”—“A Copy of such Warranty”—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, sub-s. 1.]*—To bring the respondents—vendors of milk—within sect. 25 of the Sale of Food and Drugs Act, 1875, it is necessary for them to prove that there was a purchase by them under a warranty which justified the resale. There might be correspondence respecting the warranty or a verbal contract to give a warranty and a subsequent delivery of the milk in churns on each of which there was written “Pure new milk with all its cream.” In such a case a copy of the label constitutes “a copy of such warranty” within sect. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899.

IRVING *v.* CALLOW PARK DAIRY CO., LD; [BACON *v.* CALLOW PARK DAIRY CO., LD, (1902) 66 J. P. 804; 87 L. T. 70; 18 T. L. R. 573, 20 Cox, C. C. 295—Div. Ct.

65. *Sale by Retail—Warranty from Wholesale Dealer—Notice—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—Margarine Act, 1887 (50 & 51 Vict. c. 29), ss. 3, 7—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20.]*—The appellant was summoned on October 26th, 1903, for selling butter not of the nature, substance and quality demanded of him. He did not deny the correctness of the analyst's certificate showing an excess of water in the butter, but relied for his defence upon a warranty with which he purchased the butter in question from a wholesale dealer. On November 2nd the appellant gave notice of such defence to the respondent in the following terms: “With reference to the summons of . . . we beg to give you formal notice that our client purchased the same butter with a written warranty from George Little, Ltd., general provision merchants, of 84, Corporation Street, Manchester. The following is a copy of the warranty in question: ‘We guarantee all butter sold by us to be absolutely pure. Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887.’ The defendant

sold the butter in question in the same state as purchased, and at the time when he sold it had no reason to believe that it was otherwise. The defendant intends to rely on the foregoing as a defence to this summons.”

It appeared that the appellant had been dissatisfied with the guarantee, and after the butter had been delivered, but before the sale to the respondent, had taken it to the wholesale house, who added the concluding words: “Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887. In case of samples being taken for analysis, show this warranty to the inspector.”

HELD—that the notice was a good one, in spite of the addition of the concluding words, and the appellant was entitled to rely on the warranty.

FARTHING *v.* PARKINSON, (1904) 68 J. P. 353; [90 L. T. 783, 20 Cox, C. C. 661—Div. Ct.

66 *Sale by Retail—Warranty Given to Middleman by Producer—Whether Retailer Can Rely on—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.]*—A retailer cannot rely upon a written warranty given to the middleman by the producer, at any rate unless the middleman agrees in writing to give him the benefit of such warranty.

The respondent, a milkman, contracted with a wholesale firm for “a supply of genuine milk as received from farmers.” There was also this clause in the agreement: “It is fully understood that this agreement is for milk as received from the farmers, that no warranty is hereby implied, and that the buyer must satisfy himself of its quality before it is accepted by him.” The farmer gave a written warranty to the wholesale firm. On an information against the respondent by the appellant for selling to him milk from which 23 per cent. of fat had been abstracted,

HELD—that the respondent could not rely on sect. 25 of the Act of 1875, because the warranty given by the farmer to the wholesale company was not a warranty to him.

HARGREAVES *v.* SPACKMAN, (1907) 98 L. T. 41; 72 J. P. 52; 6 L. G. R. 145; 24 T. L. R. 173—Div. Ct.

**II. SALE OF UNSOUND MEAT.**

*And see title PUBLIC HEALTH.*

**(a) Generally.**

67. *Condemnation by Justice—Damage Sustained by Owner—Jurisdiction of Arbitrator—“Full Compensation”—Value of Meat and Expenses—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117, 308.]*—Meat was seized by an inspector of nuisances of the local authority as unsound, and condemned by a justice under sects. 116 and 117 of the Public Health Act, 1875. The owner of the meat was thereupon summoned for an offence under sect. 117, but the magis-

**\*Sale of Unsound Meat—Continued.**

trates dismissed the summons upon an objection to its form, without inquiring into the merits. The owner of the meat claimed compensation, to be settled by arbitration, under sect. 308, for damage sustained by him by reason of the exercise by the local authority of the powers of the Act; and the arbitrator found that the meat was, at the time of its condemnation, sound and fit for the food of man, and he included in the damage sustained by the owner of the meat the loss of the carcase, and the expenses of and incidental to the seizure and in defending himself before the magistrates. In an action on the award the judge refused to admit evidence that the meat was unsound at the time it was condemned, and gave judgment for the amount claimed.

**HELD**—that the question of the soundness of the meat at the time of its condemnation was a question of fact for the arbitrator to determine, and his finding could not be reversed in the action.

**HELD ALSO**—that the “full compensation” to which the owner of the meat was entitled would include the value of the meat and the expenses incurred by him in connection with the seizure and in defending himself before the magistrates.

**WALSHAW v. BRIGHOUSE CORPORATION**, [1899] 2 [Q. B. 286, 68 L. J. Q. B. 828, 47 W. R. 600; 81 L. T. 2; 15 T. L. R. 403—C. A.]

**68. Condemnation by Justice — Damage Sustained by Owner—“Full Compensation” Value of Meat—Expenses—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117, 308.]** Upon an arbitration under sect. 308 of the Public Health Act, 1875, the sole matters to be settled by the arbitrators and the umpire are the fact that damage was suffered and the amount of compensation for such damage.

The cost of expenses incurred by reason of the prosecution should not be included in the compensation to be awarded.

**RE DAVIES AND RHONDA URBAN DISTRICT [COUNCIL]**, (1899) 80 L. T. 696—Div. Ct.

**69. Deposited for Sale—Intended for the Food of Man—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117.]**—On a Monday morning, the respondent, a medical officer of health, visited the shop of the appellant, a butcher, which was being cleansed, there being one customer in the shop. The inspector found a safe in the shop which was closed, on being opened it was found to contain, besides a quantity of sound meat, some pieces which showed signs of decomposition. It was proved that the safe had not been opened since midnight on the preceding Saturday, and that in the ordinary course of business the meat would have been examined after the shop was cleansed before setting it out for sale.

**HELD**—that there was no evidence that the

meat was deposited for sale and was intended for the food of man.

**WIELAND v. BUTLER-HOGAN**, (1904) 78 L. J. K. B. [513; 68 J. P. 810, 53 W. R. 63, 90 L. T. 588; 20 T. L. R. 419, 20 Cox, C. C. 630—Div. Ct.]

**70. Destruction of Unsound Meat Without Order of a Justice—Liability of Local Authority—Public Health Act, 1875, ss. 116, 117.]**—An assistant inspector of nuisances acting under the directions of the medical officer of health of the borough appointed under sect. 11 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), seized a certain quantity of unsound meat exposed for sale and intended for the food of man, and caused the same to be destroyed without an order of a justice of the peace obtained in that behalf.

**HELD**—by Bruce, J., on further consideration, that the seizure and subsequent destruction were improper, and the corporation of the borough were liable to damages for the wrongful acts of their servants.

**ORMEROD v. ROCHEDALE CORPORATION**, (1898) 62 [J. P. 153—Bruce, J.]

**71. Exposure for Sale — Veterinary Surgeon's Negligence in Giving Certificate—Aiding and Abetting—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 117.]**—Justices found that a veterinary surgeon had been guilty of negligence in giving a certificate as to a carcase being sound and healthy, and that such negligence had in fact caused the exposure of unsound meat for sale, and that he thereby abetted a butcher in exposing the same for food of man, and they convicted him.

**HELD**—that as all that the justices had found against the surgeon was negligence they could not convict him of aiding and abetting the commission of the offence upon such a finding.

**CALLOW v. TILLSTONE**, (1901) 64 J. P. 823; 83 [L. T. 411; 19 Cox, C. C. 576—Div. Ct.]

**72. “Exposure for Sale”—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28.]**—A cow, the property of a farmer in the country, had been killed and dressed when at the point of death from inflammation. The appellant, knowing the circumstances, had purchased the diseased carcase, and arranged with a meat salesman carrying on business at H. to consign it to him for sale, and the appellant deposited the carcase on the premises of the meat salesman for the purpose of sale and intended for the food of man. The meat was seized at that place by the respondent, an inspector of nuisances, and subsequently condemned. The appellant was convicted by the stipendiary magistrate.

**HELD**—that as there had been no exposure for sale by the appellant, but only a deposit

**Sale of Unsound Meat—Continued.**

for purposes of sale upon premises other than his own, he could not be convicted under sect. 117 of the Public Health Act, 1875, which was not affected by sect. 28 of the Public Health Acts Amendment Act, 1890, and that accordingly the conviction must be quashed.

*Barlow v. Terrett* ([1891] 2 Q. B. 107; 60 L. J. M. C. 104, 55 J. P. 632, 39 W. R. 640, 65 L. T. 148—Div. Ct.) followed.

*FIRTH v. M'PHAIL*, [1905] 2 K. B. 300; 74 L. J. K. B. 458, 69 J. P. 203, 92 L. T. 567; 21 T. L. R. 403; 3 L. G. R. 478; 20 Cox, C. C. 821—Div. Ct.

**73. Summons Issued by One Magistrate—Hearing by a Different Magistrate who Condemns the Meat—Application for a Case to be Stated—Certiorari—Town's Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 131.]**—Where under sect. 131 of the Town's Improvement Clauses Act, 1847, a magistrate condemns meat brought before him as unfit for human food, a summons in respect thereof may be issued by another magistrate, though the magistrate who adjudicates upon the summons must be the magistrate who condemned the meat.

Where an application to a magistrate to state a case has been granted, the Court will not exercise its discretion by making a rule for a *certiorari*.

*REX v. THOMAS*, (1902) 18 T. L. R. 71—Div. Ct.

**(b) In London.**

**74. Prosecution by Sanitary Inspector "on Behalf of Sanitary Authority"—No Express Authority—Right of Private Individual to Prosecute—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 47 (2), 107, 123.]**—The respondent, a sanitary inspector, purporting to act on behalf of the borough council, the sanitary authority, laid an information under sect. 47 (2) of the Public Health (London) Act, 1891, against the appellant for having on his premises unsound meat intended for the use of man. The respondent had no express authority from the sanitary authority.

**HELD**—that a private individual may take proceedings under that section. that, therefore, it was unnecessary for a sanitary inspector to have the express authority of the sanitary authority, and that the words in the information "on behalf of the borough council" could be rejected as mere surplusage.

*GIEBLEE v. MANNING*, [1906] 1 K. B. 709, 75 L. J. K. B. 463; 70 J. P. 181; 54 W. R. 527; 94 L. T. 580, 22 T. L. R. 416; 4 L. G. R. 561, 21 Cox, C. C. 160—Div. Ct.

**75. Taken by Inspector from Shop of Retail Butcher—Finding of Magistrate that there had been no Exposure for Sale—Proceedings against the Original Vendor—"Liable to be Seized"—Public Health**

(London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (1) (2) (3)]—The appellant, an inspector, found hanging in the doorway of a retail butcher some diseased meat, which was taken away by him and subsequently destroyed by order of a magistrate. It was found as a fact by the magistrate that the meat was not exposed for sale, and would not have been sold until it had been passed by the inspector. It had very shortly before the visit of the inspector been brought by the respondent, a wholesale dealer. In a summons against the respondent for an offence under sect. 47 (3) of the Public Health (London) Act, 1891,

**HELD**—that the words "liable to be seized" in that sub-section mean "*prima facie* liable to be seized at the time of the sale by the wholesale dealer by reason of its condition," and that it is not necessary that it should have been sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, by the person who had bought it from the original vendor.

*R. v. DENNIS* ([1894] 2 Q. B. 458; 63 L. J. M. C. 153; 58 J. P. 622; 42 W. R. 586; 71 L. T. 436—C. C. R.) discussed.

*GRIVELL v. MALPAS*, [1906] 2 K. B. 32; 75 L. J. K. B. 647; 70 J. P. 334, 95 L. T. 123; 22 T. L. R. 515, 4 L. G. R. 668, 21 Cox, C. C. 220—Div. Ct.

**III. SALE OF BREAD.**

**76 Sale—Otherwise than by Weight—Irish Bread Act.]**—By 1 & 2 Vict. c. 28, s. 4, all bread sold in Ireland must (with certain exceptions) be sold by weight only and not by measure.

To satisfy these requirements, the bread must be actually weighed as bread before or at the time of sale. It is not sufficient to show that the dough was cut by a machine into pieces calculated, when baked, to weigh a certain number of pounds.

*SLATER v. BREWSTERS*, [1905] 2 Ir. R. 258—[K. B. D.]

**77. Sale otherwise than by Weight—Two-penny Loaf—3 Geo. 4, c. cvi. s. 4.]**—An inspector in the employment of the appellants sent a person to the shop of the respondent. The messenger asked for a 2d. loaf, and was served by the respondent with a loaf similar in shape and appearance to a cottage loaf usually sold at 2d. The loaf was not weighed by any one in his presence, and nothing was said as to its weight. It was subsequently weighed by the inspector, and found to weigh some 2 ozs. less than 2 lbs.

**HELD**—that this was a selling of bread contrary to 3 Geo. 4, c. cvi. s. 4.

*LONDON COUNTY COUNCIL v. READ*, [1900] 1 Q. B. 288; 69 L. J. Q. B. 39; 63 J. P. 774; 48 W. R. 393; 81 L. T. 452; 16 T. L. R. 14—Div. Ct.



**Sale of Bread—Continued.**

78. *Sale Otherwise than "by Weight"—True Weight not Ascertained*—3 Geo. 4, c. cvi. s. 4 ]—The true weight of the quantity of bread sold for a particular price must be ascertained, either before it is sold or exposed for sale, or else, if necessary, in the presence of the purchaser. A baker, upon being asked for a half-quarter loaf of bread, put a loaf into a weighing scale, there being already a 2-lb. weight in the other scale. The loaf did not move the beam. It was then handed to the purchaser. The loaf when weighed subsequently was found to weigh 5 ozs. short of 2 lbs.

HELD—that there was no evidence that the bread had been weighed at all, or that its weight had been ascertained, or that it had been sold "by weight" within sect. 4 of the London Bread Act, 1822, and that the seller was liable to be convicted.

COX v BLEINES, [1902] 1 K B 670, 71 [L. J. K B 437, 66 J. P. 407, 50 W. R. 392, 86 L. T. 563, 18 T. L. R. 356, 20 Cox, C C 188—Div. Ct.

79. *Sale Otherwise than by Weight—Loaves Weighing Approximately Two Pounds—Sold as One Pound and Three-quarters—Each Loaf Tested in Scales as Exceeding that Weight—Bread (Sale in London) Act, 1822 (3 Geo. 4, c. 106), ss 4, 5 ]*—In order to comply with the provisions of the Bread Act, 1822, which prohibit the sale of bread otherwise than by weight within ten miles of the Royal Exchange, it is sufficient to ascertain that the weight of a loaf is above the weight professed to be sold without ascertaining its exact weight.

*Dictum* of Channell, J., in *Cox v. Bleines* ([1902] 1 K B 670, 71 L. J. K B 437; 66 J. P. 407; 50 W. R. 392, 86 L. T. 563, 18 T. L. R. 356—Div. Ct., *supra*) approved and followed.

BRIDGE v. PASSMAN, (1904) 68 J. P. 129—[Div. Ct.

80. *Sale Otherwise than by Weight—Each Loaf must be Weighed by Itself—Bread Act, 1836 (6 & 7 Will. 4 c. 37), s. 4 ]*—A person went to the respondent's shop and asked for a loaf of bread. He was served with a loaf, for which he paid 3d and which purported to be a 2lb loaf. It was then weighed and found to be  $\frac{1}{2}$  oz. deficient in weight. The respondent proved he had weighed all the loaves baked that morning, three at a time, and all the batches weighed 6 lb., and that the loaf in question had been so weighed.

HELD—that the loaf had not been properly weighed, as the weighing must be such as to show the weight of each particular loaf sold to the customer.

WELCH v. CUTLER, (1905) 69 J. P. 149, 92 L. T. [239; 3 L. G. R. 282, 20 Cox, C. C. 809—Div. Ct.

**IV. MARGARINE.**

81. *Analyst's Certificate—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19 (2)—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3 ]*—A defendant was charged with selling to the prosecutor's prejudice as butter, "an article or quantity of material of the weight of 1 lb., or thereby, which was not of the nature, substance and quality of butter, but was margarine"; the complaint further alleged "that the said article or quantity of material, or sample of said parcel of margarine" was analysed by a public analyst and "certified by him to be of the nature labelled." The certificate, a copy of which was served with the complaint, certified that the article was "not of the nature, substance, and quality of butter," and gave particulars of the analysis, but did not say that the article was "margarine."

HELD—(1) that it was not necessary to set out the particulars of the analysis in the complaint, and (2) that the use in the complaint of the word "margarine" was mere surplusage, and did not invalidate it.

WILSON v M'LAUGHLIN, [1907] S. C. (J.) 61—[Ct. of Justiciary.

82. *Branding—Labelling—"Package"—"Parcel"—Butt of Margarine—Small Quantity taken therefrom for Sale—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6 ]*—On the counter of the defendant's shop was a butt of margarine with the lid removed, but "branded" as required in the case of a "package" containing margarine by sect. 6 (1) of the Act of 1887.

An assistant, asked for a pound of margarine, took that quantity from the butt and sold it.

HELD—that the defendant was liable to be convicted under sect. 6 (2), for the margarine in question ought to have been "labelled," as it came within the words "and if such margarine be exposed for sale by retail, there shall be attached to each 'parcel' thereof . . . a label . . ."

MAGUIRE v. PORTER, [1905] 2 Ir. R. 147—[K. B. D.

83. *Branding—Package Containing Margarine Sold by Dealer in Margarine—Tub Containing Margarine behind the Counter—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6 ]*—By sect. 6 of the Margarine Act, 1887. "Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations: Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'margarine' on the top, bottom, and sides . . ."

A tub open at the top, placed at the back of the counter of a shop in full view of anyone entering the shop and containing margarine, which is scooped from the tub for delivery to customers, is a package containing margarine within the meaning of sect. 6, and must be marked accordingly.

*Margarine—Continued.*

McNAIR v. HORAN, (1904) 68 J. P. 518, 91 L. T. 553; 20 Cox, C. C. 279—Div. Ct.

84. *Branding—"Parcel"—Pyramid of Six Margarine Pats with One Label—One "Parcel" or Six—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6.*—Separate pats of margarine exposed for sale by retail, each partly wrapped in paper, with no common wrapper or fastening, may form a "parcel" within the meaning of sect. 6 of the Margarine Act, 1887, and so require only one label.

PARKINSON v. McNAIR, (1905) 69 J. P. 399; 93 [L. T. 553; 3 L. G. R. 982; 21 Cox, C. C. 42—Div. Ct.

85. *Excess of Water—Sale not of Nature, Substance, and Quality demanded—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Margarine Act, 1887 (50 & 51 Vict. c. 29).*—The respondent purchased at the appellants' shop a pound of margarine for 6d. The margarine was analysed, and the certificate of the analyst stated: "Water, 21 per cent. (and this was at least 5 per cent. in excess of the amount of water which margarine should contain)." Upon an information charging the appellants with selling margarine not of the nature, substance, and quality demanded by the respondent, the analyst gave evidence that, in his experience, margarine should contain less moisture than butter, but that in his certificate he had allowed the same *maximum* of water for the margarine as was allowed in butter, viz., 16 per cent. The justices convicted the appellants on the ground that the water in the margarine was excessive.

HELD—that there was evidence to justify the conviction.

BURTON & SONS v. MATTINSON, (1902) 66 J. P. 628; 86 L. T. 770; 18 T. L. R. 545; 20 Cox, C. C. 262—Div. Ct.

86. *Fancy Name—Margarine Sold as "Marvo" and as Margarine—Sale of Substance under a Name other than the Name of Margarine—Margarine Act, 1887 (50 & 51 Vict. c. 29), ss. 3, 6.—Sale of Food and Drugs Act, 1889 (62 & 63 Vict. c. 51), s. 6 (2).*—If a butter substitute is sold as margarine, and all the conditions of the Sale of Food and Drugs and Margarine Acts are complied with, it can at the same time be sold under a fancy name, such as "Marvo," and such a sale does not constitute an offence under sect. 3 of the Margarine Act, 1887.

TANNER v. DYBALL, (1906) 70 J. P. 279; 94 L. T. 539; 4 L. G. R. 506—Div. Ct.

87. *Fancy Name—Margarine Sold under Fancy Name—Selling under a Name other than Margarine—"Keeloma" Asked for and Received—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3.*—P. asked for half a pound of "keeloma," and was served with a substance wrapped in butter paper with no label or

printing upon it. P. paid 4½d. Nothing was said by the salesman and P. did not see the bulk from which the substance was taken, and she did not see it wrapped up.

Two notices were displayed in the shop: (i) "If you ask for butter you will be served with one of our new butter substitutes," and (ii) "Only keeloma and overweight, the new butter substitutes, sold here, and to comply with the provisions of the Food and Drugs Acts, 1875 and 1899, are sold under the name of 'margarine'."

On the packet being opened it was found that underneath the brown paper was a second wrapper of paper with the word "margarine" printed on it as required by the Margarine Act, 1887, and the Food and Drugs Act, 1899. On the substance itself was a small label with the words: "Ninepence. Keeloma, the only perfect substitute for butter." P. knew that the substance was, what in fact it was, margarine.

On a prosecution for selling by retail a parcel of margarine under a name other than margarine, to wit the name of "keeloma," contrary to the Margarine Act, the justices overruled the contention of the appellants that, "having regard to the notices displayed in the shop, the parties had knowledge that they were in fact buying margarine, and that the paper wrapper underneath the brown paper, being printed as required by the Act, the provisions of the Act as to the sale of margarine had been duly complied with," and found as a fact that the substance was sold as "keeloma," and convicted the vendors. On appeal it was

HELD—that there had been no offence and that the conviction must be quashed.

Tanner v. Dyball (*supra*) followed.

KEELOMA DAIRY Co., LD. v. JONES, (1906) 70 [J. P. 533; 22 T. L. R. 535; 5 L. G. R. 246—Div. Ct.

88. *Importation of Margarine not Marked Margarine—Conviction—Whether Right of Appeal—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), ss. 1, 25.*—There is no appeal to quarter sessions from a summary conviction under sect. 1 of the Sale of Food and Drugs Act, 1899, for importing margarine except in packages conspicuously marked margarine, since by sect. 1 (2), "subject to the provisions of this Act . . . this section shall have effect as if it were part of the Customs Consolidated Act, 1876."

Bray, J., dissented from the judgment of the Court, being of opinion that sect. 25 of the Sale of Food and Drugs Act, 1899, which provides that "unless the context otherwise requires . . . an offence under this Act shall be treated as an offence under those Acts," gave such an appeal.

REX v. OTTO MONSTED, LD., [1906] 2 K. B. 456; [75 L. J. K. B. 629; 70 J. P. 435; 95 L. T. 526; 4 L. G. R. 942—Div. Ct.

**Margarine—Continued.**

89. *Purchase with Written Warranty—Sale in same State—Proceedings against Wholesale Vendors—Evidence—Certificate of Analyst—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), ss. 6, 14, 21, 25—*Margarine Act, 1887* (50 & 51 Vict. c. 29), ss. 6, 7, 12.]—Proceedings were taken against L., a retail dealer, under sect. 6 of the Sale of Food and Drugs Act, 1875, and sect. 6 of the Margarine Act, 1887, at the hearing he escaped conviction under the former Act, because he was able to show under sect. 25 that he had purchased the article with a written warranty, and had sold it in the same state as when he purchased it, which is a sufficient defence to a charge under that Act; the charge under the Act of 1887 was then abandoned. An information was then laid against the respondents, the wholesale firm from whom L. had purchased the article, and a summons under sect. 6 of the Margarine Act issued against them in the ordinary course. In the course of the hearing the same certificate of the public analyst which had been used in the prosecution of L. was tendered as evidence that the article sold by the respondents was margarine, but it was rejected.

HELD—that the certificate was not evidence against the respondents, who were entitled to strict proof that the article sold was margarine.

TYLER v. KINGHAM AND SON, LD., [1900] 2 Q. B. [413; 69 L. J. Q. B. 630; 64 J. P. 598, 83 L. T. 169; 16 T. L. R. 394—Div. Ct

90. *Register—Examination by Inspector—Right of Inspector to take Notes of Entries in Register—Sale of Food and Drugs Act, 1899* (62 & 63 Vict. c. 51), s. 7, sub-s. (1) and (3) (b)]—The power of inspection conferred upon an officer of the Board of Agriculture by sect. 7 of the Food and Drugs Act, 1899, entitles the officer to make notes of the contents of the register, and a refusal to permit the officer so to make notes is a contravention of the statute (sect. 7 (3) (b)), and a prosecution may proceed against a party so refusing.

HART v. COHEN AND VAN DER LAAN, (1902) 4 F [445—Ct. of Sess., 2nd Div

91. *Selling to Prejudice of Purchaser Article of Food not of Nature Demanded—Standard for Margarine to be fixed by the Court—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 6—*Margarine Act, 1887* (50 & 51 Vict. c. 29), s. 3 ]—On an information under sect. 6 of the Sale of Food and Drugs Act, 1875, for unlawfully selling to the prejudice of a purchaser a certain article of food—margarine—not of the nature, substance, and quality demanded by the said purchaser, the justices found as a fact that there was a sale to the prejudice of the purchaser, as they were of opinion that the article sold was not of the nature, substance, and quality demanded, the evidence before

them proving to their satisfaction that margarine as usually sold contained at least 85 per cent. of fat, and they convicted the defendant. It appeared that the margarine sold contained only 75 15 per cent. of fat.

HELD—that as there is no statutory standard for margarine, the justices on such an information must fix for themselves a standard for margarine, based upon the evidence before them.

HELD ALSO (Lord Alverstone, C.J., dissenting)—that there was evidence before the justices on which they could come to the conclusion that margarine as usually sold contained at least 85 per cent. of fat.

BURTON & SONS v. MATTINSON ((1902) 66 J. P. 628, 86 L. T. 770—Div. Ct., No. 85, *supra*) and WILSON and M'PHEE v. WILSON ((1904) 68 J. P. 175—Ct. of Sess., No. 15, *supra*) followed.

ROBERTS v. LEEMING, (1905) 69 J. P. 417; 3 [L. G. R. 1031—Div. Ct.

**FORBEARANCE.**

See CONTRACT; GAMING AND WAGERING.

**FORCIBLE ENTRY AND DETAINER.**

See LANDLORD AND TENANT.

**FOREIGN ATTACHMENT.**

See PRACTICE AND PROCEDURE.

**FOREIGN ENLISTMENT.**

See CRIMINAL LAW.

**FOREIGN JUDGMENT.**

See CONFLICT OF LAWS.

**FOREIGN LAW AND FOREIGNERS.**

See CONFLICT OF LAWS

**FOREIGN STATE, ACTION BY.**

See ACTION.

**FORESHORE.**

See WATERS AND WATERCOURSES.

**FORFEITURE.**

See CRIMINAL LAW; FISHERIES; LAND-  
LORD AND TENANT; REAL PROPERTY;  
SETTLEMENTS, WILLS.

**FORGERY.**

See BANKERS AND BANKING, CRIMINAL  
LAW.

**FRANCHISE.**

See ELECTIONS, FERRIES; FISHERIES;  
MARKETS AND FAIRS; REAL PRO-  
PERTY.

**FRAUD.**

See ACTION, 1, 2; BANKERS AND  
BANKING, 17, BUILDERS, 20; COM-  
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FRAUD, PLEADING, 14. TRUSTS,  
158.

**FRAUDS, STATUTE OF.**

See CONTRACT; SALE OF GOODS; SALE OF  
LAND.

**FRAUDULENT AND  
VOIDABLE CON-  
VEYANCES.**

See also AGENCY; BANKRUPTCY; SET-  
TLEMENTS.

1 *Ante-Nuptial Parol Contract to Settle Property to which Husband Entitled jure mariti—Post-Nuptial Settlement—Recital of Ante-Nuptial Agreement—Husband's Interest Determinable on Bankruptcy—Intention to Defeat or Delay Creditors—“Memorandum or Note in Writing”—Estoppel—13 Eliz. c. 5—Statute of Frauds (29 Chas. 2 c. 3), s. 4.*—A husband entitled *jure mariti* to his wife's reversionary interest in personalty\* (subject only to the contingency of her surviving him before he had reduced it into possession, which did not happen), in 1873 joined with his wife, then an infant, and her guardians, in executing a post-nuptial deed of settlement. This

settlement recited that, previously to the marriage in 1872, he had “agreed to make such settlement of the fortune of his said wife as is hereinafter contained,” and contained a covenant by him with her trustees that, on the interest falling into possession, he and she, or the survivor, and all other necessary parties, would assign and transfer it to the trustees upon the trust of the settlement, which were for her for life, and after her death, if the husband should not have been or become a bankrupt, for him until he should become a bankrupt, with remainder for the issue of the marriage in the usual way, the survivor of the husband and wife having a power of appointment among issue. The wife having died of full age in 1877, the husband, in 1897, appointed two-thirds of the trust funds to two of his three sons, and surrendered his life interest to them, and five months afterwards he was adjudicated a bankrupt in 1898. The reversionary interest had since fallen into possession in 1899. There was nothing to suggest that the settlor was indebted at the time he made the settlement, or that any creditors he then had remained unpaid, or that he then had in contemplation any hazardous or speculative transactions.

The question raised was whether the fund was bound by the settlement or belonged to the Official Receiver.

**HELD**—that under the circumstances the husband made a right and proper settlement; that on the evidence there was no intention on the part of the husband of defeating or delaying his creditors, and he only intended to reserve to himself, out of the property coming to him in the right of his wife, such an interest as after her death he could receive without prejudice to the welfare of his children; that the reservation of a life interest to the husband on the death of his wife, made determinable on bankruptcy, did not invalidate the settlement; that the deed, taken as a whole, constituted a “memorandum or note” in writing of a parol ante-nuptial contract in consideration of marriage, which satisfied the requirements of the Statute of Frauds, and enabled the contract to be enforced both against the settlor who signed the deed and against his trustee in bankruptcy, and so bound the property in question.

*In re Pearson* ((1876) 3 Ch. D. 807; 25 W. R. 126, 35 L. T. 68—Bacon, C.J.) overruled.

*Barkworth v. Young* ((1856) 4 Drew. 1; 3 Jur. (N.S.) 34, 26 L. J. Ch. 153; 5 W. R. 156) approved.

Decision of Farwell, J. ([1901] 2 Ch. 145; 70 L. J. Ch. 625; 49 W. R. 476; 85 L. T. 304; 17 T. L. R. 370; 8 Manson, 266), reversed.

*IN RE HOLLAND, GLEGG v. HOLLAND*, [1902] 2 Ch. [360; 71 L. J. Ch. 518; 50 W. R. 575; 86 L. T. 542; 18 T. L. R. 563; 9 Manson, 259—C. A.

2. “*Fraudulent Conveyance*” — *Setting Aside—Transfer of Bankrupt's Business to Limited Company—Bankruptcy Act, 1883* (46

**Fraudulent and Voidable Conveyances—Contd.**

& 47 Vict. c. 52), s. 4 (1) (b).]—A trader who was in financial difficulties transferred his assets to a limited company in the *bonâ fide* hope of thereby benefiting his creditors. His assets were about £2,000 in value, and his debts £1,000. In consideration of the transfer the company undertook to pay his debts, and to allot to him shares and debentures of the face value of £1,000. The debentures could not be enforced until interest was two months overdue (*i.e.* for at least six months from date of issue), or until an execution was levied.

**HELD**—that the transfer did not necessarily tend to defeat or delay creditors and could not be set aside as void against the trader's trustee in bankruptcy.

**IN RE HARRIS, EX PARTE THE TRUSTEE, (1906)** [54 W. R. 460; 14 Manson, 127—Div. Ct.]

**3. Post-Nuptial Settlement — Equitable Reversionary Interest in Stocks and Shares—Intention to “Delay, Hinder, or Defraud”—Creditors — Judgment Creditor — Charging Order—Appointment of Receiver—Equitable Execution—Injunction—Settlement Set Aside—Honest Trustee—Costs out of Settled Fund—Possibility of Surplus—Form of Order—13 Eliz. c. 5.]—C. H., at a date when he was insolvent, made a voluntary settlement in favour of his wife and child of his equitable reversionary interest in personal estate comprising stocks and shares**

**HELD**—that, as against his creditors it was void under 13 Eliz. c. 5, on the ground that it “delayed, hindered, or defrauded” judgment creditors (suing on behalf of themselves and all other creditors) from obtaining either—

(1) A charging order under sect. 14 of the Judgments Act, 1838.

Or, (2) The appointment of a receiver, by way of equitable execution, of the reversionary interest, which would have operated as an injunction to restrain the debtor from himself receiving the property.

One of the trustees who, with knowledge of the settlor's position, prepared the settlement in question, but who acted in good faith and afterwards appeared at the trial to defend the settlement:

**HELD**—entitled to his costs out of the settled property.

Where in such a case there is a possibility of a surplus after payment of the creditors, the order should declare the settlement void as against them, not directing the settlement to be delivered up to be cancelled, but directing the trustees to join and concur in all acts and things necessary for making the property comprised in the settlement available for satisfying the claims of the creditors.

*Dixon v. Wrench* ((1869), L. R. 4 Exch. 154; 38 L. J. Ex. 113; 20 L. T. 492; 15 W. R. 591) doubted.

*Bolland v. Young* ([1904] 2 K. B. 824; 73 L. J. K. B. 1030; 53 W. R. 67—C. A., *see* B.D.—VOL. I,

*PRACTICE and PROCEDURE*, 164) and *Tyrrell v. Paignton* ([1895] 1 Q. B. 202; 64 L. J. P. 33; 71 L. T. 687; 43 W. R. 163—C. A.) followed and applied.

**IDEAL BEDDING Co., LD. v. HOLLAND, [1907] 2** [Ch. 157; 76 L. J. Ch. 441; 96 L. T. 774; 23 T. L. R. 467; 14 Manson, 113—Kekewich, J.]

**4. Voluntary Conveyance — Policies of Assurance—Investment of Policy-moneys—Protection of Creditors—13 Eliz. c. 5.]—A testator voluntarily assigned to his niece, the defendant, two policies of assurance on his own life. Shortly after the testator's death the policy-moneys, with other moneys of her own, were invested on behalf of the niece on mortgage. The testator's will was afterwards proved, and his estate proved to be insolvent.**

**HELD**—that the assignments became void when the plaintiffs, the creditors, asserted their claims; and thereupon there arose a legal title on the part of the plaintiffs to have their debts satisfied out of the fund subsisting, and the Court had jurisdiction to secure the fund for the benefit of the creditors.

**IN RE MOUAT, KINGSTON COTTON MILLS Co. v. [MOUAT, [1899] 1 Ch. 831; 68 L. J. Ch. 390; 47 W. R. 506; 80 L. T. 406—Stirling, J.]**

**5. Voluntary Settlement—Intent to Defeat and Delay subsequent Creditors—13 Eliz. c. 5.]—Where a voluntary settlement has been executed more than two years prior to the bankruptcy, and the settlor was, at the time of the execution of such settlement, able to pay all his debts without the aid of the property comprised in the settlement, it will not be set aside under 13 Eliz. c. 5, except upon proof of actual intent to defraud future creditors on the part of the settlor or the trustees of the settlement.**

An honest settlement affirmatively proved to be honest, ought not to be set aside merely because some years afterwards it is proved to have the effect of defeating and delaying subsequent creditors.

**IN RE LANE-FOX, EX PARTE GIMBLETT, [1900] 2** [Q. B. 508; 69 L. J. Q. B. 722; 48 W. R. 650; 83 L. T. 176; 7 Manson, 295—

Wright, J.]

**FREEBOARD.**

*See* SHIPPING AND NAVIGATION.

**FREEMAN.**

*See* LOCAL GOVERNMENT.

**FREIGHT.**

*See* SHIPPING AND NAVIGATION.

## FRIENDLY SOCIETIES

## I REGISTERED SOCIETIES

- (a) Disputes 1347
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## II COLLECTING SOCIETIES AND INDUSTRIAL ASSURANCE COMPANIES 1352

## III UNREGISTERED SOCIETIES 1353

## I REGISTERED SOCIETIES

## (a) Disputes

1 *Compensation for Accident—Scheme Certified by Registrar of Friendly Societies—Committee appointed under Scheme—Dispute as to Ability of Workman to Resume Work—Decision of Committee Not Final—Workman's Compensation Act 1897 (60 & 61 Vict c 3) s 3 (1)*—An injured workman received for some time an allowance under a scheme accepted by the firm's employees and certified by the Registrar of Friendly Societies. The masters then contended that the man was well enough to resume work and eventually the committee of the compensation scheme decided to stop the allowance. They relied upon a rule which authorised them to adopt this course— if a workman failed to go to work when able to do so. The workman then sued in the County Court for his weekly allowance.

Held—that the action would lie there was nothing in the rules to make the decision of the committee as to his ability to work conclusive and he was entitled to have the question submitted to the ordinary tribunals.

HAWORTH v ANDREW KNOWLES & SONS LD  
[ACCIDENT SOCIETY AND OTHERS (1908) 19 T L R 658—C A]

2 *Jurisdiction of Arbitration Committee—Decision without Notice to Member—Ineligibility—Friendly Societies Act 1896 (59 & 60 Vict c 25) s 68*—A member of a friendly society was duly summoned before the arbitration committee in respect of a breach of rules involving a fine of 2s 6d. After evidence had been given he was asked to withdraw.

In his absence he was declared guilty of a different offence viz. fraud and dishonest conduct and a resolution of expulsion was passed. No written notice had been given to him (as required by the rules) that he was to be charged with such last mentioned offence.

Held—that the proceedings had been so informal that the decision to expel the member could not be supported and must be treated as null and void.

ANDREWS AND OTHERS v MITCHELL [1905] A C 178; 4 L J K B 333; 81 L T 537—H L (E)

3 *Membership lapsing in consequence of Dispute—Right to Bring Action*—A member of a friendly society had a dispute with the lodge and the executive the tribunal appointed by the rules to settle differences between the society and its members decided against him. His sick allowance was suspended and his contributions in consequence fell into arrear. After seven months the lodge resolved that his membership had lapsed.

Held—that a Court of law had no jurisdiction as to disputes decided by the executive during the period of his membership and that there was no ground for setting aside the resolution of the lodge.

CRICHTON v DALRYMYTH LODGE OF FREE GARDENERS (1904) 6 F 998—Ct of Sess

4 *Writ of Prohibition to County Court—How far Writ Discretionary*—The secretary of a friendly society moved for a writ of prohibition on an action in the County Court in which Hogg a member of the society was the plaintiff and the applicant was the defendant. The plaintiff claimed certain sick pay. It was contended on the part of the applicant that this was a dispute which should under the rules of the society have been referred to arbitration and that the County Court had no jurisdiction.

Held—that facts were in dispute between the parties and when that was the case arbitration was necessary and that the County Court judge therefore had no jurisdiction.

Quare how far the writ of prohibition is discretionary.

IN RE HOGG EX PARTE PARKIN (1898) 14 T L R 210—Phillimore J

## (b) Dissolution

5 *By Award—Cross Claims—Jurisdiction of Chief Registrar—Friendly Societies Act 1896 (59 & 60 Vict c 25) s 80*—Proceedings had been commenced for the dissolution of a friendly society under the provisions of sect 80 of the Friendly Societies Act 1896. The manager Evans had claims against the society and the society had cross claims against him. Evans sought for a writ of prohibition to restrain the Chief Registrar from adjudicating upon these claims.

Held—that the Registrar was not proposing to do anything except what he had jurisdiction to do under sect 80.

REG v THE CHIEF REGISTRAR OF FRIENDLY SOCIETIES EX PARTE EVANS (1900) 16 T L R 346—C A

6 *Winding up Unregistered Company—Companies Act 1862 (25 & 26 Vict c 80) s 190*—The Court has jurisdiction under sect 190 of the Companies Act 1862 to wind up compulsorily as an unregistered company a society registered under the Friendly

**Registered Societies—Continued**

Societies Acts but not registered under the Companies Act 1862.

The fact that such a society has passed a resolution to dissolve and is actually in process of dissolution does not prevent a creditor from obtaining a winding up order.

IN RE IRISH MERCANTILE LOAN SOCIETY [1907] 1 [1] R 98—M R

**(c) Nomination of Life Policy**

7 *Assignability—Friendly Societies Act 1875* (48 & 49 Vict c 60) s 15—*Friendly Societies Act 1896* (59 & 60 Vict c 25) ss 56, 57]—Policies created under the Friendly Societies Acts of 1875 and 1896 are not assignable other than by nomination as provided by the Acts.

*Caddick v Highton* ((1899) 68 L J Q B 281; 47 W R 668; 80 L T 5715 T L R 182; [1901] 2 Ch 46 n—*Phillimore J* *infra*) followed.

IN RE REDMAN WARTON v REDMAN [1901] [Ch 471; 60 L J Ch 669; 65 J P 536; 50 W R 13; 85 L T 13; 17 T L R 618—*Kekewich J*

Overruled by *In re Griffin Griffin v Griffin* No 9 *infra*.

8 *Nominee's Death in Nominee's Lifetime—Right of Nominee's Executor to Policy Moneys—Friendly Societies Act 1875* (38 & 39 Vict c 60) s 15 *supra* s 8]—G effected a policy on her life for £100 with the defendant friendly society and assigned all her interest under the same by deed to one J C who paid the premiums to the society as they became due. The society refused to treat the assignment as valid and G thereupon duly filled up a nomination form and nominated the same J C as the person to receive the policy moneys at her death. J C predeceased G and the premiums were during the life of G paid by C as the executor of J C under the belief that the policy moneys would become payable under the deed to the estate of the deceased. In an action by C to recover the policy moneys upon G's death.

Held—that although a policy granted under the Friendly Societies Acts was not assignable by deed and therefore that C could not recover as assignee yet that he was entitled to the policy moneys as the executor of the person who had been duly nominated by the assured since a nomination under sect 15 sub-sect 3 of the Friendly Societies Act, 1875 if unrevoked created a vested interest in the nominee.

*CADDICK v HIGHTON* (1899) 68 L J Q B 280; [47 W R 668; 80 L T 527; 15 T L R 182—*Phillimore J*

Overruled by *In re Griffin Griffin v Griffin* No 9 *infra*.

9 *Assignability—Friendly Societies Act 1875* (38 & 39 Vict c 60) s 15 sub s 3—

*Friendly Societies Act 1896* (59 & 60 Vict c 25) ss 56, 57]—*Prima facie* a policy issued by a friendly society is or the proceeds of such a policy are assignable by the person who has taken it out and therefore part of the property of the member or the estate of the deceased member as the case may be unless some statute or the rules of the society prevent the policy having this ordinary incident of property.

A policy issued by a friendly society governed by the Act of 1875 is assignable. Sect 15 sub-sect 3 is a section intended not so much to give a power of alienation as to give a testamentary power.

*In re Redman Warton v Redman* ([1901] 2 Ch 471; 70 L J Ch 669; 50 W R 19; 85 L T 13—*Kekewich J* No 7 *supra*) and *Caddick v Highton* ([1901] Ch 470 n (1899) 68 L J Q B 281; 47 W R 668; 80 L T 527; 15 T L R 182—*Phillimore J* No 8 *supra*) overruled.

IN RE GRIFFIN GRIFFIN v GRIFFIN [1907] 1 [Ch 135; 71 L J Ch 11; 50 W R 250; 86 L T 38; 18 T L R 142—C A

10 *Moneys Payable at Member's Death exceeding £100—Nominating a sum not exceeding £100—Revocation—Friendly Societies Act 1875* (38 & 39 Vict c 60) s 15 sub s 3]—A member of a friendly society can under sect 15 sub-sect 3 of the Friendly Societies Act 1875 nominate a person to receive a sum not exceeding £100 payable by the society on his death even though the total sum payable by the society on his death exceeds £100. Such a nomination can only be revoked in the manner prescribed in the section and cannot be revoked by will.

Decision of *Mathew J* ([1899] 1 Q B 469; 67 L J Q B 328; 14 T L R 19) reversed. *BENNETT v SLATER* [1899] 1 Q B 45; 68 [L J Q B 45; 4; W R 82; 79 L T 324; 15 T L R 25—C A

**(d) Officers**

12 *Removal of Branch Secretary for Irregularities—Delivery up of Books—Friendly Societies Act 1896* (59 & 60 Vict c 25) s 68]—A branch secretary was competently brought before the Glasgow District of Ancient Order of Foresters to answer as to irregularities as an office bearer and member of the society. He admitted that they had right to do certain things and if not he could have appealed to a higher jurisdiction within the society. He was removed from his office and was expelled from the society; and was ordered to deliver up books and documents which he had in his possession as an office bearer.

Held—that the secretary when he had received notice from the competent court that he was removed from the office and was called upon to deliver up the books had no right to part with them to someone else than the official to whom he was directed to deliver them, and was bound to deliver them up.

**Registered Societies—Continued**

**CLASCO V. DISTRICT OF ANCIENT ORDER OF  
FORESTERS & STEVENSON (1900) 11**

**(a) Rules**

**13 Alteration—Rule Giving Power of  
Alteration—Subsequent Alteration of Rules—  
Effect of on Members' Elected Rights**—Sect  
27 of the Friendly Societies Act 1855 gave  
power to friendly societies to alter their rules  
or to make new rules. The Act of 1855 was  
repealed by the Friendly Societies Act 1875  
which had no section corresponding to sect  
27 of the earlier Act but which provided that  
the rules of subsisting societies should con-  
tinue in force until altered or amended.

Under the power given by sect 27 of the  
Act of 1855 a friendly society whose rules  
had made no provision for the alteration of  
the same made a rule that no new rule  
shall be made nor any of the rules herein  
contained or hereafter to be made shall be  
amended altered or rescinded unless with  
the consent of a majority of members present  
at a general meeting.

**Held**—that this rule continued in force  
after and notwithstanding the repeal in 1875  
of the statute under which it was made, that  
it preserved to the society the right to alter  
their rule and that members who joined  
the society while such rule was in force were  
bound by future alterations of the rules duly  
made thereunder.

S joined the society when the above rule  
was in force and in due time became entitled  
to superannuation allowance. After he be-  
came so entitled and whilst he was in re-  
ceipt of such allowance the society altered  
their rules imposing upon those entitled to  
superannuation allowance conditions for  
breaches of which they were liable to lose  
their allowance and for breaches of which  
S lost his allowance.

**Held**—that S was bound by the alteration  
although the effect was to deprive him of a  
benefit which he previously possessed under  
the rules.

**SMITH V. GALLOWAY [1898] 1 Q. B. 71; 67  
[L. J. Q. B. 15; L. R. 400 46 W. R. 204—  
Div. Ct.]**

**14 Alteration—Validity—Knowledge of  
Registry—Conclusiveness—Power of  
Society to Alter Rights of their Servants—In-  
dustrial and Provident Societies Act 1893 (56  
& 57 Vict. c. 80) s. 10 (3)**—The plaintiff was  
elected general manager at a weekly salary of  
the defendant society which was registered  
under the Industrial and Provident Societies  
Act 1893. At the time of his election there  
was a fundamental rule of the society that  
the manager could not be dismissed except  
by a two-thirds majority at a special meet-  
ing; by another rule of the society funda-  
mental rules could not be altered except by a  
two-thirds majority at a special meeting.  
Subsequently it was resolved at a meeting of  
the committee that the former rule should be

amended so as to give the committee power  
to dismiss the manager and notice of this  
amendment was given to the Registrar of  
Friendly Societies who issued to the society  
an acknowledgment of the registry of the  
amendment as provided by sect 10 sub-sect  
3 of the Act. The committee subsequently  
resolved to dismiss the plaintiff and gave  
him one week's notice of dismissal. The  
plaintiff when elected manager was gener-  
ally aware of the rules and knew that he  
could be dismissed only by a two-thirds  
majority at a special meeting. He had no  
knowledge of the amendment in the rule  
until after his dismissal.

**Held**—(1) that the acknowledgment of  
registry by the Registrar was conclusive as  
to the validity of the amendment.

**Reple v. Northumbrian Building  
Society (1880) 2 Q. B. D. 373; 87 W. R. 868  
60 L. J. 558—C. A.]** followed and applied.

And (2) that the amendment was binding  
on the plaintiff so as to render his dismissal  
valid.

**BUTLER V. SPRINGMOUNT CO-OPERATIVE DAIRY  
[SOCIETY] [1906] 11 R. 193—C. A.]**

**15 Impulsion of Member—Member's  
Right to be Quitted—Friendly Societies Act  
1890 (59 & 60 Vict. c. 25) s. 9; Sch. I cl. 2**  
—The rules of a friendly society provided  
that the society should be called the Cran-  
mer Loyal Orange Lodge Friendly Society  
and that it should be exclusively composed  
of members of the Loyal Orange Institution  
of England. The rules provided for the  
expulsion of a member on conviction for  
felony and that if a member entered the  
Army or Navy he should cease to be a  
member but there was no rule empowering  
the expulsion of a member upon his ceasing  
to be a member of the Loyal Orange Insti-  
tution of England. The plaintiff who was  
a member of the society was expelled from  
the Loyal Orange Institution of England  
for having voted at a Parliamentary election  
for a certain candidate. The friendly society  
thereupon passed a resolution expelling him  
from the society. It was an action by the  
plaintiff claiming to be reinstated a member  
of the society.

**Held**—that under the rules of the friendly  
society it was a condition that a member  
should be and continue to be a member of  
the Loyal Orange Institution of England  
and that when he ceased to be a member  
of that institution he also ceased automati-  
cally to be a member of the society and that  
therefore the plaintiff was not entitled to  
succeed.

**SAROBANT V. BUTTEWORTH AND OTHERS (1907)  
[23 T. L. R. 450—Div. Ct.]**

## II COLLECTING SOCIETIES AND INDUS- TRIAL ASSURANCE COMPANIES

**16 Policy of Insurance—Life Assurance  
Company—Notice of Default before For-**



**Collecting Societies etc—C continued**

*Je t re—Service—Collecting Societies and Industrial Assurance Companies Act 1890 (59 & 60 Vict c 26) s 3 10*—Notice of default before forfeiture of an insurance policy as required by sect 3 of the Collecting Societies and Industrial Assurance Companies Act 1890 is well served within sect 10 of that Act if sent by post addressed to the assured at his last known place of abode

MORGAN v McCLURE [1899] 2 I R 200—

[Q B

17 *Policy of Insurance—Life Insured sought to be transferred to another Society or Company—Notice thereof—Collecting Societies and Industrial Assurance Companies Act 1890 (59 & 60 Vict c 26) s 4 sub s 2 s 11 sub s 1*—Section 4 sub s 1 of the Collecting Societies and Industrial Assurance Companies Act 1890 enacts that The society or company to which the member or person is sought to be transferred shall within seven days of his application for admission to that society or company give notice thereof in writing to the society or company from which he is sought to be transferred and sect 11 (1) makes the failure to give such notice an offence

A person insured in an industrial assurance society signed a proposal for an insurance in another society and handed to the agent of the new society his books and policies in the former society receiving in lieu policies in the new society. On information charging the new society with an offence in not giving notice under the Act

Held—that the assured was a person who sought to be transferred within the meaning of sect 4 (2) of the Act though the current policy in the former society had not run out and that notice was required and that an offence under sect 11 (1) had been committed

PEARL LIFE ASSURANCE CO v SCOTTISH LEGAL LIFE ASSURANCE SOCIETY [1901] 1 K B 528  
70 L J K B 860; 40 W R 493 84 L T 153; 17 T L R 238—Div Ct

**III UNREGISTERED SOCIETIES**

18 *Canadian Society—Construction of Rules—Obliged to Resign—Charge against Member—Opportunity for Defence—Unjudicial Division of Committee*—The appellant served in the Montreal police force for several years and was a member of the respondent pension society one of the rules of which provided that—any member entitled by length of service to a gratuity or pension who is dismissed from the force or is obliged to resign shall have his case considered by the board of directors and his right to such gratuity or pension determined by a majority of the board. The appellant had completed the necessary period of service when he was obliged to

resign within the meaning of the rule and became qualified for a pension subject to the rules. The board of the respondent society appointed a committee of four to investigate the reason of the appellant's resignation. The committee heard evidence and without telling the appellant what the charges were or giving him an opportunity of defending himself they advised the board that the pension should be refused. The board thereupon summoned a general meeting of the members and submitted a resolution to the meeting which by a majority declined not to grant a pension and the board then passed a formal resolution refusing a pension.

Held—that the appellant should have had an opportunity of defending himself that the board had improperly abnegated their judicial functions and that the proceedings must be set aside.

When a constable suspended and resigns pending an inquiry into his conduct he has been obliged to resign within the meaning of the above rule.

MAINTON v L'ASSOCIATION DE LA POLICE DE MONTREAL [1900] A C 535; 7 L J P C 73 95 I T 130 2 T L R 768—P C

19 *Illegal Association—Mutual Assurance Society—Unregistered—Action against Treasurer to Recover Moneys of the Society—Action not in Furtherance of Objects of the Society—Companies Act 1862 (25 & 26 Vict c 89) s 1—Friendly Societies Act 1890 (59 & 60 Vict c 5)*—The trustees of an association consisting of more than twenty persons which was formed for the purpose of mutual insurance against death or accident and which was not registered under any Act brought an action against the treasurer of the society to recover moneys of the society in his hands. The defence was that the society was an illegal association within sect 4 of the Companies Act 1862 and that therefore the action was not maintainable.

Held—that the action was maintainable by Lord Alverstone C J and Darling J on the ground that assuming the society to be an illegal association the action was not in furtherance of the objects of the society but was merely for the purpose of recovering the money of the members; by Channell J on the ground that the society came within the exception in sect 4 of the Companies Act 1862 of a society formed in pursuance of another Act of Parliament—namely the Friendly Societies Act 1890 which contemplated the existence of unregistered friendly societies.

MARRS v THOMPSON (1902) 80 T 59 18  
[1 I R 505—Div Ct

20 *Winding up—Continuance Impracticable—Jurisdiction of Court to Wind Up and Distribute Assets Equitably*—Where a fund belongs to a society each member of which has some interest therein regulated by a

**Unregistered Societies—Continued**

trust deed or rules and by reason of changed circumstances the society cannot be continued without prejudicing the interests of some members to the benefit of others the Court has jurisdiction to wind up the society and distribute the assets among the members according to their respective interests.

The employees of a company formed a provident fund for the purpose of giving sick allowances and old age pensions. By the rules a member ceased to subscribe on attaining sixty five and became entitled to an old age pension for the rest of his life. The company ceased working and therefore no new members joined the society and its funds were being exhausted by paying pensions to members over sixty five whilst young members were likely to lose all their contributions which would be exhausted before they attained the age to claim a pension.

**Held**—that the Court would interfere and wind up the society (though neither registered nor a partnership) and distribute the funds equitably among the members.

The Judge in Chambers subsequently gave directions as to the basis of the scheme (see *L. J. Rep.*)

**IN RE LEAD CO'S WORKMEN'S FUNDS SOCIETY**  
[LOWES AND COMPANY FOR SMELTING DOWN  
LEAD [1904] 2 Ch 196 73 I. J. Ch 623 5  
W. R. 51 91 L. T. 433; O. T. I. R. 504—  
Warrington J.]

**21 Winding up—Jurisdiction of Court—Majority**—The rules of an unregistered friendly society contained no provision for its winding up. The membership of the society which at one time had been eighty eight decreased to forty nine, and the funds from 1823 to 1876. The expenditure had been greater than the receipts for some years. At a meeting to decide whether the society should continue twenty seven members being present a resolution was passed by a majority of one that the society should be dissolved. Subsequently at a committee meeting at the suggestion of the trustees the committee decided to continue the society. At a subsequent general meeting thirty two members were present and paid their subscriptions. The plaintiffs among whom were some who had paid their subscriptions brought an action claiming a dissolution of the society.

**Held**—that the Court had jurisdiction to dissolve the society but that in the circumstances no sufficient reason had been shown for its dissolution.

**BLAKE v SMITHER** (1900) 22 T. L. R. 698—  
[Fekewich J.]

**FUGITIVE OFFENDERS**

See EXTRADITION

END OF VOLUME I